Property

Volume 2

Christian Turner

CALI®
eLangdell® Press

Property

Volume II

by
Christian Turner
Assistant Professor of Law
University of Georgia School of Law
eLangdell® Press
2012

Contents

About the Author v

Notices vi

1. More on Adverse Possession
Christian Turner 8

2. Temporal Sharing of Land
Christian Turner 40

3. Leaseholds *Christian Turner* 86

4. Shared Ownership *Christian Turner*
130

5. Easements *Christian Turner* 200

6. Covenants *Christian Turner* 234

About the Author

Christian Turner teaches courses in property, land use, legal theory, and the regulation of information. His research interests are in the public/private distinction and institutional analysis. Drawing from his mathematical training, he is interested in both the logic and illogic of the law — and in understanding seemingly complex and diverse legal principles as consequences of basic, trans-substantive ideas.

Prior to joining the faculty at the University of Georgia, Christian was a Visiting Assistant Professor at Fordham Law School, worked at Wiggin and Dana law firm in New Haven, and clerked for Judge Guido Calabresi on the Second Circuit. He is a graduate of Stanford Law School and holds a Ph.D. in mathematics from Texas A&M University.

Notices

Permission to include "Economic Analysis of "Takings" of Private Property," http://cyber.law.harvard.edu/bridge/LawEconomics/takings.htm, from Professor William Fisher.

Permission to include "Housing Complex Owners Vote to Ban Smoking" by Mr. Emerson and the Leader-Telegram newspaper, Eau Claire, Wis.

Eduardo M. Peñalver, Property as Entrance, 91 Va. L. Rev. 1889 (2005); Copyright is owned by the Virginia Law Review Association and the article is used by permission of the Virginia Law Review Association.

Mark Kelman, Market Discrimination and Groups, 53 Stan. L. Rev. 833, 840 (2001), reprinted with permission of the Stanford Law Review.

This work by Christian Turner licensed and published by CALI eLangdell Press under a Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Unported License. CALI and CALI eLangdell Press reserve under copyright all rights not expressly granted by this Creative Commons license. CALI and CALI eLangdell Press do not assert copyright in US Government works or other public domain material included herein. Permissions beyond the scope of this license may be available throughfeedback@cali.org.

In brief, the terms of that license are that you may copy, distribute, and display this work, or make derivative works, so long as

- you give CALI eLangdell Press and the author credit;
- you do not use this work for commercial purposes; and
- you distribute any works derived from this one under the same licensing terms as this.

Suggested attribution format for original work:

> Christian Turner, Property II, Published by CALI eLangdell Press. Available under a Creative Commons BY-NC-SA 3.0 License.

CALI® and eLangdell® are United States federally registered trademarks owned by the Center for Computer-Assisted Legal Instruction. The cover art design is a copyrighted work of CALI, all rights reserved. The CALI graphical logo is a trademark and may not be used without permission.

Should you create derivative works based on the text of this book or other Creative Commons materials therein, you may not use this book's cover art and the aforementioned logos, or any derivative thereof, to imply endorsement or otherwise without written permission from CALI.

This material does not contain nor is intended to be legal advice. Users seeking legal advice should consult with a licensed attorney in their jurisdiction. The editors have endeavored to provide complete and accurate information in this book. However, CALI does not warrant that the information provided is complete and accurate. CALI disclaims all liability to any person for any loss caused by errors or omissions in this collection of information.

Version 1.0 – June 14, 2012

1. More on Adverse Possession

Christian Turner

1.1. Personal Property

O'Keeffe v. Snyder,

83 N.J. 478 (1980)

Joel H. Sterns, Trenton, for defendant-appellant Barry Snyder, d/b/a Princeton Gallery of Fine Art (Sterns, Herbert & Weinroth, Trenton, attorneys; Mark D. Schorr and William J. Bigham, Trenton, on briefs).

Thomas C. Jamieson, Jr., Trenton, for third party defendant-appellant Ulrich A. Frank (Jamieson, McCardell, Moore, Peskin & Spicer, Trenton, attorneys).

Roger A. Lowenstein, Roseland, for plaintiff-respondent (Lowenstein, Sandler, Brochin, Kohl, Fisher & Boylan, Roseland, attorneys; Roger A. Lowenstein and Lee Hilles Wertheim, Roseland, on briefs).

Pollock, J.

This is an appeal from an order of the Appellate Division granting summary judgment to plaintiff, Georgia O'Keeffe, against defendant, Barry Snyder, d/b/a Princeton Gallery of Fine Art, for replevin of three small pictures painted by O'Keeffe. In her complaint, filed in March, 1976, O'Keeffe alleged she was the owner of the paintings and that they were stolen from a New York art gallery in 1946. Snyder asserted he was a purchaser for value of the paintings, he had title by adverse possession, and O'Keeffe's action was barred by the expiration of the six-year period of limitations provided by N.J.S.A. 2A:14-1 pertaining to an action in replevin. Snyder impleaded third party defendant, Ulrich A. Frank, from whom Snyder purchased the paintings in 1975 for $35,000.

The trial court granted summary judgment for Snyder on the ground that O'Keeffe's action was barred because it was not commenced within six years of the alleged theft. The Appellate Division reversed and entered judgment for O'Keeffe. A majority of that court concluded that the paintings were stolen, the defenses of expiration of the statute of limitations and title by adverse possession were identical, and Snyder had not proved the elements of adverse possession. Consequently, the majority ruled that O'Keeffe could still enforce her right to possession of the paintings.

… . We reverse and remand the matter for a plenary hearing in accordance with this opinion.

I

The record, limited to pleadings, affidavits, answers to interrogatories, and depositions, is fraught with factual conflict. Apart from the creation of the paintings by O'Keeffe and their discovery in Snyder's gallery in 1976, the parties agree on little else.

O'Keeffe contended the paintings were stolen in 1946 from a gallery, An American Place. The gallery was operated by her late husband, the famous photographer Alfred Stieglitz.

... . . In 1946, Stieglitz arranged an exhibit which included an O'Keeffe painting, identified as Cliffs. According to O'Keeffe, one day in March, 1946, she and Stieglitz discovered Cliffs was missing from the wall of the exhibit. O'Keeffe estimates the value of the painting at the time of the alleged theft to have been about $150.

About two weeks later, O'Keeffe noticed that two other paintings, Seaweed and Fragments, were missing from a storage room at An American Place. She did not tell anyone, even Stieglitz, about the missing paintings, since she did not want to upset him.

Before the date when O'Keeffe discovered the disappearance of Seaweed, she had already sold it (apparently for a string of amber beads) to a Mrs. Weiner, now deceased. Following the grant of the motion for summary judgment by the trial court in favor of Snyder, O'Keeffe submitted a release from the legatees of Mrs. Weiner purportedly assigning to O'Keeffe their interest in the sale.

O'Keeffe testified on depositions that at about the same time as the disappearance of her paintings, 12 or 13 miniature paintings by Marin also were stolen from An American Place. According to O'Keeffe, a man named Estrick took the Marin paintings and "maybe a few other things." Estrick distributed the Marin paintings to members of the theater world who, when confronted by Stieglitz, returned them. However, neither Stieglitz nor O'Keeffe confronted Estrick with the loss of any of the O'Keeffe paintings.

There was no evidence of a break and entry at An American Place on the dates when O'Keeffe discovered the disappearance of her paintings. Neither Stieglitz nor O'Keeffe reported them missing to the New York Police Department or any other law enforcement agency. Apparently the paintings were uninsured, and O'Keeffe did not seek reimbursement from an insurance company. Similarly, neither O'Keeffe nor Stieglitz advertised the loss of the paintings in Art News or any other publication. Nonetheless, they discussed it with associates in the art world and later O'Keeffe mentioned the loss to the director of the Art Institute of Chicago, but she did not ask him to do anything because "it wouldn't have been my way." O'Keeffe does not contend that Frank or Snyder had actual knowledge of the alleged theft.

Stieglitz died in the summer of 1946, and O'Keeffe explains she did not pursue her efforts to locate the paintings because she was settling his estate. In 1947, she retained the services of Doris Bry to help settle the estate. Bry urged O'Keeffe to report the loss of the paintings, but O'Keeffe declined because "they never got anything back by reporting it." Finally, in 1972, O'Keeffe authorized Bry to report the theft to the Art Dealers Association of America, Inc., which maintains for its members a registry of stolen paintings. The record does not indicate whether such a registry existed at the time the paintings disappeared.

In September, 1975, O'Keeffe learned that the paintings were in the Andrew Crispo Gallery in New York on consignment from Bernard Danenberg Galleries. On February 11, 1976, O'Keeffe discovered that Ulrich A. Frank had sold the paintings to Barry Snyder, d/b/a Princeton Gallery of Fine Art. She demanded their return and, following Snyder's refusal, instituted this action for replevin.

Frank traces his possession of the paintings to his father, Dr. Frank, who died in 1968. He claims there is a family relationship by marriage between his family and the Stieglitz family, a contention that O'Keeffe disputes. Frank does not know how his father acquired the paintings, but he recalls seeing them in his father's apartment in New Hampshire as early as 1941-1943, a period that precedes the alleged theft. Consequently, Frank's factual contentions are inconsistent with O'Keeffe's allegation of theft. Until 1965, Dr. Frank occasionally lent the paintings to Ulrich Frank. In 1965, Dr. and Mrs. Frank formally gave the paintings to Ulrich Frank, who kept them in his residences in Yardley, Pennsylvania and Princeton, New Jersey. In 1968, he exhibited anonymously Cliffs and Fragments in a one day art show in the Jewish Community Center in Trenton. All of these events precede O'Keeffe's listing of the paintings as stolen with the Art Dealers Association of America, Inc. in 1972.

Frank claims continuous possession of the paintings through his father for over thirty years and admits selling the paintings to Snyder. Snyder and Frank do not trace their provenance, or history of possession of the paintings, back to O'Keeffe.

As indicated, Snyder moved for summary judgment on the theory that O'Keeffe's action was barred by the statute of limitations and title had vested in Frank by adverse possession. For purposes of his motion, Snyder conceded that the paintings had been stolen. On her cross motion, O'Keeffe urged that the paintings were stolen, the statute of limitations had not run, and title to the paintings remained in her.

II

[The Court held that there were disputed issues of material fact regarding, among other things, whether the paintings were stolen. The case was, therefore, remanded for trial.]

III

On the limited record before us, we cannot determine now who has title to the paintings. That determination will depend on the evidence adduced at trial. Nonetheless, we believe it may aid the trial court and the parties to resolve questions of law that may become relevant at trial.

Our decision begins with the principle that, generally speaking, if the paintings were stolen, the thief acquired no title and could not transfer good title to others regardless of their good faith and ignorance of the theft. Proof of theft would advance O'Keeffe's right to possession of the paintings absent other considerations such as expiration of the statute of limitations.

Another issue that may become relevant at trial is whether Frank or his father acquired a "voidable title" to the paintings under N.J.S.A. 12A:2-403(1). That section, part of the Uniform Commercial Code (U.C.C.), does not change the basic principle that a mere possessor cannot transfer good title. Nonetheless, the U.C.C. permits a person with voidable title to transfer good title to a good faith purchaser for value in certain circumstances. N.J.S.A. 12A:2-403(1). If the facts developed at trial merit application of that section, then Frank may have transferred good title to Snyder, thereby providing a defense to O'Keeffe's action. No party on this appeal has urged factual or legal contentions concerning the applicability of the U.C.C. Consequently, a more complete discussion of the U.C.C. would be premature, particularly in light of our decision to remand the matter for trial.

On this appeal, the critical legal question is when O'Keeffe's cause of action accrued. The fulcrum on which the outcome turns is the statute of limitations in N.J.S.A. 2A:14-1, which provides that an action for replevin of goods or chattels must be commenced within six years after the accrual of the cause of action.

The trial court found that O'Keeffe's cause of action accrued on the date of the alleged theft, March, 1946, and concluded that her action was barred. The Appellate Division found that an action might have accrued more than six years before the date of suit if possession by the defendant or his predecessors satisfied the elements of adverse possession. As indicated, the Appellate Division concluded that Snyder had not established those elements and that the O'Keeffe action was not barred by the statute of limitations.

Since the alleged theft occurred in New York, a preliminary question is whether the statute of limitations of New York or New Jersey applies. The New York statute, N.Y. Civ. Prac. Law § 214 (McKinney), has been interpreted so that the statute of limitations on a cause of action for replevin does not begin to run until after refusal upon demand for the return of the goods. Here, O'Keeffe demanded return of the paintings in February, 1976. If the New York statute applied, her action would have been commenced within the period of limitations.

[The Court concluded, based on a balance of interests, that New Jersey's statute would likely apply but left further consideration and factfinding to the trial court.]

IV

On the assumption that New Jersey law will apply, we shall consider significant questions raised about the interpretation of N.J.S.A. 2A:14-1. The purpose of a statute of limitations is to "stimulate to activity and punish neg-

ligence" and "promote repose by giving security and stability to human affairs." A statute of limitations achieves those purposes by barring a cause of action after the statutory period. In certain instances, this Court has ruled that the literal language of a statute of limitations should yield to other considerations.

To avoid harsh results from the mechanical application of the statute, the courts have developed a concept known as the discovery rule. The discovery rule provides that, in an appropriate case, a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action. The rule is essentially a principle of equity, the purpose of which is to mitigate unjust results that otherwise might flow from strict adherence to a rule of law.

This Court first announced the discovery rule in [*Fernandi v. Strully*, 35 N.J. 434 (1961)]. In *Fernandi*, a wing nut was left in a patient's abdomen following surgery and was not discovered for three years. The majority held that fairness and justice mandated that the statute of limitations should not have commenced running until the plaintiff knew or had reason to know of the presence of the foreign object in her body. The discovery rule has since been extended to other areas of medical malpractice.

Increasing acceptance of the principle of the discovery rule has extended the doctrine to contexts unrelated to medical malpractice. [The Court cites cases dealing with negligence in conduit installation, surveying, union representation, and defective products.]

The statute of limitations before us, N.J.S.A. 2A:14-1, has been held subject to the discovery rule in an action for wrongful detention of shares of stock. *Federal Insurance Co. v. Hausler*, 108 N.J.Super. 421, 426, 261 A.2d 671 (App. Div. 1970). In *Hausler*, the defendant purchased preferred stock of a corporation through a stockbroker. On March 9, 1961, the broker erroneously sent to the customer a certificate for common stock of greater value. The broker discovered the error in December, 1961, but did not learn the identity of the customer's account in which the error was made until November, 1962. Defendants refused to exchange the common stock for the preferred stock. Plaintiff, a bonding company subrogated to the broker's rights, instituted an action on July 2, 1968, within six years of the date on which the broker learned the identity of the defendants as the customers who wrongfully received the common stock, but more than six years after the broker knew it had a cause of action. Judge Goldmann, writing for a unanimous court, reversed the grant of a summary judgment for defendants and remanded the matter for a full trial to determine whether (1) the broker knew or reasonably should have known of the error and the defendants' identity in December, 1961 and (2) defendants knew of the mistake from the beginning and fraudulently concealed it. Overruling the trial court which had concluded "(t)his is not a good case in which to apply the discovery rule," Judge Goldmann found the discovery rule applicable.

Similarly, we conclude that the discovery rule applies to an action for replevin of a painting under N.J.S.A. 2A:14-1. O'Keeffe's cause of action accrued when she first knew, or reasonably should have known through the exercise of due diligence, of the cause of action, including the identity of the possessor of the paintings. See N. Ward, *Adverse Possession of Loaned or Stolen Objects: Is Possession Still 9/10 ths of the law?*, published in *Legal Problems of Museum Administration* (ALI-ABA 1980) at 89-90.

... .

In determining whether O'Keeffe is entitled to the benefit of the discovery rule, the trial court should consider, among others, the following issues: (1) whether O'Keeffe used due diligence to recover the paintings at the time of the alleged theft and thereafter; (2) whether at the time of the alleged theft there was an effective method, other than talking to her colleagues, for O'Keeffe to alert the art world; and (3) whether registering paintings with the Art Dealers Association of America, Inc. or any other organization would put a reasonably prudent purchaser of art on constructive notice that someone other than the possessor was the true owner.

V

The acquisition of title to real and personal property by adverse possession is based on the expiration of a statute of limitations. Adverse possession does not create title by prescription apart from the statute of limitations. Walsh, *Title by Adverse Possession*, 17 N.Y.U.L.Q.Rev. 44, 82 (1939) (*Walsh*); see *Developments in the Law Statutes of Limitations*, 63 Harv.L.Rev. 1177 (1950) (*Developments*).

To establish title by adverse possession to chattels, the rule of law has been that the possession must be hostile, actual, visible, exclusive, and continuous. *Redmond v. New Jersey Historical Society*, 132 N.J.Eq. 464, 474, 28A.2d 189 (E. & A. 1942). *Redmond* involved a portrait of Captain James Lawrence by Gilbert Stuart, which was bequeathed by its owner to her son with a provision that if he should die leaving no descendants, it should go to the New Jersey Historical Society. The owner died in 1887, when her son was 14, and her executors delivered the painting to the Historical Society. The painting remained in the possession of the Historical Society for over 50 years, until 1938, when the son died and his children, the legatees under his will, demanded its return. The Historical Society refused, and the legatees instituted a replevin action.

The Historical Society argued that the applicable statute of limitations, the predecessor of N.J.S.A. 2A:14-1, had run and that plaintiffs' action was barred. The Court of Errors and Appeals held that the doctrine of adverse possession applied to chattels as well as to real property, *Redmond*, *supra*, 132 N.J.Eq. at 473, 28 A.2d 189, and that the statute of limitations would not begin to run against the true owner until possession became adverse. *Id.* at 475, 28 A.2d 189. The Court found that the Historical Society had done nothing inconsistent with the theory that the painting was a "voluntary bailment or gratuitous loan" and had "utterly failed to prove that its possession of the portrait was 'adversary,' 'hostile.'" The Court found further that the Historical Society had not asserted ownership until 1938, when it refused to deliver the painting to plaintiff, and that the statute did not begin to run until that date. Consequently, the Court ordered the painting to be returned to plaintiffs.

The only other New Jersey case applying adverse possession to chattels is *Joseph v. Lesnevich*, 56 N.J.Super. 340, 153 A.2d 349 (App. Div. 1949). In *Lesnevich*, several negotiable bearer bonds were stolen from plaintiff in 1951. In October, 1951, Lesnevich received an envelope containing the bonds. On October 21, 1951, Lesnevich and his business partner pledged the bonds with a credit company. They failed to pay the loan secured by the bonds and requested the credit company to sell the bonds to pay the loan. On August 1, 1952, the president of the credit company purchased the bonds and sold them to his son. In 1958, within one day of the expiration of six years from the date of the purchase, the owner of the bonds sued the credit company and its president, among others, for conversion of the bonds. The Appellate Division found that the credit company and its president held the bonds "as openly and notoriously as the nature of the property would permit." *Lesnevich*, *supra*, 56 N.J.Super. at 355, 153 A.2d at 357. The pledge of the bonds with the credit company was considered to be open possession.

As *Lesnevich* demonstrates, there is an inherent problem with many kinds of personal property that will raise questions whether their possession has been open, visible, and notorious. In *Lesnevich*, the court strained to conclude that in holding bonds as collateral, a credit company satisfied the requirement of open, visible, and notorious possession.

Other problems with the requirement of visible, open, and notorious possession readily come to mind. For example, if jewelry is stolen from a municipality in one county in New Jersey, it is unlikely that the owner would learn that someone is openly wearing that jewelry in another county or even in the same municipality. Open and visible possession of personal property, such as jewelry, may not be sufficient to put the original owner on actual or constructive notice of the identity of the possessor.

The problem is even more acute with works of art. Like many kinds of personal property, works of art are readily moved and easily concealed. O'Keeffe argues that nothing short of public display should be sufficient to alert the true owner and start the statute running. Although there is merit in that contention from the perspective

of the original owner, the effect is to impose a heavy burden on the purchasers of paintings who wish to enjoy the paintings in the privacy of their homes.

In the present case, the trial court and Appellate Division concluded that the paintings, which allegedly had been kept in the private residences of the Frank family, had not been held visibly, openly, and notoriously. Notwithstanding that conclusion, the trial court ruled that the statute of limitations began to run at the time of the theft and had expired before the commencement of suit. The Appellate Division determined it was bound by the rules in Redmond and reversed the trial court on the theory that the defenses of adverse possession and expiration of the statute of limitations were identical. Nonetheless, for different reasons, the majority and dissenting judges in the Appellate Division acknowledged deficiencies in identifying the statute of limitations with adverse possession. The majority stated that, as a practical matter, requiring compliance with adverse possession would preclude barring stale claims and acquiring title to personal property. The dissenting judge feared that identifying the statutes of limitations with adverse possession would lead to a "handbook for larceny." The divergent conclusions of the lower courts suggest that the doctrine of adverse possession no longer provides a fair and reasonable means of resolving this kind of dispute.

The problem is serious. According to an affidavit submitted in this matter by the president of the International Foundation for Art Research, there has been an "explosion in art thefts" and there is a "worldwide phenomenon of art theft which has reached epidemic proportions."

The limited record before us provides a brief glimpse into the arcane world of sales of art, where paintings worth vast sums of money sometimes are bought without inquiry about their provenance. There does not appear to be a reasonably available method for an owner of art to record the ownership or theft of paintings. Similarly, there are no reasonable means readily available to a purchaser to ascertain the provenance of a painting. It may be time for the art world to establish a means by which a good faith purchaser may reasonably obtain the provenance of a painting. An efficient registry of original works of art might better serve the interests of artists, owners of art, and bona fide purchasers than the law of adverse possession with all of its uncertainties. Although we cannot mandate the initiation of a registration system, we can develop a rule for the commencement and running of the statute of limitations that is more responsive to the needs of the art world than the doctrine of adverse possession.

We are persuaded that the introduction of equitable considerations through the discovery rule provides a more satisfactory response than the doctrine of adverse possession. The discovery rule shifts the emphasis from the conduct of the possessor to the conduct of the owner. The focus of the inquiry will no longer be whether the possessor has met the tests of adverse possession, but whether the owner has acted with due diligence in pursuing his or her personal property.

For example, under the discovery rule, if an artist diligently seeks the recovery of a lost or stolen painting, but cannot find it or discover the identity of the possessor, the statute of limitations will not begin to run. The rule permits an artist who uses reasonable efforts to report, investigate, and recover a painting to preserve the rights of title and possession.

Properly interpreted, the discovery rule becomes a vehicle for transporting equitable considerations into the statute of limitations for replevin, N.J.S.A. 2A:14-1. In determining whether the discovery rule should apply, a court should identify, evaluate, and weigh the equitable claims of all parties. If a chattel is concealed from the true owner, fairness compels tolling the statute during the period of concealment. That conclusion is consistent with tolling the statute of limitations in a medical malpractice action where the physician is guilty of fraudulent concealment.

It is consistent also with the law of replevin as it has developed apart from the discovery rule. In an action for replevin, the period of limitations ordinarily will run against the owner of lost or stolen property from the time of the wrongful taking, absent fraud or concealment. Where the chattel is fraudulently concealed, the general rule is that the statute is tolled.

A purchaser from a private party would be well-advised to inquire whether a work of art has been reported as lost or stolen. However, a bona fide purchaser who purchases in the ordinary course of business a painting entrusted to an art dealer should be able to acquire good title against the true owner. Under the U.C.C. entrusting possession of goods to a merchant who deals in that kind of goods gives the merchant the power to transfer all the rights of the entruster to a buyer in the ordinary course of business. In a transaction under that statute, a merchant may vest good title in the buyer as against the original owner. The interplay between the statute of limitations as modified by the discovery rule and the U.C.C. should encourage good faith purchases from legitimate art dealers and discourage trafficking in stolen art without frustrating an artist's ability to recover stolen art works.

The discovery rule will fulfill the purposes of a statute of limitations and accord greater protection to the innocent owner of personal property whose goods are lost or stolen. Accordingly, we overrule *Redmond v. New Jersey Historical Society*, *supra*, and *Joseph v. Lesnevich*, *supra*, to the extent that they hold that the doctrine of adverse possession applies to chattels.

By diligently pursuing their goods, owners may prevent the statute of limitations from running. The meaning of due diligence will vary with the facts of each case, including the nature and value of the personal property. For example, with respect to jewelry of moderate value, it may be sufficient if the owner reports the theft to the police. With respect to art work of greater value, it may be reasonable to expect an owner to do more. In practice, our ruling should contribute to more careful practices concerning the purchase of art.

The considerations are different with real estate, and there is no reason to disturb the application of the doctrine of adverse possession to real estate. Real estate is fixed and cannot be moved or concealed. The owner of real property knows or should know where his property is located and reasonably can be expected to be aware of open, notorious, visible, hostile, continuous acts of possession on it.

Our ruling not only changes the requirements for acquiring title to personal property after an alleged unlawful taking, but also shifts the burden of proof at trial. Under the doctrine of adverse possession, the burden is on the possessor to prove the elements of adverse possession. Under the discovery rule, the burden is on the owner as the one seeking the benefit of the rule to establish facts that would justify deferring the beginning of the period of limitations.

VI

[The Court then held that the running of the statute of limitations not only cuts of the original owner's replevin remedy but also vests title in the possessor.] In the past, adverse possession has described the nature of the conduct that will vest title of a chattel at the end of the statutory period. Our adoption of the discovery rule does not change the conclusion that at the end of the statutory period title will vest in the possessor.

VII

We next consider the effect of transfers of a chattel from one possessor to another during the period of limitation under the discovery rule. Under the discovery rule, the statute of limitations on an action for replevin begins to run when the owner knows or reasonably should know of his cause of action and the identity of the possessor of the chattel. Subsequent transfers of the chattel are part of the continuous dispossession of the chattel from the original owner. The important point is not that there has been a substitution of possessors, but that there has been a continuous dispossession of the former owner.

Professor Ballantine explains:

> Where the same claim of title has been consistently asserted for the statutory period by persons in privity with each other, there is the same reason to quiet and establish the title as where one person has held. The same flag has been kept flying for the whole period. It is the same ouster and disseisin. If the statute

> runs, it quiets a title which has been consistently asserted and exercised as against the true owner, and the possession of the prior holder justly enures to the benefit of the last.

(H. Ballantine, *Title by Adverse Possession*, 32 Harv.L.Rev. 135, 158 (1919))

… .

For the purpose of evaluating the due diligence of an owner, the dispossession of his chattel is a continuum not susceptible to separation into distinct acts. Nonetheless, subsequent transfers of the chattel may affect the degree of difficulty encountered by a diligent owner seeking to recover his goods. To that extent, subsequent transfers and their potential for frustrating diligence are relevant in applying the discovery rule. An owner who diligently seeks his chattel should be entitled to the benefit of the discovery rule although it may have passed through many hands. Conversely an owner who sleeps on his rights may be denied the benefit of the discovery rule although the chattel may have been possessed by only one person.

We reject the alternative of treating subsequent transfers of a chattel as separate acts of conversion that would start the statute of limitations running anew. At common law, apart from the statute of limitations, a subsequent transfer of a converted chattel was considered to be a separate act of conversion. In his dissent, Justice Handler seeks to extend the rule so that it would apply even if the period of limitations had expired before the subsequent transfer. Nonetheless, the dissent does not cite any authority that supports the position that the statute of limitations should run anew on an act of conversion already barred by the statute of limitations. Adoption of that alternative would tend to undermine the purpose of the statute in quieting titles and protecting against stale claims.

The majority and better view is to permit tacking, the accumulation of consecutive periods of possession by parties in privity with each other.

As explained by Professor Walsh:

> The doctrine of tacking applies as in corresponding cases of successive adverse possessions of land where privity exists between such possessors. Uncertainty is created by cases which hold that each successive purchaser is subject to a new cause of action against which the statute begins to run from that time, in this way indefinitely extending the time when the title will be quieted by operation of the statute. It should be entirely clear that the purposes of statutes of limitation are the same whether they relate to land or chattels, and therefore the same reasons exist for tacking successive possessions as the prevailing cases hold. Nevertheless, under the cases, new actions in conversion arise against successive purchases of the converted property, and there is strong reason back of the argument that the statute runs anew against each succeeding cause of action. No doubt the prevailing rule recognizing privity in these cases may be based upon the argument that the possessory title is transferred on each successive sale of the converted chattel, subject to the owner's action to recover the property, and the action of replevin which is his proprietory action, continues in effect against succeeding possessors so that the statute bars the action after the successive possessions amount to the statutory period.

(*Walsh*, *supra* at 83-84)

In New Jersey tacking is firmly embedded in the law of real property. The rule has been applied also to personal property… . .

Treating subsequent transfers as separate acts of conversion could lead to absurd results. As explained by Dean Ames:

> The decisions in the case of chattels are few. As a matter of principle, it is submitted this rule of tacking is as applicable to chattels as to land. A denial of the right to tack would, furthermore, lead to this result. If a converter were to sell the chattel, five years after its conversion, to one ignorant of the seller's tort, the disposed owner's right to recover the chattel from the purchaser would continue five years longer than his right to recover from the converter would have lasted if there had been no sale. In other words, an innocent purchaser from a wrong-doer would be in a worse position than the wrong-doer himself, a conclusion as shocking in point of justice as it would be anomalous in law.

It is more sensible to recognize that on expiration of the period of limitations, title passes from the former owner by operation of the statute. Needless uncertainty would result from starting the statute running anew merely because of a subsequent transfer. It is not necessary to strain equitable principles, as suggested by the dissent, to arrive at a just and reasonable determination of the rights of the parties. The discovery rule permits an equitable accommodation of the rights of the parties without establishing a rule of law fraught with uncertainty.

VIII

We recognize the possible relevancy of claims of common law and statutory copyright and related questions of infringement… . . For present purposes, it is sufficient to note that there are valuable rights in a work of art, apart from the right to title and possession; such as, the rights of reproduction, distribution, and display. Those rights, assembled under the rubric of a copyright, are not involved in this appeal.

… .

We reverse the judgment of the Appellate Division in favor of O'Keeffe and remand the matter for trial in accordance with this opinion.

Sullivan, J.., dissenting.

[Justice Sullivan believed that the uncontested facts were sufficient to grant summary judgment to O'Keeffe but did not dissent from the majority's legal holdings.]

Handler, J., dissenting.

The Court today rules that if a work of art has been stolen from an artist, the artist's right to recover his or her work from a subsequent possessor would be barred by the statute of limitations if the action were not brought within six years after the original theft. This can happen even though the artist may have been totally innocent and wholly ignorant of the identity of the thief or of any intervening receivers or possessors of the stolen art. The Court would grudgingly grant some measure of relief from this horrendous result and allow the artist to bring suit provided he or she can sustain the burden of proving "due diligence" in earlier attempting to retrieve the stolen artwork. No similar duty of diligence or vigilance, however, is placed upon the subsequent receiver or possessor, who, innocently or not, has actually trafficked in the stolen art. Despite ritualistic disavowals, the Court's holding does little to discourage art thievery. Rather, by making it relatively more easy for the receiver or possessor of an artwork with a "checkered background" to gain security and title than for the artist or true owner to reacquire it, it seems as though the Court surely will stimulate and legitimatize art thievery.

I believe that there is a much sounder approach in this sort of case than one that requires the parties to become enmeshed in duplicate or cumulative hearings that focus on the essentially collateral issues of the statute of limitations and its possible tolling by an extended application of the discovery doctrine. The better approach, I would suggest, is one that enables the parties to get to the merits of the controversy. It would recognize an artist's or owner's right to assert a claim against a newly-revealed receiver or possessor of stolen art as well as the correlative right of such a possessor to assert all equitable and legal defenses. This would enable the parties to concentrate directly upon entitlement to the artwork rather than entitlement to bring a lawsuit. By dealing with the merits of the claims instead of the right to sue, such an approach would be more conducive to reconciling the demands for

individual justice with societal needs to discourage art thievery. In addition, such a rule would comport more closely with traditional common law values emphasizing the paramountcy of the rights of a true owner of chattels as against others whose possession is derived from theft. Simultaneously, it would acknowledge that the claims of the true owner as against subsequent converters may in appropriate circumstances be counterbalanced by equitable considerations.

I therefore dissent.

I

By virtue of cross-motions for summary judgment, the posture of the case as it comes to us is that the paintings were stolen from their true owner, plaintiff O'Keeffe, and that defendant Snyder acted in good faith in purchasing the paintings. Hence, we are presented for purposes of this appeal with the classic confrontation between a true owner of property and a subsequent bona fide purchaser for value, each of whom is relatively innocent and each of whom has been victimized by a thief. The true owner here is the artist who created the paintings, and she seeks to recover them through an action for replevin.

An action brought for replevin is a proper means for an owner to regain possession of chattels lost through conversion. The statute of limitations applicable to replevin actions is six years. N.J.S.A. 2A:14-1. A fundamental miscalculation by the majority, however, is its assumption that this six-year limitations statute is applicable to O'Keeffe's claims. The statute of limitations defense was raised by defendant Snyder, but it is not available here because Snyder's acts of conversion his purchase of the paintings from third-party defendant Frank and his refusal to return them to plaintiff O'Keeffe upon demand constituted independent tortious acts each of which occurred well within six years of the commencement of plaintiff's lawsuit. Hence, there is no reason not to permit O'Keeffe's lawsuit and allow the parties to proceed to the heart of the controversy.

In averting a direct confrontation with the merits of the dispute, the majority ignores some rather fundamental law. It rejects the doctrine that the acquisition of a stolen chattel, or a refusal to return it upon demand, itself constitutes a tortious conversion as against the true owner.

… .

II

The holding of the majority, which involves a convoluted rendition of the law of statutes of limitations and adverse possession, in my respectful opinion, not only espouses an erroneous perception of the proper public policy to be achieved, but is actually unneeded even to secure the values endorsed by the Court. There is no reason why the concerns of the majority cannot be reasonably and fully accommodated by traditional doctrines that would, in a case such as this, lead us to a thorough consideration and careful balancing of all the equities as they bear directly upon the merits of the controversy.

It is the general rule that "a bona fide purchaser of personal property taken tortiously or wrongfully, as by trespass or theft, does not acquire a title good against the true owner." … .

This rule is not a recent development. As noted by Judge Fritz in his dissenting opinion below, it has a long and distinguished history and was recognized by Lord Blackstone as a fundamental principle of English law with respect to chattels or personal property. This basic rule as to nonpassage of title to stolen personalty, viz, "(i)f a person steal (*sic*) goods and sell (*sic*) them, the title is not transferred, but remains in the original owner, and he may reclaim them," was adopted in this country. Early cases in the United States followed this rule that good title could not be acquired from a thief, even by a bona fide purchaser.

… .

It follows from this well-established principle that, generally, as between the true owner who has lost personal property through theft and a subsequent good faith purchaser for value, the former is entitled to the goods over

the latter. Title remains in the true owner rather than flowing to the bona fide purchaser when "'the wrongdoer sells the chattel to (such) innocent purchaser … because the wrongdoer had (no title) to give.'"

These basic tenets are fully applicable to creative works of art and govern ownership claims in the case of the theft or wrongful appropriation of artistic creations such as those involved in this case.

Consequently, if we were to view this record as presenting only the undisputed fact that the paintings were stolen and could thus not be validly transferred thereafter to Snyder as a bona fide purchaser, plaintiff O'Keeffe would clearly be entitled to prevail. And, in that posture, I would subscribe to the result urged in the dissenting opinion of Justice Sullivan, namely, a reversal and entry of judgment in favor of plaintiff. Under all of the circumstances, however, I do not believe that such a disposition would be appropriate and would instead counsel a remand, albeit with a focus and under guidelines very different from those expressed in the majority opinion.

III

"As a general rule, a defendant in a replevin action may interpose any defense which questions the plaintiff's title or right to possession, or upholds his own taking or unlawful detention." While the fundamental principle is that a wrongdoer cannot, as against the true owner, convey good title even to a bona fide purchaser, that precept is not absolute. Some exceptions to this common law rule are derived from judicial rulings, others, from statutes. *Dobbs*, *supra*, § 4.7 at 282, 286; N.J.S.A. 12A:2-403(2) (U.C.C. s 2-403(2)) (U.C.C. codifies the common law notion of voidable or equitable title where goods have been "entrusted" by the owner "to a merchant who deals in goods of that kind").

Aside from specialized defenses peculiar to sales transactions, there are also general equitable defenses such as laches, unclean hands, estoppel or mistake cognizable in equity actions or in other actions in which such defenses may be raised. Notwithstanding in this case a failure to denominate each and every equitable defense which might be available to him, defendant Snyder has adequately invoked the defenses which would be germane in addressing plaintiff's claim for the return of the paintings… . .

… .

Equitable considerations have special pertinency in the instant proceedings. They appropriately require the fullest exposure of all facets of the controversy: the uniqueness of the chattels paintings created by a renowned artist whose artworks have in general grown greatly in value; the theft or mysterious disappearance of these paintings several decades ago; the subsequent possession and enjoyment of the paintings by the Frank family; Frank's subsequent attempts to sell the paintings, and their eventual acquisition by Snyder; the experience and status of Snyder in the art world, and whether he sufficiently investigated the provenance of the O'Keeffe paintings and acted with commensurate due care and reasonable prudence when he purchased them.[1] The difficulties caused by the lengthy interim between the original disappearance of the paintings and their ultimate surfacing in Snyder's gallery also has a definite bearing upon the equities in this case.[2] These considerations, I believe, should be given direct application as constituent elements of the primary claims and the affirmative defenses of the parties rather than be given at most, as required by the majority opinion, oblique application as an aspect of the discovery rule relevant only as to whether O'Keeffe is entitled to assert a claim for the stolen paintings.

IV

I am mindful that the majority is concerned with the importance of the policy of repose and the discouragement of stale claims. At times, however, these policies must yield to other equally important policies. The majority has in this case gone well beyond a simple and understandable desire for quietude in litigation. It has actually placed the entire burden of proof as to the absence of comparative fault upon the original owner-artist, albeit in the sheep's clothing of the discovery rule… . .

1. Authority relied on here by the majority recognizes the responsibilities of experienced and knowledgeable persons in the art world, viz:

> If the object is a work of a living artist(,) it may be that no one can be an innocent purchaser from a seller who lacks a provenance without at least calling the artist." Ward, *Adverse Possession of Loaned and Stolen Objects: Is Possession Still 9/10 ths of the Law?*, in *Legal Problems of Museum Administration* 83, 96 (ALI-ABA 1980). Moreover, "(a)s experts(,) the court will expect (museums) to be more familiar with how to go about this (checking the "usual sources" to see if the work of art is stolen) than the average innocent purchaser.

Ibid.
↩

1. There is no compelling reason why courts or parties should suffer the "Ames anomaly" referred to by the majority in support of its thesis. Ames, *The Disseisin of Chattels*, 3 Harv.L.Rev. 313, 323 (1890). *Ante* at 876. To the extent that it appears that O'Keeffe's claims against any person in possession prior to Snyder would have been barred under the statute of limitations, this factor would constitute a potent, if not dispositive, equity in favor of Snyder.↩

1.2. Encroachments

Pile v. Pedrick,

31 A. 646 (Penn. 1895).

John Sparhawk, Jr., and Melick & Potter, for appellants.

E. H. Hanson and J. M. Pile, for appellees.

William, J.

The learned judge of the court below was right in holding that the wall in controversy was not a party wall. It was not intended to be. The defendants were building a factory, and, under the advice of their architect, decided to build within their own lines, in order to avoid the danger of injury to others from vibration which might result from the use of their machinery. They called upon the district surveyor to locate their line, and built within it, as so ascertained. Subsequent surveys by city surveyors have determined that the line was not accurately located at first, but was about 1 1/2 inches over on the plaintiffs'. This leaves the ends of the stones used in the foundation wall projecting into the plaintiffs' lands, below the surface, 1 3/8 inches. This unintentional intrusion into the plaintiffs' close is the narrow foundation on which this bill in equity rests. The wall resting on the stone foundation is conceded to be within the defendants' line. The defendants offered, nevertheless, to make it a party wall, by agreement, and give to plaintiffs the free use of it, as such, on condition that the windows on the third and fourth floors should remain open until the plaintiffs should desire to use the wall. This offer was declined. The trespass was then to be remedied in one of two ways: It could be treated, with the plaintiffs' consent, as a permanent trespass, and compensated for in damages, or the defendants could be compelled to remove the offending ends of the stones to the other side of the line. The plaintiffs insisted upon the latter course, and the court below has, by its decree, ordered that this should be done. The defendants then sought permission to go on the plaintiffs' side of the line and chip off the projecting ends, offering to pay for all inconvenience or injury the plaintiffs or their tenants might suffer by their so doing. This they refused. Nothing remained but to take down and rebuild the entire wall from the defendants'

side, and with their building resting on it. This the decree requires, but in view of the course of the litigation the learned judge divided the costs. This is the chief ground of complaint on this appeal. Costs are not of course, in equity. They may be given or withheld as equity and good conscience require. It often happens that a chancellor is constrained to enforce a legal right under circumstances that involve hardship to the defendant, and in such cases it is, as it should be, common to dispose of the costs upon a consideration of all the circumstances, and the position and conduct of the parties. The costs in this case were within the power of the chancellor. They were disposed of in the exercise of his official discretion, and we see no reason to doubt that they were disposed of properly. The decree is affirmed; the costs of this appeal to be paid by the appellants.

Golden Press, Inc. v. Rylands,

235 P.2d 592 (Colo. 1951).

Arthur A. Brooks, Jr., Lee W. Kennedy, Denver, for plaintiff in error.

Howard Roepnack, Robert J. Sullivan, Denver, for defendants in error.

Stone, Justice.

Plaintiffs Rylands and Reid owned a parcel of land fronting on West Colfax Avenue, Jefferson County, upon which were located their residence and garage and some rental cottages. Defendant Golden Press, Inc., constructed a one-story brick and cinder block business building on its property which adjoined plaintiffs' property on the east. According to plaintiffs' survey here unchallenged, the west wall of defendant's building is two inches clear of the lot line at the front or south end, is exactly on the line at the north end, and is approximately 160 feet in length.

In the action here involved, plaintiffs allege that in contructing the building defendant caused its foundation and footings to extend from two to three and a half inches upon plaintiffs' land. They further allege that during its construction defendant trespassed upon plaintiffs' property by permitting an I-beam to fall on their garage roof; by destroying a flower bed and line fence; by disturbing a graveled driveway, and by walking upon and digging into plaintiffs' land. They allege still further that 'in the operation of the defendant's business and rental operation, the defendant permits, causes and occasions people to drive into and across the premises of the plaintiff by directing people to park in the rear and failing to disclose to the people an entrance to the east of the building, and the patrons of the store are misled by the signs directing them to park in the rear.'Plaintiffs prayed for injunction requiring that defendant remove all footings and foundations upon their property and that defendant, its servants, agents and customers be enjoined from trespassing upon their property and for damages in the sum of $1750 and exemplary damages. Upon issue raised by general denial the case was tried to a jury as to the issue of damages alleged by trespass, the court reserving the determination of the issue of injunction. On the issue of damages the jury returned a verdict in favor of the defendant. The court then found encroachment as alleged and granted mandatory injunction requiring that defendant's projecting footings be removed from plaintiffs' property, and further decreed 'that the defendant take action to properly direct drivers of vehicles where they should drive and park so as to stay on defendant's property, and the defendant shall remove any signs and directions that tend to confuse drivers of vehicles and lead them to believe that they are to drive or park on the property of plaintiffs'; then by separate order set aside the verdict of the jury and sustained plaintiffs' motion for a new trial, on the ground that there was no evidence to support it.

Defendant specifies and argues error in setting aside the verdict of the jury and ordering a new trial as to the issue of actual and exemplary damages. However, that order was discretionary and not a final judgment to which a writ of error lies, and there was no election to stand on the case made as in Mooney v. Carter, 114 Colo. 267, 160 P.2d 390.

Challenge is also raised as to expert witness fees allowed to plaintiffs' surveyor Coberly and his assistant, on the ground that there was no evidence as to the services performed or their value. The court was advised by the testimony of these witnesses as to their qualifications and the work which they had performed, and had knowledge of the time spent in giving testimony. The fees allowed were reasonable for their services in attending and testifying at the trial; their testimony was essential to establishing the property line between the parties and the amount of encroachment, and, under our statute there was no error in the allowance made therefor.

Error is specified to the portion of the injunctive decree requiring defendants to take action to direct drivers and to remove signs tending to confuse drivers. As to this issue the only evidence as to signs or instructions after the completion of the building was related to signs apparently issued by tenants rather than by defendant, and that evidence diclosed no sign directing people to park on plaintiffs' land or properly tending to mislead the public. Moreover, a judgment must be definite and certain in itself.'It must fix clearly the rights and liabilities of the respective parties to the cause, and be such as defendant may readily understand and be capable of performing'.49 C.J.S., Judgments, s 72, p. 191.'The rights of the parties under a mandatory judgment whereby they may be subjected to punishment as contemnors for a violation of its provisions, should not rest upon implication or conjecture, but the language declaring such rights or imposing burdens should be clear, specific and unequivocal so that the parties may not be misled thereby.' Plummer v. Superior Court, 20 Cal.2d 158, 124 P.2d 5, 8. Lacking in this essential requirement, the portion of the decree above referred to may not stand.

There remains for consideration the portion of the decree requiring defendant to remove the footings of its building where they encroach upon the property of the plaintiffs. Ordinarily, mandatory injunction will issue to compel removal of encroaching structures, but it is not to be issued as a matter of course. On appeal to the court for an equitable remedy, the court must consider the peculiar equities of the case. A study of many decisions discloses no specific and universally-accepted rule as to encroachments. Even in jurisdictions like Massachusetts, in which it has been declared that mandatory injunction for removal of encroachment can only be denied where estoppel or laches is shown, Beaudoin v. Sinodinos, 313 Mass. 511, 48 N.E.2d 19, there are numerous cases where injunction has been refused in the absence of those defenses. See cases cited as exceptional in Gerogosian v. Un. Realty Co., 289 Mass. 104, 193 N.E. 726, 96 A.L.R. 1282. Generally in other jurisdictions such harsh rule is not followed. Sometimes a slight and harmless encroachment is held to be within the rule 'de minimis,' as in Tramonte v. Colarusso, 256 Mass. 299, 152 N.E. 90, and McKean v. Alliance Land Co., 200 Cal. 396, 253 P. 134, and generally the courts require that he who seeks equity should do equity and come with clean hands.Tramonte v. Colarusso, supra; McKee v. Fields, 187 Or. 323, 210 P.2d 115.

Where the encroachment is deliberate and constitutes a willful and intentional taking of another's land, equity may well require its restoration regardless of the expense of removal as compared with damage suffered therefrom; but where the encroachment was in good faith, we think the court should weigh the circumstances so that it shall not act oppressively. 5 Pomeroy' Equity Jurisprudence, page 852, s 508. While the mere balance of convenience is not the proper test, yet relative hardship may properly be considered and the court should not become a party to extortion.Restatement of the Law, Torts, s 941. Where defendant's encroachment is unintentional and slight, plaintiff's use not affected and his damage small and fairly compensable, while the cost of removal is so great as to cause grave hardship or otherwise make its removal unconscionable, mandatory injunction may properly be denied and plaintiff relegated to compensation in damages. Owenson v. Bradley, 50 N.D. 741, 197 N.W. 885, 31 A.L.R. 1296, Ann. 14 A.L.R. 831, 31 A.L.R. 1302, 76 A.L.R. 1287; Nebel v. Guyer, 99 Cal.App.2d 30, 221 P.2d 337; Mary Jane Stevens Co. v. First Nat'l Bldg. Co., 89 Utah 456, 57 P.2d 1099.

In the case before us issue was raised in the argument as to whether or not the encroachment was intentional. There was no finding on this issue by the trial court and the decree is not necessarily predicated upon intent. In the absence of proof to the contrary there is a presumption that men act in good faith and that they intend to do what

they have the right to do. Prior to the building of the wall, plaintiffs and defendant each employed a surveyor, but neither was called as a witness and the results of their surveys are not disclosed except that, as stated by plaintiff Reid, before there was any digging done plaintiff's employed Prouty to survey and defendants employed Linn to survey 'and there semed to be a little difficulty in their agreeing. Mr. Prouty came out and made another survey, and Mr. Linn came out and made another survey and, of course, all this time the building was progressing.'Plaintiff Rylands testified that she called Prouty to survey twice 'because there was trouble between the lines. They had called their surveyor, and they weren't satisfied, and we weren't satisfied, and Mr. Prouty was called back to resurvey, to look the figures over, and the lines,' during the course of construction. There is no indication from the record as to whether or not these surveyors agreed after their resurveys. Plaintiffs rely entirely as to the location of the line upon the survey by Coberly and his assistant, who were employed by plaintiffs and made their survey just prior to the trial and long after the wall was completed. Plaintiff Rylands' brother, Thomas P. Nother, upon whom plaintiffs relied to show knowledge and intent as to the line on the part of defendant's agents, testified as to Coberly's survey: 'He found out their north end of their building was right on the line, and the south end of their building was a little bit inside the line, that is how I determined that they were over with their footings so far.'With reference to the earlier surveys, witness Nother testified that before the concrete was poured for the foundation, he informed Mr. Ernst who was superintendent of construction that his building was about eight inches over the line and Ernst replied, 'You're wrong, we have got our own surveyor. He has put us on the line'; that witness answered, 'Well, I am not going to argue about it, I am warning you, you are over your line,' and that thereupon the superintendent had the laborers move the forms over.

Defendant's witness Argo, who had charge of constructing the wall, testified that he had a survey line run by Linn and they dug the hole for the footings right straight down to the property line; that the lady next door had made a statement that they were on her property and they had another survey run and 'the surveyor told us we better move over, as I remember, two inches, and we did.' He further testified, 'We weren't going to form that footing, and then the people next door made a little fuss about us being on their property, so we put a form in for that footing, so it would be on our side.'

There is disclosed continued argument by plaintiffs with representatives of defendant during construction of the wall as to trespassing on their lands, but we find no evidence from the record challenging the good faith of defendant's representative in locating the footings.

Again we note that while plaintiffs were continually complaining as to trespass of the workmen on their property, they took no steps for injunction or other legal determination of the disputed line until after both the foundation and upper wall were completed.

Further, we note that the encroachment here complained of is very slight. It is conceded that the wall above the foundation does not project over the property line and that the only encroachment consists of a projection of the footings a distance of two inches at the middle, increasing to three and a half inches at the north end. The top of these footings is about seven feet below the surface of the ground and they go down to nine feet below the surface. They constitute no interference whatever with plaintiffs' present use of the property as a driveway and iris bed, and the only testimony as to future damage was to the effect that if plaintiffs wished to build to their line with a basement, they would have to detour around this slight projection of defendant's footings.

The testimony indicates that the value of plaintiffs' lands is approximately $200 per front foot, so that if defendant had taken the entire strip of three and a half inches both at and below the surface, its value would have been only about $55, and the value of the portions extending from seven to nine feet below the surface and only along the rear eighty feet of wall would appear to be very small. Plaintiffs, at the trial, refused defendant permission to enter upon their property for the purpose of chipping off the encroaching footings with a jack hammer, and demanded that they be removed from defendant's side of the land, if necessary by tearing down the wall. The

expense and hardship of such removal would be so great in comparison with any advantage of plaintiffs to be gained thereby that we think it would be unconscionable to require it, and that under all the circumstances disclosed mandatory injunction should have been denied by the trial court, with permission for plaintiffs to proceed, if desired, in damages.

Accordingly, the injunctive decree is reversed and the case remanded for further proceedings, if desired, consistent herewith.

Hilliard, J., not participating.

1.3. Improving Trespassers

Somerville v. Jacobs,

170 S.E.2d 805 (W. Va. 1969)

Richard F. Pence, Parkersburg, for appellants.

Wilson & Hill, George W. Hill, Jr., Burk & Bayley, Robert W. Burk, McDougle, Davis & Morris, Fred L. Davis, Parkersburg, for appellees.

Haymond, President:

The plaintiffs, W. J. Somerville and Hazel M. Somerville, ... , the owners of Lots 44, 45 and 46 in the Homeland Addition to the city of Parkersburg, in Wood County, believing that they were erecting a warehouse building on Lot 46 which they owned, mistakenly constructed the building on Lot 47 owned by the defendants, William L. Jacobs and Marjorie S. Jacobs, ... Construction of the building was completed in January 1967 and by deed dated January 14, 1967 the Somervilles conveyed Lots 44, 45 and 46 to the plaintiffs Fred C. Engle and Jimmy C. Pappas who subsequently leased the building to the Parkersburg Coca-Cola Bottling Company, a corporation. Soon after the building was completed but not until then, the defendants learned that the building was on their property and claimed ownership of the building and its fixtures on the theory of annexation. The plaintiffs then instituted this proceeding for equitable relief in the Circuit Court of Wood County and in their complaint prayed, among other things, for judgment in favor of the Somervilles for $20,500.00 as the value of the improvements made on Lot 47, or, in the alternative, that the defendants be ordered to convey their interest in Lot 47 to the Somervilles for a fair consideration... . . [Both parties moved for summary judgment after discovery and stipulations.]

By final judgment rendered June 11, 1968, the circuit court required the defendants within 60 days to elect whether they would (1) retain the building and pay W. J. Somerville $17,500.00 or suffer judgment against themselves in his favor in that amount, or (2) convey title to Lot 47 of Homeland Addition to W. J. Somerville for the sum of $2,000.00 cash... . .

This case was submitted for decision upon the record of proceedings in the trial court and the briefs and the oral arguments in behalf of the defendants. The brief in behalf of the plaintiffs, not having been filed within the time required by the provisions of Rule VI of this Court and the defendants having refused to waive the requirement of the rule, oral argument in behalf of the plaintiffs was not permitted upon the submission of the case.

... .

The controlling question for decision is whether a court of equity can award compensation to an improver for improvements which he has placed upon land not owned by him, which, because of mistake, he had reason to believe he owned, which improvements were not known to the owner until after their completion and were not induced or permitted by such owner, who is not guilty of any fraud or inequitable conduct, and require the owner

to pay the fair value of such improvements or, in the alternative, to convey the land so improved to the improver upon his payment to the owner of the fair value of the land less the value of the improvements.

… .

Though the precise question here involved has not been considered and determined in any prior decision of this Court, the question has been considered by appellate courts in other jurisdictions and though the cases are conflicting the decisions in some jurisdictions, upon particular facts, recognize and sustain the jurisdiction of a court of equity to award compensation to the improver to prevent unjust enrichment to the owner and in the alternative to require the owner to convey the land to the improver upon his payment to the owner of the fair value of the land less the improvements.

In the early case of Bright v. Boyd, 4 Fed.Cas. p. 127, a Federal trial court held in an opinion by Justice Story that an improving occupant could institute and maintain a suit in equity to secure compensation for his improvements on land of the owner and that as a doctrine of equity an innocent purchaser for valuable consideration, without notice of any infirmity in his title, who by his improvements added to the permanent value of the owner is entitled to compensation for the value of the improvements and to a lien upon the land which its owner must discharge before he can be restored to his original rights in the land.

In the early Kentucky case of Thomas v. Thomas' Executor, 55 Ky. (16 B. Mon.) 420, the court recognized the equitable principle that one who acquires title to land bona fide, and enters upon and improves it, supposing it to be his own, is entitled to compensation for improvements.

In the leading case of Union Hall Association v. Morrison, 39 Md. 281, a plaintiff who claimed title to a small lot, entered by mistake into possession of other land in the neighborhood of such lot and erected on such land a valuable building and who, after having been ousted from the possession of the land in an action by its owner, instituted a suit in equity for compensation for the improvements. In that case the court held that although there was nothing in the conduct of the defendant owner which created an equitable estoppel as he had been ignorant of his rights, the plaintiff, whose good faith was beyond question, had an equitable right to compensation for the improvements; that the defendant should have the option of accepting from the plaintiff payment for the lot for its value without the improvements and conveying the lot to the plaintiff, or of holding the lot with the improvements upon payment to the plaintiff their actual value to the extent that they enhanced the value of his lot, and that the plaintiff was entitled to a lien for the value of the improvements and, upon default in the payment for such improvements, the property should be sold to enforce such payment. In discussing the relief to which the plaintiff was entitled the opinion contains this language:

> With respect to the nature and terms of the decree it will be proper that the appellee shall have the option to accept from the appellant payment for the lot of ground, estimated at its just value, without the improvements thereon, and be required on the payment thereof with interest, to convey the same to the appellant, by a sufficient deed. Or at his election to take and hold the lot with improvements, paying to the appellant the actual value of the improvements, to the extent of the additional value which they have conferred upon the land, and in default of such payment, the same ought to be declared to be a lien, and charge on the property, and the lot and improvements should be decreed to be sold for the payment thereof.

[The court reviews a large number of cases from other states where courts recognized an equitable interest in a good-faith, improving trespasser in the land improved or the value of the improvements.]

From the foregoing authorities it is manifest that equity has jurisdiction to, and will, grant relief to one who, through a reasonable mistake of fact and in good faith, places permanent improvements upon land of another, with

reason to believe that the land so improved is that of the one who makes the improvements, and that the plaintiffs are entitled to the relief which they seek in this proceeding.

The undisputed facts … is [sic] that the plaintiff W. J. Somerville in placing the warehouse building upon Lot 47 entertained a reasonable belief based on the report of the surveyor that it was Lot 46, which he owned, and that the building was constructed by him because of a reasonable mistake of fact and in the good faith belief that he was constructing a building on his own property and he did not discover his mistake until after the building was completed. It is equally clear that the defendants who spent little if any time in the neighborhood were unaware of the construction of the building until after it was completed and were not at any time or in any way guilty of any fraud or inequitable conduct or of any act that would constitute an estoppel. In short, the narrow issue here is between two innocent parties and the solution of the question requires the application of principles of equity and fair dealing between them.

It is clear that the defendants claim the ownership of the building. Under the common law doctrine of annexation, the improvements passed to them as part of the land. Dawson v. Grow, 29 W.Va. 333, 1 S.E. 564; Bailey v. Gardner, 31 W.Va. 94, 5 S.E. 636, 13 Am.St.Rep. 847. This is conceded by the plaintiffs but they assert that the defendants can not keep and retain it without compensating them for the value of the improvements, and it is clear from the testimony of the defendant William L. Jacobs in his deposition that the defendants intend to keep and retain the improvements and refuse to compensate the plaintiffs for their value. The record does not disclose any express request by the plaintiffs for permission to remove the building from the premises if that could be done without its destruction, which is extremely doubtful as the building was constructed of solid concrete blocks on a concrete slab, and it is reasonably clear, from the claim of the defendants of their ownership of the building and their insistence that certain fixtures which have been removed from the building be replaced, that the defendants will not consent to the removal of the building even if that could be done.

In that situation if the defendants retain the building and refuse to pay any sum as compensation to the plaintiff W. J. Somerville they will be unjustly enriched in the amount of $17,500.00, the agreed value of the building, which is more than eight and one-half times the agreed $2,000.00 value of the lot of the defendants on which it is located, and by the retention of the building by the defendants the plaintiff W. J. Somerville will suffer a total loss of the amount of the value of the building. If, however, the defendants are unable or unwilling to pay for the building which they intend to keep but, in the alternative, would convey the lot upon which the building is constructed to the plaintiff W. J. Somerville upon payment of the sum of $2,000.00, the agreed value of the lot without the improvements, the plaintiffs would not lose the building and the defendants would suffer no financial loss because they would obtain payment for the agreed full value of the lot and the only hardship imposed upon the defendants, if this were required, would be to order them to do something which they are unwilling to do voluntarily. To compel the performance of such an act by litigants is not uncommon in litigation in which the rights of the parties are involved and are subject to determination by equitable principles. And the right to require the defendants to convey the lot to the plaintiff W. J. Somerville is recognized and sustained by numerous cases cited earlier in this opinion. Under the facts and circumstances of this case, if the defendants refuse and are not required to exercise their option either to pay W. J. Somerville the value of the improvements or to convey to him the lot on which they are located upon his payment of the agreed value, the defendants will be unduly and unjustly enriched at the expense of the plaintiff W. J. Somerville who will suffer the complete loss of the warehouse building which by bona fide mistake of fact he constructed upon the land of the defendants. Here, in that situation, to use the language of the Supreme Court of Michigan in Hardy v. Burroughs, 251 Mich. 578, 232 N.W. 200, "It is not equitable * * * that defendants profit by plaintiffs' innocent mistake, that defendants take all and plaintiffs nothing."

To prevent such unjust enrichment of the defendants, and to do equity between the parties, this Court holds that an improver of land owned by another, who through a reasonable mistake of fact and in good faith erects a

building entirely upon the land of the owner, with reasonable belief that such land was owned by the improver, is entitled to recover the value of the improvements from the landowner and to a lien upon such property which may be sold to enforce the payment of such lien, or, in the alternative, to purchase the land so improved upon payment to the landowner of the value of the land less the improvements and such landowner, even though free from any inequitable conduct in connection with the construction of the building upon his land, who, however, retains but refuses to pay for the improvements, must, within a reasonable time, either pay the improver the amount by which the value of his land has been improved or convey such land to the improver upon the payment by the improver to the landowner of the value of the land without the improvements.

It is pertinent to observe that, in cases involving the right to recover for improvements placed by mistake upon land owned by one other than the improver, the solution of the questions involved depends largely upon the circumstances and the equities involved in each particular case. Here, under the facts as stipulated by the parties, the equities which control the decision are clearly in favor of the plaintiffs.

To reverse the judgment of the circuit court the defendants cite and rely upon several cases which are clearly distinguishable upon their facts from the case at bar and are not applicable to or controlling of the decision in the instant proceeding.

In Dawson v. Grow, 29 W.Va. 333, 1 S.E. 564, the improver was guilty of negligence in not consulting the registration records, which would have informed her that the property which she claimed had been previously conveyed to another by deed of record, and because of her negligence she was held not to be entitled to compensation for improvements. In Hall v. Hall, 30 W.Va. 779, 5 S.E. 260 [and other cases] the title of the improver in each instance to the land improved was questionable and the improvements in each instance were made under a mistake of law concerning such title against which, as stated in the *Hall* case, "courts cannot relieve.", and for that reason compensation for improvements was denied. In [other cases] questions of estoppel were involved which are not presented in the case at bar. In Harrison v. Miller, 124 W.Va. 550, 21 S.E.2d 674, a constructive trustee of real estate placed improvements upon it with his individual funds. At the time he did so he was chargeable with knowledge that others were beneficially entitled to such land and for that reason he was not entitled to charge the land with the money which he had expended for such improvements.

In Cautley v. Morgan, 51 W.Va. 304, 41 S.E. 201, the defendants Morgan and Huling and the plaintiff Cautley were owners of adjoining lots fronting on Quarrier Street in Charleston, West Virginia. The plaintiff, being desirous of building a party wall between the lots for a business building on her lot, entered into an agreement with the defendants by which, among other things, she was given the right to construct the wall to the extent of ten inches upon the lot of the defendants. In constructing the wall the plaintiff, by mistake, built it six inches farther on the land of the defendants than the ten inches provided for in the contract. The wall was completed in 1893 and in the fall of 1899 the defendants, desiring to use the wall, discovered the mistake. They notified the plaintiff and, after unsuccessful efforts were made to adjust the matter, the defendants instituted an action of ejectment against the plaintiff to recover the land on which the plaintiff had encroached in the construction of the wall. In a suit by the plaintiff to enjoin the prosecution of the action of ejectment, the court refused the injunction and dismissed the bill with costs. In the opinion the court said: "It seems to be one of those cases where there was no intentional fault upon the part of either, but by the improper action, though unintentional of one of the parties a mistake was made, whereby one party or the other must suffer a hardship. This being the case, it is held: That that party, upon whom a duty devolves and by whom the mistake was made, should suffer the hardship rather than he who had no duty to perform and was no party to the mistake." It appears, however, from the facts that the plaintiff, in undertaking to build the wall and assuming the responsibility of fixing the location herself, had the duty to see that it was properly located and that she had sufficient data to enable her to avoid the mistake if she had used the data with proper care. In other words the plaintiff, by not making proper use of the available data, was guilty of careless or negli-

gent conduct in making the mistake. She was limited by the contract to place the wall upon only ten inches of the defendants' property and in making an encroachment of more than ten inches she was also guilty of breach of the contract. Accordingly she was not entitled to equitable relief and the case is distinguishable from the case at bar for those reasons and for the additional reason that the loss of a portion of the wall of the width of only six inches would be a relatively insignificant hardship compared to the complete loss here involved of an entire building of the admitted value of $17,500.00.

In reaching the conclusion to deny the injunction, the court followed closely the case of Kirchner v. Miller, 39 N.J.Eq. 355, ... In that case, as so indicated, the plaintiff and the defendant were owners of adjoining lots, the plaintiff employed a surveyor to fix the dividing line which he mislocated, and the plaintiff, supposing that he was building on his own land, inadvertently placed his house a few inches on the lot of the defendant who was not aware of the encroachment. The court held that equity would not enjoin an action of ejectment by the defendant against the plaintiff to recover possession of the strip of land on which he built the house in question. In that case it appeared, also as previously indicated, that the plaintiff could have removed the part of the building on the lot of the defendant at an expense of $75.00 and the defendant admitted that the loss of the strip would cause no injury to his house but would reduce the value of the lot in the amount of $150.00. It is evident that the court in the *Kirchner* case was influenced by the lack of hardship sustained by the plaintiff by reason of his mistake, for in the opinion the court said "Where there is no hardship there is no ground for interference. This case is not one for the application of the doctrine." In the *Kirchner* case, in commenting upon the holding in McKelway v. Armour, 10 N.J.Eq. (2 Stock.) 115, in which it was held that the plaintiff was entitled to be paid for the improvements by the landowner or that the landowner was required to sell his property to the plaintiff at a price to be fixed by the court or to exchange properties with him, the court, by way of dictum, said: "The exercise of such a judicial power, unless based upon some actual or implied culpability on the part of the party subjected to it, is a violation of constitutional right." The same statement, also by way of dictum, appears in the opinion in the *Cautley* case and it also appears, as a citation from the *Kirchner* case, in the opinion in Olin v. Reinecke, 336 Ill. 530, 168 N.E. 676. In no other of the many cases that have been considered does any such statement appear. Such statement, being mere dictum, is contrary to the holdings in numerous cases previously cited in this opinion, in which the conveyance of the improved property by the landowner was required and held to be proper. Of course, in an ordinary situation, no court could or would undertake to require a person to convey his land to another who might desire it, but such conveyance may properly be required in litigation in which the rights of the parties, including such landowner, are involved and which are subject to determination upon principles of equity.

The judgment of the Circuit Court of Wood County is affirmed.

Affirmed.

Caplan, Judge, dissenting:

Respectfully, but firmly, I dissent from the decision of the majority in this case. Although the majority expresses a view which it says would result in equitable treatment for both parties, I am of the opinion that such view is clearly contrary to law and to the principles of equity and that such holding, if carried into effect, will establish a dangerous precedent.

Basically, I believe that the principles expressed in Cautley v. Morgan, 51 W.Va. 304, 41 S.E. 201, reflect my view of this matter and that that case cannot realistically be distinguished from the instant case, as was attempted in the majority opinion. In that opinion it was said that the plaintiff who encroached upon the defendant's property was guilty of "careless or negligent conduct in making the mistake." The opinion reasoned that the plaintiff had the duty to see that the wall was properly located and that she had sufficient data to enable her to avoid the mistake if she had used the data with proper care. Certainly, in the instant case the plaintiff, had he caused to be made a proper survey and had exercised proper care, would have constructed the subject building on his own property

rather than on that of the defendant. It occurs to me that the failure to use proper care is more evident in this case than it was in *Cautley.*

The majority opinion appears to rely on McKelway v. Armour, 2 Stock. (10 N.J.Eq.) 115 for the proposition that the owner of property upon which a building was mistakenly built must either purchase the building or sell his property. This case, decided in 1854, was substantially overruled some thirty years later by Kirchner v. Miller, 39 N.J.Eq. 355 wherein the court said of the decision in *McKelway*, "[t]he exercise of such a judicial power, unless based upon some actual or implied culpability on the part of the party subjected to it, is a violation of constitutional right. No tribunal has the power to take private property for private use. The Legislature itself cannot do it." This precise language was used by the Court in *Cautley* in rejecting the view taken in *McKelway.* In Cautley the Court held: "That that party, upon whom a duty devolves and by whom the mistake was made, should suffer the hardship rather than he who had no duty to perform and was no party to the mistake." See 7 M.J., Equity, Section 25.

I am of the opinion that the *Cautley* case is not distinguishable from the instant case and that the language which says that such taking of property violates a constitutional right is not mere dictum as expressed in the majority opinion.

I am aware of the apparent alarmist posture of my statements asserting that the adoption of the majority view will establish a dangerous precedent. Nonetheless, I believe just that and feel that my apprehension is justified. On the basis of unjust enrichment and equity, the majority has decided that the errant party who, without improper design, has encroached upon an innocent owner's property is entitled to equitable treatment. That is, that he should be made whole. How is this accomplished? It is accomplished by requiring the owner of the property to buy the building erroneously constructed on his property or by forcing (by court edict) such owner to sell his property for an amount to be determined by the court.

What of the property owner's right? The solution offered by the majority is designed to favor the plaintiff, the only party who had a duty to determine which lot was the proper one and who made a mistake. The defendants in this case, the owners of the property, had no duty to perform and were not parties to the mistake. Does equity protect only the errant and ignore the faultless? Certainly not.

It is not unusual for a property owner to have long range plans for his property. He should be permitted to feel secure in the ownership of such property by virtue of placing his deed therefor on record. He should be permitted to feel secure in his future plans for such property. However, if the decision expressed in the majority opinion is effectuated then security of ownership in property becomes a fleeting thing. It is very likely that a property owner in the circumstances of the instant case either cannot readily afford the building mistakenly built on his land or that such building does not suit his purpose. Having been entirely without fault, he should not be forced to purchase the building.

In my opinion for the court to permit the plaintiff to force the defendants to sell their property contrary to their wishes is unthinkable and unpardonable. This is nothing less than condemnation of private property by private parties for private use. Condemnation of property (eminent domain) is reserved for government or such entities as may be designated by the legislature. Under no theory of law or equity should an individual be permitted to acquire property by condemnation. The majority would allow just that.

I am aware of the doctrine that equity frowns on unjust enrichment. However, contrary to the view expressed by the majority, I am of the opinion that the circumstances of this case do not warrant the application of such doctrine. It clearly is the accepted law that as between two parties in the circumstances of this case he who made the mistake must suffer the hardship rather than he who was without fault. Cautley v. Morgan, supra.

I would reverse the judgment of the Circuit Court of Wood County and remand the case to that court with directions that the trial court give the defendant, Jacobs, the party without fault, the election of purchasing the building, of selling the property, *or* of requiring the plaintiff to remove the building from defendant's property.

I am authorized to say that Judge Berry concurs in the views expressed in this dissenting opinion.

1.4. Problem

Problem related to Adverse Possession

For fifteen years, Marty Spelunker has offered to the public caving expeditions in "Marty Caverns," as he advertises them. In the beginning, Marty supplied all the necessary equipment and led small groups into the caverns through a small entrance in the northwest corner of his property – all for $20 per person for a day trip and $60 per person for a three-day expedition.

When word got around the spelunking community about some of the rare features in Marty Caverns, business picked up. Marty began charging a bit more and hired additional guides. Five years ago, a story about Marty Caverns appeared in Outside Magazine. Marty increased his staff further but still could not keep up with demand. At the same time, Marty constructed walkways around some of the more delicate parts of the cave, and in another part placed a souvenir and photo stand – both at considerable expense.

A year ago, Nancy Neighbor was forced to extend the depth of her water well. On doing so, she unwittingly drilled into Marty Caverns. Marty went to talk with Nancy, explaining the fragility of the cave ecosystem and urging her to find another source for her water rather than attempting to drill wells on her property.

After talking with a lawyer, Nancy wrote a letter to Marty demanding rental income for conducting "ongoing expeditions on my property." Marty immediately calls you, his lawyer, for advice. What is your analysis of this situation and what do you tell Marty? Suppose that the statutory period for adverse possession is ten years in this jurisdiction.

Discussion

This problem is based on an actual case, *Marengo Cave Co. v. Ross*, 212 Ind. 624, 10 N.E.2d 917 (Ind. 1937). The central issue there, and the focus of the casebooks that discuss the case, is the "open and notorious" element of the adverse possession doctrine. As we'll see, though, it's not the only concept that is taxed by the facts in this case.

Does Nancy Own the Caves Below Her Land?

In the problem, Nancy is demanding payment for Marty's use of "her" land. Her theory must be that her right to exclude extends laterally over all the lands to which she has title and downward from the surface to the center of the Earth – the old common law doctrine, *ad coelum ad infernos* (from the heavens to the depths).

We've discussed briefly in class how this doctrine was severely limited after the invention of the airplane and the development of transcontinental air travel. If individual property owners could enforce their rights to exclude against overflying airplanes (or satellites), then airlines would be forced to acquire licenses to overfly land. It isn't too difficult to see that this would be a mess, at least without some extremely careful and innovative market devices. Even if there were no holdouts, the transaction costs associated with acquisition of overflight rights would be enormous. Yet, without these transaction costs, we're confident the deals would go through. That is, in general, airlines value overflight rights much more than most individuals actually value the extent to which the sanctity of the airspace over their property would be diminished by overflying airplanes. But even though there might be *some* landowners who really would not sell to the airlines, it might still be better to place the initial entitlement in the airlines, on the theory that we're better off if those few individuals who wish to exclude airplanes must pay off the small collection of airlines than if the airlines had to buy entitlements from *everybody*. I won't go any further in this analysis except to note that this shift in entitlements has uneven distributional effects: people near

airports have faced diminution in the value of their property (at least as residential property) not encountered by the farmer in Iowa whose property is overflown by the occasional transcontinental jet at 35,000 feet. The neighbors of airports really might have held out for a high price, but in lieu of granting them rights to block, we've built up a fair amount of legal machinery aimed at minimizing noise, pollution, etc, though these efforts to mitigate may disproportionately benefit wealthy landowners.

All that's an aside but one that helps frame an initial question not dealt with by the court in *Marengo Cave Co.*: why not limit a landowner to surface rights, creating a commons in subterranean exploration and recreation, just as there is a regulated commons in airspace?

Put differently, is there a good reason to continue the common law rule that landowners can exclude others from the space *below* their property when we have dramatically curtailed their right to exclude from the space *above* their property? If we recognized a commons in the underground, then Marty would win this case.

But, of course, the underground, at least the immediate underground, is relevantly different from the sky. First, there is a long history not only of formal recognition of property interests in the underground, but also of actual use and appropriation from the underground – think oil, gas, and other minerals. When we expropriated landowner's rights to exclude planes, we took away certain non-use interests, and only to a very limited extent, but if we expropriate subterranean rights, we're taking away something of tangible and, sometimes, high value. Second, there isn't really a publicly important industry that depends on gaining underground rights in a manner that might be frustrated by forcing it to buy such rights from willing sellers. Even with something like oil, a holdout is not much of a problem. The worry for airlines was that random holdouts would create a patchwork of no-fly zones that necessitated wasteful (if not impossible) routing. A route is a continuous line, and once rights are obtained along much of a route someone else along the route could engage in strategic bargaining to try to capture profits from the route. Put differently, overflight rights are path dependent and location- sensitive, whereas mineral rights are not.

We're probably not worried that spelunking will become prohibitively expensive or be blocked entirely by holdouts. It's (a) not as important an industry as air travel so that blocking is both less likely and less of a concern and (b) more like oil in that owners are less likely to engage in strategic bargaining because most underlying caverns do not become dramatically more valuable as other caverns are acquired. (Though not exactly like oil: imagine a large, ecologically significant perhaps, cave system the continuity of which depends on a few passageways all underlying the land of a single owner. The ability to use the caverns might be significantly impeded without rights to use the passageways, and so the owner might be in a position to hold out.) You might think of other reasons in addition that argue in favor of keeping the *ad inferno* part of the old doctrine, even as we have jettisoned a substantial aspect of the *ad coelum* part.

To end this rather long detour, the court will certainly conclude that Nancy "owns" all the underground below her land. The question is whether she has lost this property, either in part or in total.

Has Nancy Lost Her Subterranean Interest?

We've studied a couple of ways this loss can occur. First, adverse possession vests title in adverse possessors automatically at the end of the relevant limitations period. Second, we've studied cases that attempt to limit forfeiture when improvements either encroach on or lie entirely on the land of another.

Adverse Possession

In any adverse possession problem, we should start by listing the elements and then just march through them – as the court did in the *Marengo Cave* case. Any decent lawyer or judge would do that. But the resolution of these elements in hard cases requires a bit more. Here, we're going to get hung up on "open and notorious," and a satisfying reult probably cannot be reached just by thinking hard about what those words mean.

Here are the elements: (1) Actual possession, (2) Open and notorious, (3) Exclusive, (4) Hostile, (5) Continuous, (6) for the statutory period. These can be arranged in any order to yield a more or less memorable acronym – feel free. Some courts also include "under a claim of right" and payment of taxes. If you discussed the role of property taxes in this case, that's fine. But many courts do not require it, and I won't assume the court in this hypothetical jurisdiction does.

Actual possession: Here, the caverns were used just as we'd expect a true owner of the caverns to use them. It doesn't matter that Marty hasn't constructed a dwelling in the caverns. Some courts formulate the standard as whether the property was possessed in a manner that gives notice. As to this question, courts split on questions such as whether adverse possession of rural land requires less presence (on the theory that true owners of rural lands tend to occupy their land less intensely) or more presence (on the theory that more activity is necessary to give notice to the true owner of rural lands). required on rural land. You could discuss the major issue in this problem with respect to this element, but the "open and notorious" element appears better suited to probe whether the possession was sufficient to give notice. This case is interesting in part because it is clear that there was "possession" but at the same time questionable whether it was "open" that the possession was of the true owner's land. In most other cases, these two elements are less distinct.

Exclusive: There is no question that Marty has not shared his asserted rights to the caverns with others. He has been charging admission after all.

Hostile: The general rule is that only objective hostility to the record owner's formal interests is required. That's certainly met here. Marty would not win in a jurisdiction that required the APor to know that the land was not his (only land pirates win). But Marty would likely satisfy this element in those few jurisdictions that impose a good faith requirement. Note also that there is no evidence of any permission from Nancy. And even if we were in a jurisdiction that presumed permission on land like this, that presumption could be rebutted here, where it's relatively clear from her conduct that Nancy had no idea that she owned any of portion of the caverns – or at least, we're pretty confident that additional facts can be marshaled to rebut the presumption..

Continuous: As with actual possession, we only require as much continuity as a record owner would exhibit. Seasonal occupancy is fine, for example, on land that is typically occupied seasonally. Here, Marty doesn't *live* in the caverns, but it's clear that he makes regular use of them – likely even to a greater extent than average cave-owners make.

Statutory period: The instructions tell us that the limitations period is 10 years in this jurisdiction. Marty has been operating the cave (from an entrance on his property) for 15 years. The evidence seems to be that he has met the above-listed elements for that long.

The question though is how long Marty's possession of the caves has been "open and notorious" – and that question might be resolved differently for the first ten years than for the last five. For the last 5 years, Marty has been operating the caverns under greater publicity and has added improvements. But five years is not enough, and so unless the possession was open and notorious before these improvements and publicity, Marty will lose on an AP claim.

Open and notorious: Here's the rub. Recall in the *Gobble* case that evidence concerning the reputation in the community was used to support the possessors' claim on this element. Neighbors testified that they thought the possessors were the owners of the land in question. But what exactly are we probing here? Whether the possession was out in the open enough that a reasonable owner would have discovered it? That seems to be what most courts say, and it fits with the "owner negligence" theory of adverse possession. Indeed, the *Marengo Caves* case is explicit about this: "Where there has been no actual notice, it is necessary to show that the possession of the disseisor was so open, notorious, and visible as to warrant the inference that the owner must or should have known of it."

The court in *Marengo Caves* cashes this out as a question whether a common observer would assume the land belonged to the possessor – much like the *Gobble* court relied on community reputation. The *Marengo Caves* court separately inquired into "notoriety" and explicitly tied this element to community reputation – stating that APors' possession must be "manifest to the community."

The cave cases force us to draw a distinction between the questions whether the possession itself was "open and notorious" and whether it was "open and notorious" that the possession was of a particular parcel of land. This is the most important issue in this problem: Here, there is little question that Marty's operation of the caves was open and notorious; the issue is whether it was open and notorious that his possessory interest burdened the particular overlying parcel at issue. You could give a fine answer by arguing this issue either way. But we won't find a way out of this dilemma just by thinking about what the words "open and notorious" mean. Instead, we'll have to consider the purpose of adverse possession doctrine to discover how a court is likely to rule or should rule.

If adverse possession is about punishing O's negligence, then it will be more difficult to conclude that adverse possession occurred here. We'll have to think about whether it's negligent for an owner near a large (famous?) underground cave system to fail to undertake measures to discover whether any part of the caves underlie her property. (We ask this question with respect to this element, because the open and notorious element most closely resembles this inquiry.) The *Marengo Caves* court is an exemplar of this mode of interpretation and concluded that there was no way absent a survey that the true owner could have known about the intrusion. That may be, but the same might be said of any number of garden variety boundary disputes. The question is whether we think owners in such circumstances ought to get surveys if they value their property enough to fight an AP claim. We do so believe as to boundary disputes, and it doesn't seem too radical to suggest that those residing near large, well-known cave systems ought to get a survey to determine their ownership rights if they'd like to claim a piece of the caves.

You could, of course, disagree, and side with the *Marengo Caves* court.

But we might wish to emphasize the other justifications for adverse possession, especially if we're Marty's lawyer. (See notes – efficiency improvements – including encouraging use, encouraging monitoring, reducing transaction costs – reliance, endowment effect.) If AP is not about punishing negligent Os, then we might construe the open and notorious requirement as demanding only that the possession itself not be hidden – not that the possession be clearly tied to an identifiable surface parcel. Even if it wouldn't be negligent for an owner to fail to ascertain whether the possession is adverse, we would still, under these other theories, recognize the adverse possession. If you made this argument, you'd want to tie it to specific theories from the list above.

Note finally the odd asymmetry this case exposes. Adverse possession of the overlying land would almost certainly give title to both the surface and the underground – even without actual possession of the underground. Here, on the other hand, if Marty wins he certainly won't be awarded both the caverns *and* the surface. So the AP theory must be that Marty has effected a severance: he gets the underground, while Nancy keeps the surface – like adverse possession of a hedgerow gives the possessor only title to the hedgerow, not all of the adjoining land.

This somewhat problematic distinction is probably what led some of you to wonder whether Marty really ought to take only a prescriptive easement for continued use of the underground, arguing that the caverns are more like a trail on the surface. Perhaps – the line between "use" and "possession" is not free of ambiguity. But it seems to me that Marty's use is at least as "possessory" as the Fagerstroms' in *Nome 2000*. True, they spent the night on their "claim" on a regular, if not frequent, basis. But, to me, Marty's intensive commercial use and overnight expeditions put this case on the "possession" side rather than the "use" side. You could argue otherwise.

Improving Trespasser

Finally, if Marty loses, might he still have a claim for the value of his improvements.

Recall that people who have encroached on other's land, or built structures entirely on neighboring land, may get something even if they do not meet the requirements of adverse possession. The old common law doctrine

held that the true owner could always demand that the encroacher tear down the encroaching structure. These days, most courts follow the relative hardship doctrine. Under this doctrine, encroachers still don't get title free of charge, as they would under adverse possession. But they do gain the right to force the sale of either the land underlying the encroachment or of an easement. The doctrine is applied only when three elements are met. (You should not invoke this doctrine in your answer without discussing these elements.) The encroachment must be (1) in good faith, (2) an insubstantial interference with the true owner's rights, and (3) expensive to remove.

The fact pattern is not clear as to whether any of the physical improvements in the cave merely encroach on Nancy's land (without benefiting that land) or lie entirely on Nancy's land in a way that they could be called improvements. If the former, then the relative hardship doctrine might apply, but it's not easy to see how. First, the easy part: Marty is clearly a good faith encroacher if he is an encroacher at all. So, if the walkways lie only partly on Nancy's property, in such a way that they cannot reasonably be moved or removed, then perhaps the doctrine will work to permit Marty to force a sale of that portion of the caves on which the encroaching portion of the walkways lie. It's not at all clear how a court might resolve the question of whether the interference is substantial, and in any event would require us to know a lot more about the physical layout of the caverns and the walkways. We also don't know where the souvenir stand is. If it merely encroaches on Nancy's property, rather than being located entirely on it, then perhaps the doctrine could apply. We'll face the same fact-bound inquiry discussed above. It's hard to imagine, though, that moving or removal of the stand would be prohibitively expensive.

If the walkways and/or stand lie entirely *on* Nancy's property, so that they can be said to be improvements of Nancy's land, then we're in the *Somerville v. Jacobs* realm. You could cite the majority opinion (where the court decided that the improving trespasser, here Marty, can force a sale of the land if the owner chooses not to pay the encroacher the court-determined value of the improving structure) or the dissent (holding that each side should be given the right to tear down the structure, leading – hopefully – to ex post bargaining).

The major focus of this problem was adverse possession, and a fine answer need not have spent much time at all on the encroachment issue except perhaps to note that the value involved was quite limited. I leave it to you think about what, if anything, to do about the

benefits Marty has conferred on the caverns through mapping, development, and publicity. Is it fair, if he cannot take by adverse possession, to permit Nancy to reap those benefits?

Marengo Cave Co. v. Ross,

10 N.E.2d 917 (Ind. 1937)

John H. Luckett, of English, and Walter Bulleit, of New Albany, for appellant.

Connor D. Ross, of Indianapolis, and H. W. Mock, of English, for appellee.

Roll, Judge.

Appellee and appellant were the owners of adjoining land in Crawford county, Ind. On appellant's land was located the opening to a subterranean cavity known as 'Marengo Cave.' This cave extended under a considerable portion of appellant's land, and the southeastern portion thereof extended under lands owned by appellee. This action arose out of a dispute as to the ownership of that part of the cave that extended under appellee's land. Appellant was claiming title to all the cave and davities, including that portion underlying appellee's land. Appellee instituted this action to quiet his title as by a general denial and filed a cross-complaint by a general denial and filed a crosscomplaint wherein he sought to quiet its title to all the cave, including that portion underlying appellee's land. There was a trial by jury which returned a verdict for the appellee. Appellant filed its motion for a new trial which was overruled by the court, and this the only error assigned on appeal. Appellant assigns as grounds for a

new trial that the verdict of the jury is not sustained by sufficient evidence, and is contrary to law. These are the only grounds urged for a reversal of this cause.

The facts as shown by the record are substantially as follows: In 1883 one Stewart owned the real estate now owned by appellant, and in September of that year some young people who were upon that land discovered what afterwards proved to be the entrance to the cavern since known as Marengo Cave, this entrance being approximately 700 feet from the boundary line between the lands now owned by appellant and appellee, and the only entrance to said cave. Within a week after discovery of the cave, it was explored, and the fact of its existence received wide publicity through newspaper articles, and otherwise. Shortly thereafter the then owner of the real estate upon which the entrance was located took complete possession of the entire cave as now occupied by appellant and used for exhibition purposes, and began to charge an admission fee to those who desired to enter and view the cave, and to exclude therefrom those who were unwilling to pay for admission. This practice continued from 1883, except in some few instances when persons were permitted by the persons claiming to own said cave to enter same without payment of the usual required fee, and during the following years the successive owners of the land upon which the entrance to the cave was located, advertised the existence of said cave through newspapers, magazines, posters, and otherwise, in order to attract visitors thereto; also made improvements within the cave, including the building of concrete walks, and concrete steps where there was a difference in elevation of said cavern, widened and heightened portions of passageways; had available and furnished guides, all in order to make the cave more easily accessibly to visitors desiring to view the same; and continuously, during all this time, without asking or obtaining consent from any one, but claiming a right so to do, held and possessed said subterranean passages constituting said cave, excluding therefrom the 'whole world,' except such persons as entered after paying admission for the privilege of so doing, or by permission.

Appellee has lived in the vicinity of said cave since 1903, and purchased the real estate which he now owns in 1908. He first visited the cave in 1895, paying an admission fee for the privilege, and has visited said cave several times since. He has never, at any time, occupied or been in possession of any of the subterranean passages or cavities of which the cave consists, and the possession and use of the cave by those who have done so has never interfered with his use and enjoyment of the lands owned by him. For a period of approximately 25 years prior to the time appellee purchased his land, and for a period of 21 years afterwards, exclusive possession of the cave has been held by appellant, its immediate and remote grantors.

The cave, as such, has never been listed for taxation separately from the real estate wherein it is located, and the owners of the respective tracts of land have paid the taxes assessed against said tracts.

A part of said cave at the time of its discovery and exploration extended beneath real estate now owned by appellee, but this fact was not ascertained until the year 1932, when the boundary line between the respective tracts through the cave was established by means of a survey made by a civil engineer pursuant to an order of court entered in this cause. Previous to this survey neither of the parties to this appeal, nor any of their predecessors in title, knew that any part of the cave was in fact beneath the surface of a portion of the land now owned by appellee. Possession of the cave was taken and held by appellant's remote and immediate grantors, improvements made, and control exercised, with the belief on the part of such grantors that the entire cave as it was explored and held was under the surface of lands owned by them. There is no evidence of and dispute as to ownership of the cave, or any portion thereof, prior to the time when in 1929 appellee requested a survey, which was approximately 46 years after discovery of the cave and the exercise of complete dominion thereover by appellant and its predecessors in title.[1]

It is appellant's contention that it has a fee-simple title to all of the cave; that it owns that part underlying appellee's land by adverse possession.Section 2-602, Burns' Ann.St.1933, section 61, Baldwin's Ind.St.1934, provides as

follows: 'The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterward: * * * Sixth. Upon contracts in writing other than those for the payment of money, on judgments of courts of record, and for the recovery of the possession of real estate, within twenty (20) years.'

It will be noted that appellee nor his predecessors in title had never effected a severance of the cave from the surface estate. Therefore the title of the appellee extends from the surface to the center but actual possession is confined to the surface. Appellee and his immediate and remote grantors have been in possession of the land and estate here in question at all times, unless it can be said that the possession of the cave by appellant as shown by the evidence above set out has met all the requirements of the law relating to the acquisition of land by adverse possession. A record title may be defeated by adverse possession. All the authorities agree that, before the owner of the legal title can be deprived of his land by another's possession, through the operation of the statute of limitation, the possession must have been actual, visible, notorious, exclusive, under claim of ownership and hostile to the owner of the legal title and to the world at large (except only the government), and continuous for the full period prescribed by the statute. The rule is not always stated in exactly the same words in the many cases dealing with the subject of adverse possession, yet the rule is so thoroughly settled that there is no doubt as to what elements are essential to establish a title by adverse possession. Craven v. Craven (1913) 181 Ind. 553, 103 N.E. 333,105 N.E. 41; Rennert v. Shirk (1904) 163 Ind. 542, 72 N.E. 546;Vandalia R. Co. v. Wheeler (1914) 181 Ind. 424, 103 N.E. 1069; Tolley v. Thomas (1910) 46 Ind.App. 559, 93 N.E. 181; McBeth v. Wetnight (1914) 57 Ind.App. 47, 106 N.E. 407. Let us examine the various elements that are essential to establish title by adverse possession and apply them to the facts that are established by the undisputed facts in this case.

(1) The possession must be actual. It must be conceded that appellant in the operation of the 'Marengo Cave' used not only the cavern under its own land but also that part of the cavern that underlaid appellee's land, and assumed dominion over all of it. Yet it must also be conceded that during all of the time appellee was in constructive possession, as the only constructive possession known to the law is that which inheres in the legal title and with which the owner of that title is always endowed. Morrison v. Kelly (1859) 22 Ill. 609, 610, 74 Am.Dec. 169; Cook v. Clinton (1887) 64 Mich. 309, 31 N.W. 317,8 Am.St.Rep. 816; Ables v. Webb (1905) 186 Mo. 233, 85 S.W. 383, 105 Am.St.Rep. 610;1 R.C.L. 692; 2 C.J. 51 et seq. and authorities there cited. Whether the possession was actual under the peculiar facts in this case we need not decide.

(2) The possession must be visible. The owner of land who, having notice of the fact that it is occupied by another who is claiming dominion over it, nevertheless stands by during the entire statutory period and makes no effort to eject the claimant or otherwise protect his title, ought not to be permitted, for reasons of public policy, thereafter to maintain an action for the recovery of his land. But, the authorities assert, in order that the possession of the occupying claimant may constitute notice in law, it must be visible and open to the common observer so that the owner or his agent on visiting the premises might readily see that the owner's rights are being invaded. Holcroft v. Hunter (1832) 3 Blackf. 147; Towle v. Quante (1910) 246 Ill. 568, 92 N.E. 967; Tinker v. Bessel (1912) 213 Mass. 74, 99 N.E. 946; Jasperson v. Scharnikow (1907) 150 F. 571, 80 C.C.A. 373, 15 L.R.A. (N.S.) 1178 and note. What constitutes open and visible possession has been stated in general terms, thus; it is necessary and sufficient if its nature and character is such as is calculated to apprise the world that the land is occupied and who the occupant is; Dempsey v. Burns (1917) 281 Ill. 644, 118 N.E. 193, and such an appropriation of the land by claimant as to apprise, or convey visible notice to the community or neighborhood in which it is situated that it is in his exclusive use and enjoyment. Goodrich v. Mortimer (1919) 44 Cal.App. 576, 186 P. 844. It has been declared that the disseisor 'must unfurl his flag' on the land, and 'keep it flying,' so that the owner may see, if he will, that an enemy has invaded his domains, and planted the standard of conquest. Robin v. Brown (1932) 308 Pa. 123, 162 A. 161; Willamette Real Estate Co. v. Hendrix (1895) 28 Or. 485, 42 P. 514,52 Am.St.Rep. 800; People's Savings Bank v. Bufford (1916) 90 Wash. 204, 155 P. 1068; 1 Amer.Juris. p. 865.

(3) The possession must be open and notorious. The mere possession of the land is not enough. It is knowledge, either actual or imputed, of the possession of his lands by another, claiming to own them bona fide and openly, that affects the legal owner thereof. Where there has been no actual notice, it is necessary to show that the possession of the disseisor was so open, notorious, and visible as to warrant the inference that the owner must or should have known of it. In Philbin v. Carr (1920) 75 Ind.App. 560, 129 N.E. 19, 29, 706, it was said:

> However, in order that the possession of the occupying claimant may constitute notice in law, it must be visible and open to the common observer so that the owner or his agent on visiting the premises might readily see that the owner's rights are being invaded. In accordance with the general rule applicable to the subject of constructive notice, before possession can operate as such notice, it must be clear and unequivocal.

Holcroft v. Hunter (1832) 3 Blackf. 147; Towle v. Quante supra.

And again, the possession must be notorious. It must be so conspicuous that it is generally known and talked of by the public. 'It must be manifest to the community.' Thus, the Appellate Court said in Philbin v. Carr supra, that:

> Where the persons who have passed frequently over and along the premises have been unable to see any evidence of occupancy, evidently the possession has not been of the character required by the rule. The purpose of this requirement is to support the principle that a legal title will not be extinguished on flimsy and uncertain evidence. Hence, where there has been no actual notice, the possession must have been so notorious as to warrant the inference that the owner ought to have known that a stranger was asserting dominion over his land. Insidious, desultory, and fugitive acts will not serve that purpose. To have that effect the possession should be clear and satisfactory, not doubtful and equivocal.

See cases there cited on page 585 of 75 Ind.App.,129 N.E. 19, 28, 706.

(4) The possession must be exclusive. It is evident that two or more persons cannot hold one tract of land adversely to each other at the same time.

> It is essential that the possession of one who claims adversely must be of such an exclusive character that it will operate as an ouster of the owner of the legal title; because, in the absence of ouster the legal title draws to itself the constructive possession of the land. A possession which does not amount to an ouster or disseisin is not sufficient.

Philbin v. Carr, supra. See cases cited on page 585 of 75 Ind.App.,129 N.E. 19, 28, 706.

The facts as set out above show that appellee and his predecessors in title have been in actual and continuous possession of his real estate since the cave was discovered in 1883. At no time were they aware that any one was trespassing upon their land. No one was claiming to be in possession of appellee's land. It is true that appellant was asserting possession of the 'Marengo Cave.' There would seem to be quite a difference in making claim to the 'Marengo Cave,' and making claim to a portion of appellee's land, even though a portion of the cave extended under appellee's land, when this latter fact was unknown to any one. The evidence on both sides of this case is to the effect that the 'Marengo Cave' was thought to be altogether under the land owned by appellant, and this erroneous supposition was not revealed until a survey was made at the request of appellee and ordered by the court in this case. It seems to us that the following excerpt from Lewey v. H. C. Frick Coke Co. (1895) 166 Pa. 536, 31 A. 261,

263,28 L.R.A. 283, 45 Am.St.Rep. 684, is peculiarly applicable to the situation here presented, inasmuch as we are dealing with an underground cavity. It was stated in the above case:

> The title of the plaintiff extends from the surface to the center, but actual possession is confined to the surface. Upon the surface he must be held to know all that the most careful observation by himself and his employes could reveal, unless his ignorance is induced by the fraudulent conduct of the wrongdoer. But in the coal veins, deep down in the earth, he cannot see. Neither in person nor by his servants nor employes can he explore their recesses in seach for an intruder. If an adjoining owner goes beyond his own boundaries in the course of his mining operations, the owner on whom he enters has no means of knowledge within his reach. Nothing short of an accurate survey of the interior of his neighbor's mines would enable him to ascertain the fact. This would require the services of a competent mining engineer and his assistants, inside the mines of another, which he would have no right to insist upon. To require an owner, under such circumstances, to take notice of a trespass upon his underlying coal at the time it takes place, is to require an impossibility; and to hold that the statute begins to run at the date of the trespass is in most cases to take away the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible. * * *
>
> The reason for the distinction exists in the nature of things. The owner of land may be present by himself or his servants on the surface of his possessions, no matter how extensive they may be. He is for this reason held to be constructively present wherever his title extends. He cannot be present in the interior of the earth. No amount of vigilance will enable him to detect the approach of a trespasser who may be working his way through the coal seams underlying adjoining lands. His senses cannot inform him of the encroachment by such trespasser upon the coal that is hidden in the rocks under his feet. He cannot reasonably be held to be constructively present where his presence is, in the nature of things, impossible. He must learn of such a trespass by other means than such as are within his own control, and, until these come within his reach, he is necessarily ignorant of his loss. He cannot reasonably be required to act until knowledge that action is needed is possible to him.

We are not persuaded that this case falls within the rule of mistaken boundary as announced in Rennert v. Shirk (1904) 163 Ind. 542, 72 N.E. 546, 549, wherein this court said:

> Appellant insists, however, that, if one takes and holds possession of real estate under a mistake as to where the true boundary line is, such possession cannot ripen into a title. In this state, when an owner of land, by mistake as to the boundary line of his land, takes actual, visible, and exclusive possession of another's land, and holds it as his own continuously for the statutory period of 20 years, he thereby acquires the title as against the real owner. The possession is regarded as adverse, without reference to the fact that it is based on mistake; it being prima facie sufficient that actual, visible, and exclusive possession is taken under a claim of right.

The reason for the above rule is obvious. Under such circumstances appellant was in possession of the necessary means of ascertaining the true boundary line, and to hold that a mere misapprehension on the part of appellant as to the true boundary line would nullify the well-established law on adverse possession. In that case appellee had actual, visible, notorious, and exclusive possession. The facts in the present case are far different. Here the possession of appellant was not visible. No one could see below the earth's surface and determine that appellant was trespassing upon appellee's lands. This fact could not be determined by going into the cave. Only by a survey could

this fact be made known. The same undisputed facts clearly show that appellant's possession was not notorious. Not even appellant itself nor any of its remote grantors knew that any part of the 'Marengo Cave' extended beyond its own boundaries, and they at no time even down to the time appellee instituted this action made any claim to appellee's lands. Appellee and his predecessors in title at all times have been in possession of the land which he is now claiming. No severance by deed or written instrument was ever made to the cave, from the surface. In the absence of a separate estate could appellant be in the exclusive possession of the cave that underlies appellee's land.

'If there is no severance, an entry upon the surface will extend downward, and draw to it a title to the underlying minerals; so that he who disseises another, and acquires title by the statute of limitations, will succeed to the estate of him upon whose possession he has entered.' Delaware & Hudson Canal Co. v. Hughes (1897) 183 Pa. 66, 38 A. 568, 570,38 L.R.A. 826, 63 Am.St.Rep. 743.

Even though it could be said that appellant's possession has been actual, exclusive, and continuous all these years, we would still be of the opinion that appellee has not lost his land. It has been the uniform rule in equity that the statute of limitation does not begin to run until the injured party discovers, or with reasonable diligence might have discovered, the facts constituting the injury and cause of action. Until then the owner cannot know that his possession has been invaded. Until he has knowledge, or ought to have such knowledge, he is not called upon to act, for he does not know that action in the premises is necessary and the law does not require absurd or impossible things of any one. Lewey v. Frick Coke Co. (1895) 166 Pa. 536, 31 A. 261,28 L.R.A. 283, 45 Am.St.Rep. 684; Delaware & Hudson Canal Co. v. Hughes, supra.

In the case of Bailey v. Glover (1874) 21 Wall. (88 U.S.) 342, 348, 22 L.Ed. 636, the court said:

> We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party. * * *
>
> To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

In Livingston v. Rawyards (1880) L.R. 5 App.Cas. 34, Lord Hatherly treats an underground trespass as a species of fraud. While there is no active fraud shown in this case, yet the facts come clearly within the case of Lightner Mining Co. v. Lane (1911) 161 Cal. 689, 120 P. 771, 776, and cases cited on page 776, Ann.Cas. 1913C, 1093. The following excerpt from this opinion clearly sets forth our view:

> In the English decisions the willful and secret taking of coal from a neighbor's mine is usually characterized as fraudulent. Hilton v. Woods, L.R. 4 Eq.Cas. 440; Dean v. Thwaite, 21 Beav. 623; Ecclesiastical Coms. v. North E. Ry. Co., L.R. 4, Ch.Div. 860; Trotter v. McLean, L.R. 13, Ch.Div. 586. Such an act, so committed, has all the substantial elements of fraud. Where one by misrepresentation induces another knowingly to part with his property, because his mind is so beclouded by the falsehood that he is unaware of the wrong done him, it is called a fraud. It is a taking of another's property without his knowledge of the fact that it is really taken from him. The ignorance in that case is produced by artifice. Where one betrays a trust and appropriates trust property to his own use, it is called a fraud. The injured party allows the other to have the possession and the opportunity to convert the property secretly, because of faith and confidence in the wrongdoer. In the case of underground mining of a neighbor's ore, nature has supplied

> the situation which gives the opportunity to the trespasser to take it secretly and causes the ignorance of the owner. Relying upon this ignorance, he takes an unfair advantage of his natural opportunities, and thereby clandestinely appropriates another's property while appearing to be making only a lawful use of his own. The act in its very nature constitutes the deceit which makes it a fraud.

So in the case at bar, appellant pretended to use the 'Marengo Cave' as his property and all the time he was committing a trespass upon appellee's land. After 20 years of secret user, he now urges the statute of limitation, section 2-602, Burns' St.1933, section 61, Baldwin's Ind.St.1934, as a bar to appellee's action. Appellee did not know of the trespass of appellant, and had no reasonable means of discovering the fact. It is true that appellant took no active measures to prevent the discovery, except to deny appellee the right to enter the cave for the purpose of making a survey, and disclaiming any use of appellee's lands, but nature furnished the concealment, or where the wrong conceals itself. It amounts to the taking of another's property without his knowledge of the fact that it is really being taken from him. In most cases the ignorance is produced by artifice. But in this case nature has supplied the situation which gives the trespasser the opportunity to occupy the recesses on appellee's land and caused the ignorance of appellee which he now seeks to avail himself. We cannot assent to the doctrine that would enable one to trespass upon another's property through a subterranean passage and under such circumstances that the owner does not know, or by the exercise of reasonable care could not know, of such secret occupancy, for 20 years or more and by so doing obtained a fee-simple title as against the holder of the legal title. The fact that appellee had knowledge that appellant was claiming to be the owner of the 'Marengo Cave,' and advertised it to the general public, was no knowledge to him that it was in possession of appellee's land or any part of it. We are of the opinion that appellant's possession for 20 years or more of that part of 'Marengo Cave' underlying appellee's land was not open, notorious, or exclusive, as required by the law applicable to obtaining title to land by adverse possession.

We cannot say that the evidence is not sufficient to support the verdict or that the verdict is contrary to law.

Judgment affirmed.

---

1. The above facts are quoted from Appellate Court's opinion. See 7 N.E.(2d) 59.↩

2. Temporal Sharing of Land

Christian Turner

2.1. Estates in Land

2.1.1. Introduction

A TAXONOMY OF PRESENT AND FUTURE INTERESTS

We have already discussed a few situations in which property is transferred from one party to another. What used to belong to *O* now, after the transaction, belongs to *A*. We now consider land transactions in which *O* desires to grant property to *A* but, perhaps, not forever. Maybe *O* wants *A* to have the property for awhile before turning it over to *B*. Perhaps *O* wants *A* to have the property, maybe even forever, but if certain events occur the property should go to *B*.

The law permits *O* to grant property with conditions and time limits. As we will see, and later consider more deeply, it restricts such arrangements to a small number of types. Our immediate task is to determine from the language of a grant which type of arrangement we have. Think of it as learning to identify animals in a park. There may be only a few different animals, and our task is to distinguish one from the other based on identifying characteristics. So too here. Grantors can and do use a wide variety of language and may specify all sorts of temporal relationships, but the law requires us to reduce this language, to map it onto, the small set of permissible relationships.

A warning: some property courses delve deeply into various accounts of the medieval history of these arrangements. This is not such a course. Nor will we be concerned with being able to unravel the most complex of temporal divisions or the most obscure doctrines. Our goal is only to gain familiarity with the basics of the common law system of estates in land, being able to identify the elements of traditional grants and to understand typical disputes that arise from such grants.

First things first: The grants that we will consider look more or less like the following

O to *A* [condition] then to *B*.

What this grant by *O* does is to give the property to *A* for awhile and then, maybe, to B. *A* has the *present interest*. *B* holds what is called the *future interest*. Makes sense: at the time of the grant, *A* has the property now, and *B* will take the property, if at all, later. So this grant creates a present interest and a future interest. This is what I meant above by "types of relationship." What *present interest* and what *future interests* are created by the grant? That's the initial question we will be trying to answer when we read a grant.

Distinguishing fee simple interests from everything else

We now ask several questions, each with two answers. Answering this series of questions will tell use precisely what present and future interests we have. Let's take these questions one by one, and we'll return to them to summarize.

Question 1: Is the present interest possibly infinite or definitely finite in duration?

That is, might *A* retain the property, under the grant, forever, or is *A* guaranteed *not* to retain the property forever under the grant? Now, of course *A* won't really live on the property for all time, but the question here is whether the *grant* will definitely cut off *A*'s ownership, and thus that of anyone who has taken from *A* by will or grant, involuntarily.

If the present interest is possibly infinite in duration, we call it a *fee simple*. If the present interest is definitely finite, it is either a *life estate* or *leasehold*. This distinction is typically, though not always, easy to discern in a grant. A life estate will almost always state that *A*'s interest is only "for life," and a leasehold will almost always set out a fixed time limit. By contrast, a fee simple will not be so limited. Traditionally, a fee simple would be created by language such as

O to *A* and his heirs [with perhaps some conditions here].

The "and his heirs" part is meant to indicate that *A*'s interest should not expire and revert to *O* or go to some other party on *A*'s death. These days, however, using such language or explicitly stating that the grant is "in fee simple" is unnecessary. Courts will presume a fee simple in the absence of clear language otherwise.

Distinguishing types of fee simple interests and their corresponding future interests

We will ask three questions to distinguish the three types of defeasible fees.

Question 2: Is the present interest definitely infinite or is it possibly finite?

If there is no condition in the grant that could cause *A* to lose the property to someone else, then *A* has a *fee simple absolute*. There is obviously *no* future interest following a fee simple absolute, since nothing in the grant could lead to someone else becoming the owner. A fee simple absolute is created by simple language

O to *A*.

You could get fancy and write something like: *O* to *A* and his heirs; or *O* to *A* in fee simple absolute. But this isn't necessary. The law has a strong presumption in favor of interpreting language to grant the biggest present interest possible, and there isn't anything bigger than the fee simple absolute. If we find a fee simple absolute we're done.

If, on the other hand, the grant contains a condition that could cause *A* to lose the property to someone else, then we say that *A* has a *defeasible fee* (which I like to think of as a fee that can be "de-feed"). The "someone else" who could get the property has a future interest. Because *A* has a fee, though, this other person's future interest may never become possessory. At the time of the grant, we just don't know what's going to happen. There are three kinds of defeasible fees, each with a corresponding future interest. They are: (1) the *fee simple subject to an executory interest* (the "someone else" has, surprise, an *executory interest*), (2) the *fee simple determinable* (the "someone else" has a *possibility of reverter*), and (3) the *fee simple subject to a condition subsequent* (the "someone else" has a *right of entry*). Those are all the types of defeasible fees and their corresponding future interests. Now let's figure out how to tell them apart.

Question 3: Is the future interest in the grantor, *O*, or someone else?

If it's in someone else, we're pretty much done. Such a grant would look like

O to *A*, but if something happens, then to *B*.

Here *A* has a defeasible fee so long as it's uncertain whether this something will ever happen. But if that thing does happen, then the grant specified that *B* should get the property. In other words, the future interest is in *B*. *B* is not the grantor.

In this case, we say that *A* has a *fee simple subject to an executory interest* and that *B* has an *executory interest*. In particular, we may say that *B* has a *shifting* executory interest, because the happening of the condition will *shift* ownership from one person who is not the grantor to another person who is not the grantor.

If the future interest is in the grantor, then we have a further question to ask in order to name the interests. Note that unless the grant mentions a third party, we assume the future interest is in the grantor. We'll look at some sample language below.

Question 4: Where the future interest is in the grantor, will the happening of the condition vest ownership in the grantor automatically or only if the grantor asserts his or her right to retake the property?

If it's automatic, we have a *fee simple determinable* in *A* and a *possibility of reverter* in *O*. Courts differ on whether this alternative is presumed. But a guaranteed way to specify that reversion to the grantor should be automatic is to use what is often called "durational language." For example,

O to *A* so long as the property is only used for residential purposes.

O to *A* until alcohol is consumed on the premises.

"So long as," "while," "until," and the like are key words that all courts will interpret as an intent to specify an automatic reversion to *O* and thus an intent to create a fee simple determinable / possibility of reverter.

If the reversion is not automatic, we call the present interest a *fee simple subject to a condition subsequent* and the future interest a *right of entry*. Some courts will insist on something approaching an explicit reference to a "right of entry" or "right to enter and retake." Some look for a non-durational formulation of the condition – "but if" or "upon condition that." And still others will presume that reversion is not automatic unless it's absolutely clear the grantor intended otherwise. The following will surely create a FSSC / Right of Entry:

O to *A*, but if alcohol is ever served on the property, then I shall have a right of entry.

Note that this distinction does not arise with executory interests. For whatever reason, if the future interest is in someone other then *O*, the property transfers automatically on the happening of the condition.

Summary

It may take awhile to explain and to read through this initially, but distinguishing fee interests is not very difficult. We ask four questions:

1. Potentially infinite? Yes = fee simple (FS). No = something else.
1. If potentially infinite, is it possibly finite? Yes = defeasible fee. No = *FS absolute* (done).
1. If defeasible fee simple, future interest in someone other than the grantor? Yes = *FS subject to executory interest* / *executory interest* (done). No = go to question 4.
1. If in the grantor, forfeiture automatic? Yes = *FSD* / *POR* (done). No = *FSSCS* / *ROE* (done).

If you are a chart person, you may want to refer to (or make) a flow chart from this. The only trick, once you have this down, is figuring out from the language of the grant what the answers to these questions are. That's done through a variety of presumptions and interpretive techniques, some of which we will see in the cases that follow.

* * *

That's it for fee interests. You now know enough so that, with a little practice and after resolving any ambiguities in the language a grantor chose, you will be able to name the fee interest contained in a grant. Now, to return to our metaphor at the beginning of this section, you can name at least some of the animals you run across in the park. However, unlike the inherent joy some take in identifying the denizens of the natural world, no sensible

person would delight in distinguishing one type of land grant from another unless tangible consequences flowed from the distinction. Indeed, the law does treat these types differently. Indeed the law does treat these interests somewhat differently.

For example, what happens if a condition in a defeasible fee is violated but the present interest holder stays on? Suppose the grant was to *A* so long as alcohol is never sold on the property, but, wouldn't you know it, *A* sold alcohol on the property. The grant described is a fee simple determinable with possibility of reverter in the grantor. We know that the grantor becomes the owner of the property *immediately* upon the violation of the condition. If *A* continues to occupy the property after the violation, he or she is a trespasser. And if one trespasses in the right way, for long enough, one can take property by adverse possession. So if *A* sells alcohol and then continues on as the apparent owner of the property for the statutory period, *A* will indeed become the owner again, by adverse possession, and, this time, free of the condition.

Contrast this with what happens if the grant were to*A* but if alcohol is ever sold on the property then the grantor has a right of entry. Now if *A* sells alcohol on the property, the grantor *does not* immediately become the owner of the property. Rather, the grantor has *the right* to retake the property. But until the grantor reclaims the property, *A* continues to be the rightful owner and is not a trespasser. Therefore, the adverse possession period does not start immediately on the violation of the condition. Paradoxically, this could be worse for *A*, since a lengthy period of violation won't necessarily serve to free *A* of the condition: grantor may return and retake at any time.

This distinction isn't as stark as it appears. In fact, the equitable doctrine of laches or a statute may prevent the grantor from showing up to retake too long after a violation of the condition. As is often the case with these somewhat ancient forms, what looks formally like it might make a difference may not make much of a practical one.

Life estates and remainder interests

We now take up grants that create present interests that will definitely terminate. Some specify durations of fixed periods. These would be leaseholds, which in many places are not considered interests in land at all but only a type of contractual arrangement regarding possession. We will consider leaseholds later. For now we focus on a particular kind of definitely finite present interest: the *life estate*. These look like:

O to *A* for life, [then possibly to someone else].

Unfortunately for all of us, it is certain that the condition of *A*'s ownership, that he or she be alive, will one day no longer be satisfied. Thus, we know this cannot be a kind of fee simple interest. Indeed, we call all such interests life estates. Because everyone will one day die, all life estates have corresponding future interests. It is these future interests we must distinguish. To do so, we ask another series of questions.

Question 1: Is the future interest, the one following the life estate, in the grantor or someone else?

If it's in the grantor, then we call the future interest a *reversion*. The simplest example:

O to *A* for life.

A is the present interest holder. He or she has a life estate. When A dies, what happens? If nothing else is said, the property reverts to *O*. *O*, the grantor, has a reversion.

If, on the other hand, the future interest is in someone else, we call the interest a *remainder*. A remainder is the name of the interest in a third party that *immediately* follows a life estate. There can be no gap. An example:

O to *A* for life, then to *B*.

Here, *A* has a life estate. *B* has a remainder interest, and *O* has nothing. By the way, one who has a remainder interest is sometimes called a remainderman, a word that strikes me as even more ridiculous than "tortfeasor."

Question 2: Is there any uncertainty in who, exactly, has the remainder interest or in whether conditions on the remainder interest will be met?

If an identifiable person or group of people is certain to take the property on expiration of the life estate, then their future interest is called an *absolutely vested remainder* or, synonymously, *indefeasibly vested remainder*. The example of a remainder interest above is the quintessential absolutely vested remainder. *B* is an identified person, and there are no conditions on *B*'s taking the property.

Contrast this with the following:

O to *A*, then to *A*'s oldest living child.

O to *A*, then to *B* if *B* graduates from college.

O to *A*, then to *O*'s grandchildren.

In each of these grants, *A* has the present interest, a life estate. Each also specifies that a third party, meaning someone other than the grantor, should take when *A* dies. Thus, each creates a kind of remainder interest. But in each we either do not know who will take when *A* dies or do not know whether the specified remaindermen will take when *A* dies. We don't have an absolutely vested remainder in any of these grants. So what do we have?

There are three other types of remainder, and the last part of our job in this section will be to distinguish these three types. (1) The *contingent remainder*; (2) the *vested remainder subject to divestment*; (3) the *vested remainder subject to open*.

Question 3: If the remainder interest is in an uncertain person or class of people, is at least one member of that class identified and certain to take?

If so, then we have a *vested remainder subject to open*. That identified person is guaranteed to take at least a share of the property. Others may later join the class of remaindermen, and so we cannot say that we know with certainty exactly *what* the identified person will take until this class closes. An example may help:

O to *A* for life, then to *B*'s children. Suppose that *B* has at least one child, *C*, at the time of the grant.

Let's start with the easy part. *A* has a life estate, the present interest created by this grant. Who has the future interest? Certainly *C* will be entitled to take the property when *A* dies. But others might as well. If *B* is dead at the time of the grant, then we know with certainty who all of *B*'s children are.[1] And so this grant uses the phrase *B*'s children to refer to an identified group of individuals – not a class that could expand in the future. And so the children would have an absolutely vested remainder.

If *B* is alive at the time of the grant, then he or she might well have more children after the grant.[2] And so *C*'s share of the property will diminish as more children are born. We know *C* will get *something*, but we don't exactly know what. *C* has a vested remainder subject to open, sometimes called a *vested remainder subject to partial defeasance*, a phrase reflecting the fact that *C*'s share of the property will diminish if new individuals join the class.

At some point, though, this has to stop. *C* needs to know what portion of the property *C* has. In general, we try to determine when the grantor *intended* the class to close, meaning when no new individuals, even if they satisfy the condition, should be able to share in the grant. Often grantors may not specify this time, and so there are two common ways that classes close.

1. Naturally: There may come a point at which it's no longer physically possible for there to be new class members. For example, if the remainder is in *B*'s children, the class closes, at the latest, when *B* dies.
1. The Rule of Convenience: We close the class, unless grantor's intent is to the contrary, when a member of the class is entitled to demand possession. This typically happens when the life tenant dies. And so, using our example, where the remainder is in *B*'s children, when the the life tenant dies, *C* and any other

> living children of *B* will be entitled to take possession, and the class will close. If *B* has children at some later time, those children will not be entitled to a share of the property.

All of the above went to defining the *vested remainder subject to open*, the remainder interest we would find if we answer this question: Yes. If, on the other hand, we answer negatively, that there is no one at the time of the grant who is certain to take the property upon the death of the life tenant, then the grant to this unascertained person or group of people is called a *contingent remainder*. We just don't know who, if anyone, will take the property upon the death of the life tenant. An example:

O to *A* for life, then to *A*'s children. Assume *A* has no children at the time of the grant.

In this example, *A* has a life estate, and the class of *A*'s children has a contingent remainder. This is because while we know how to determine whether someone is in that class, there is no one in that class now, and there may never be.

Question 4: If the remainder interest contains a condition on the remainderman's taking the property, did the grantor intend that the remainderman had to satisfy the condition before having a vested interest or that the remainderman's vested interest could be taken away if the condition is satisfied?

This is, conceptually, the toughest distinction of the lot. And frankly it often makes little sense. Luckily there's an easy way to distinguish a *vested remainder subject to divestment* from a *contingent remainder*. So let's rephrase the question to make it easier to answer, though perhaps less substantive:

Question 4: Is the condition part of the clause granting the remainder, or is the condition separated from the remainder grant by a comma and words like "but if"?

Ok, so this "comma rule" won't prevail if there is contrary grantor intent, but it resolves almost all of the cases. Examples are the only way to understand this:

O to *A* for life, then to *B* if *B* graduates from law school.

Here, we have a *contingent remainder*, because "if *B* graduates from law school" is part of the "then to *B*" clause, and is not separated by a comma. We don't know if *B* will ever graduate from law school, even though we do know who *B* is. Contrast this with:

O to *A* for life, then to *B*, but if *B* does not graduate from law school, then back to *O*.

Same effect, but different name. Because the condition is separated by a comma from the "then to *B*" clause, most courts would interpret this remainder interest in *B* to be a *vested remainder subject to divestment*.

Formally this distinction turns on whether the condition is *precedent* to the remainderman's ownership, i.e. the condition must be satisfied before we can say that the remainderman has anything at all. Or whether the remainderman has been granted something that *subsequently* may be taken away, perhaps even after the remainderman has taken possession, if the condition is violated. But practically, it can be difficult to determine which of these grantor meant, and in many cases it doesn't matter.

Importantly, though, the rule against perpetuities, which is a rule that can invalidate grants that remain uncertain too far into the future, applies to contingent remainders *but not* to vested remainders subject to divestment. So the classification of these very similar types of remainders can have dramatic consequences.

Summary

Distinguishing remainder interests is a little more involved than distinguishing fees and their future interests. But a little practice makes it easy. If we have a life estate, we're going to ask what kind of future interest is created. We ask the following questions to decide:

1. Future interest in grantor? Yes = *reversion* (done). No = remainder.

1. Uncertain condition and/or unascertained remaindermen? Yes = go to next question. No = *absolutely vested remiander* (done).

1. If unascertained remaindermen, is there at least one who is certain to take? Yes = *vested remainder subject to open* (done). No = *contingent remainder* and *reversion* in *O* (done).

1. If condition, separated by comma? Yes = *vested remainder subject to divestment* (done). No = *contingent remainder* and *reversion* in *O* (done).

There it is – not as hard as all the above explanation may have seemed.

A few more notes on remainders

First, let's clean up one loose end by classifying all of the interests in the following grant:

O to *A* for life, then to the first child of *A* to graduate from law school. Assume *A* has no children at the time of the grant.

Aside from setting up an unhealthy intra-family dynamic, this is a grant of a life estate to *A*. Immediately on *A*'s death the child, if any, of *A* that has satisfied the condition will take the property. Thus, there is a remainder interest here. But we don't know who this child might be and whether any child will exist or satisfy the condition. This is a contingent remainder.

What happens if *A* dies, but no child of *A* has graduated from law school? The answer is that the property reverts to *O*. In fact, any contingent remainder also creates a reversion in *O*. So to classify fully the interests created, we'd say that *A* has a life estate, that there is a contingent remainder in one who might satisfy the condition, and that *O* has a reversion.

Second, remainders, like all future interests can be limited in time themselves. It's best not to think about this until you have the hang of the classifications above. But once you do, this possibility isn't really more complex. The upshot is that grants like this one are fine:

O to *A* for life, then to *B* for life, then to *C*.

All of the examples we have discussed so far have involved future interests that will become fee simple interests – and in fact fee simple absolute interests – once they become possessory. In this grant, *A* has a life estate, the present interest, *B* has an absolutely vested remainder for life, and *C* has an absolutely vested remainder (in fee simple). Similarly, life estates can be terminated early like fees. So we could have a life estate determinable, for example.

Third, contingent remainders can be granted in the alternative. Here's an example:

O to *A* for life, then to *B* if *B* survives *C*, otherwise to *C*.

B and *C* have alternative contingent remainders. It's easy to see that each has a contingent remainder, since each must satisfy a condition in order to take. It certainly seems as though there is no way that one or the other will not succeed *A* in ownership. Still, though, we would say *O* has a reversion, because there is no vested remainder specified in the grant.

This example brings up a fourth note. It used to be that if a contingent remainder did not vest, i.e. the condition was not satisfied or person not ascertained before the termination of the life estate, then the contingent remainder was destroyed. So in the following grant:

O to *A* for life, then to *B* if *B* graduates from law school,

if *A* died before *B* has graduated from law school, the property would revert to *O* (remembering that *O* always has a reversion when there is a contingent remainder) and stay with *O* in fee simple absolute. The law would say that the contingent remainder was *destroyed* when *A* died.

These days, most courts do not hold contingent remainders to be destructible. Rather, they are converted into *springing executory interests*. To explain what this means, consider the above grant. If *A* died before *B* graduated, the grant would be converted to a fee simple in *O* subject to *B*'s executory interest. If *B* graduates from law school, the property will spring from the grantor to *B*. It's called a springing executory interest because meeting the condition divests the grantor, rather than a third party. When it divests a third party, we call it a shifting executory interest, and we have already covered these above.

Fifth, a life estate may grant possession to *A* but be set to expire not on *A*'s death but on *B*'s. This is called a *life estate per autre vie*. Here's an example:

O to *A* for the life of *B*.

A has the present interest, which will expire when *B* dies. At that point, the property reverts to *O*, even if *A* is still alive.

Some interpretive doctrines

In addition to more modern regulations of the kinds of conditions that can be placed in grants, there are two old interpretive rules worth knowing. Each was once a widely adopted and absolute rule, meaning that they guided the interpretation of grants no matter how apparent the grantor's intent to the contrary. Today, in most jurisdictions, each is only a rule of construction, meaning that the grantor's intent will be followed if it clearly differs from the interpretations these rules would yield.

The Doctrine of Worthier Title

This doctrine applies to the following grant:

O to *A* for life, remainder in *O*'s heirs.

We have not yet discussed what an "heir" is, though you have doubtless heard the term and have some idea of its meaning. These days we mean by heir an individual who is legally entitled, by statute or by will, to inherit a decedent's estate. People who die without wills are said to die intestate, and state statutes prescribe how their property is to be distributed on death. The most important thing to remember, though, is that a living person has no heirs. Until an individual dies, we do not know (a) who the living relatives are who would be entitled to take under an intestacy statute or (b) what the individual's *last* will directs. Remember that a new will can be drafted at anytime, leaving the old one to have no effect.

The upshot is that the remainder in *O's* heirs is, until *O* dies, a contingent remainder. We don't know who those people are. This means that once *O* makes this grant, there's no one we can buy the remainder from, to get back to a fee, until *O* dies and the heirs become identifiable. There is a strong policy against leaving property divided in such a state that it is impossible, or even extremely difficult, to consolidate into a fee. And so, there is some justification for interpreting the grant above as:

O to *A* for life.

This of course gives *O* a reversion and removes the remainder interest in the unascertained heirs. This interpretation is the doctrine of worthier title.

The Rule in Shelley's Case

Here, we are concerned with the following grant:

O to *A* for life, remainder to *A*'s heirs.

The Rule in Shelley's case converts this grant to:

O to *A* for life, remainder in *A*.

This grant invokes another rule, known as the merger doctrine, which provides that when two successive estates are owned by the same person, the two estates are merged, yielding whatever type of interest results. Here, if we merge the life estate and the remainder, that is, well, everything. So *A* has a fee simple absolute. Note that

the rule would still operate, again as a rule of construction only, even if the two estates could not be merged. For example:

> *O* to *A* for life, then to B for life, and then to *A*'s heirs.

The rule would turn this into:

O to *A* for life, then to *B* for life, then to *A*.

The merger doctrine does not apply, and this grant cannot be made simpler.

Questions to Be Resolved

Just because we now know how to reduce ideally phrased grant language into the discrete forms of the traditional estates, it does not follow that we have resolved every problem that can arise with grantor's efforts to divide the timeline of future ownership. We will discuss three kinds of issues that can arise.

First is adjudicative: When we divide the timeline of ownership, those who occupy the property now may use it to the disadvantage of those will occupy later. What if the present owner wants or needs to sell the property but the future owner doesn't want it sold? What if the present owner doesn't maintain the property? Anytime property is owned by more than one human being, disagreements about how to use and care for that property are bound to arise.

Second is interpretive: Grantors can and do use odd, ambiguous, and contradictory language. We have to interpret their words and figure out which of the estates they meant to convey. This is accomplished using both standard issue interpretive canons (e.g. give words their plain meaning but interpret ambiguous phrases in the context of the whole document) and policy-laden presumptions (e.g., interpret restrictive conditions narrowly, and interpret to avoid forfeiture where possible).

Third is regulatory: Even if we know what grantor meant to do, we may not wish to allow it. There are three broad categories of regulation: (1) those meant to resolve disputes between owners of various slices of the timeline (usually a future interest holder suing to stop damage to the property by the present interest holder), (2) those concerned with preventing too much "dead-hand control," and (3) those applying public policies that would apply generally but which may take on more salience in land transactions.

With respect to the second, it is important to remember that the ability to dictate how property should be distributed and on what conditions confers on a grantor some control over the future. Through a grant, *O* can dictate that alcohol not be served on the premises or that the property only be used for residential purposes. This regulatory power that will continue to be felt when *O* is long dead, thus the phrase "dead-hand control," represents an instance of the problem law faces when adjudicating between the needs of the present and the prerogative of the future. The ability to grant property in this way is an incentive to acquire it and use it wisely. This benefits the present. But the chains it places on the future are, often, a cost. Some balance, it would seem, needs to be struck.

This account of dead-hand control is a tad misleading. After all *O* has no actual regulatory power over the property once it is granted away. If *A*'s ownership is limited by a condition that would see the property revert or go to some other party, *A* could always purchase that executory interest, merge the estates, and do as he or she pleases. *O* generally cannot dictate what happens on the property, but *O* can make it inconvenient or uneconomical to disobey his or her wishes. And as the number of parties with future interests rise and as they become difficult to ascertain, the transaction costs, setting aside the purchase prices, rise. Thus, dead-hand control is a concern, because *O* can indeed grant property in ways that make it extremely difficult to alienate and, therefore, extremely difficult to use as the present owner sees fit.

In the next sections, we will wrestle with these interpretive and regulatory issues.

1. A child in utero counts as a child alive at the time of the grant.↩

1. We do not consider *B*'s actual capacity to have children when labeling the grant. It doesn't matter if *B* is 102 years old or physically disabled from having children. Even as a practical matter, *B* could adopt, and these days adopted children count as "children" in a grant, unless the grantor makes clear an intent otherwise.↩

2.1.2. Interpretation

Wood v. Board of County Commissioners of Fremont County,

759 P.2d 1250 (Wyo. 1988)

David B. Hooper and Kenneth E. Spurrier of Hooper Law Associates, P.C., Riverton, for appellants.

Stuart R. Day of Williams, Porter, Day & Neville, P.C., Casper, for appellee.

Before Brown, C.J., Thomas, Cardine and Macy, JJ., and Rooney, J. Retired.

Brown, Chief Justice.[1]

Appellants Cecil and Edna Wood, husband and wife, appeal summary judgment favoring appellee, the Board of County Commissioners for Fremont County, Wyoming. By a 1948 warranty deed appellants conveyed land in Riverton, Wyoming, to Fremont County for the construction of a county hospital. They now contend that language in the deed created either a fee simple determinable or a fee simple subject to a condition subsequent with a right of reversion in them if the land ceased to be used for the hospital. They present three issues:

A. Whether the district court erred by granting appellee's motion for summary judgment.

B. Whether the district court erred by failing to grant appellant's motion for partial summary judgment.

C. Whether cessation of appellee's hospital operation by sale of public hospital facilities to a private company constituted the occurrence of an event which divested appellee of its estate in property conditionally conveyed by appellants.

The trial court found that appellants retained no interest in the land surrounding and under the old county hospital as a matter of law. We affirm.

On September 1, 1948, by warranty deed, appellants conveyed

> [a] tract of land situated in the SE 1/4 SW 1/4, Sec. 26, Township 1, North Range 4 East, W.R.M., Fremont County, Wyoming, described * * * as follows: Beginning at the Southwest corner of said SE 1/4 SW 1/4, Sec. 26, aforesaid, thence east along the South line of said Section 310 feet, thence North at right angles to said South line 297 feet, thence West on a line parallel to said South line 310 feet, thence South 297 feet to the point of beginning, containing 2.1 acres * * *. Said tract is conveyed to Fremont County *for the purpose of constructing and maintaining thereon a County Hospital in memorial to the gallant men of the Armed Forces of the United States of America from Fremont County, Wyoming* * * *. (Emphasis added.)

This deed was recorded in the Fremont County Clerk's Office on December 14, 1948. Appellee constructed a hospital on the land and operated it there until November 18, 1983. At that time appellee sold the land and the original hospital facility to a private company. The buyer operated a hospital on the premises until September, 1984, at which time it moved the operation to a newly constructed facility. The private company then put the premises up for sale.

Appellants filed their complaint in this case on January 16, 1986, seeking recovery of the value of the land they conveyed to the county in 1948. Appellee answered, and after discovery, filed a motion for summary judgment on October 14, 1987. Appellants filed their own motion for partial summary judgment on December 11, 1987. The trial court heard the motions on December 15, 1987, and granted summary judgment favoring appellees on January 13, 1988. This appeal followed.

The facts in this case are not in dispute and we review this order for summary judgment as a matter of law. *Fitch v. Buffalo Federal Savings and Loan Association*, 751 P.2d 1309, 1311 (Wyo. 1988). Appellants' argument boils down to whether or not the language "* * * for the purpose of constructing and maintaining thereon a County Hospital in memorial to the gallant men of the Armed Forces of the United States of America from Fremont County, Wyoming * * *" in the 1948 warranty deed is sufficient limiting language to create either 1) a fee simple determinable, or 2) a fee simple subject to a condition subsequent giving appellants title to the land. We review disputed language in a deed to determine the intent of the parties to it from the plain language in the deed considered as a whole. *Samuel Mares Post No. 8, American Legion, Department of Wyoming v. Board of County Commissioners of the County of Converse*, 697 P.2d 1040, 1043 (Wyo. 1985) (quoting *Knadler v. Adams*, 661 P.2d 1052, 1053 (Wyo. 1983)). Also, W.S. 34-2-101 (1977) provides, in pertinent part:

> [E]very conveyance of real estate shall pass all the estate of the grantor * * * unless the intent to pass a less estate shall expressly appear or be necessarily implied in the terms of the grant.

A fee simple estate in land that *automatically* expires upon the happening of a stated event, not certain to occur, is a fee simple determinable. Restatement of Property § 44 at 121 (1936). In *Williams v. Watt*, 668 P.2d 620, 627 (Wyo. 1983), we said:

> The existence of an estate in fee simple determinable requires the presence of special limitations. Restatement of the Law of Property, § 44, p. 121. The term 'special limitation' denotes that part of the language of a conveyance which causes the created interest automatically to expire upon the occurrence of the stated event. Restatement of the Law of Property, § 23, p. 55. An estate in fee simple determinable may be created so as to be defeasible upon the occurrence of an event which is not certain ever to occur. Restatement of the Law of Property, § 44, p. 125.

Words such as "so long as," "until," or "during" are commonly used in a conveyance to denote the presence of this type of special limitation. *Lacer v. Navajo County*, 141 Ariz. 396, 687 P.2d 404, 408-409 (App. 1983). See also Restatement of Property § 44 at 128 (1936). The critical requirement is that the language of special limitation must clearly state the particular circumstances under which the fee simple estate conveyed might expire. See T. Bergin and P. Haskell, *Preface to Estates in Land and Future Interests* 48 (2d ed. 1984). Language of conveyance that grants a fee simple estate in land for a special purpose, without stating the special circumstances that could trigger expiration of the estate, is not sufficient to create a fee simple determinable. *Lacer v. Navajo County*, 687 P.2d at 408 (quoting Restatement of Property § 44 comment m at 129-130 (1936)).

The plain language in the 1948 deed, stating that appellants conveyed the land to Fremont County for the purpose of constructing a county hospital, does not clearly state that the estate conveyed will expire automatically if the land is not used for the stated purpose. As such, it does not evidence an intent of the grantors to convey a fee simple determinable, and we hold that no fee simple determinable was created when the land was conveyed.

Use of the language conveying the land in "memorial" similarly fails to create a fee simple determinable. "Memorial" is defined in Webster's Third New International Dictionary 1409 (1971) as

> [s]omething that serves to preserve memory or knowledge of an individual or event.

The time for which the hospital should serve to "preserve" the memory or knowledge is not stated in the deed, just as the time for maintaining the hospital is not there stated. The language of conveyance fails to designate the time at which the hospital must be constructed as well as the time during which it must be maintained or during which the indicated memory must be preserved. The omission of such limiting language evidences an intent not to convey a fee simple determinable.

Similar reasoning applies to appellants' assertion that the language of conveyance created a fee simple subject to a condition subsequent. A fee simple subject to a condition subsequent is a fee simple estate in land that gives the grantor a *discretionary* power to terminate the grantee's estate after the happening of a stated event, not certain to occur. Restatement of Property § 45 at 133 (1936 & Supp. 1948). This type of interest is similar to the fee simple determinable in that the language of conveyance must clearly state the grantor's intent to create a discretionary power to terminate the estate he conveys. *Lacer v. Navajo County*, 687 P.2d at 409 (quoting Restatement of Property § 45 comments i and j at 138-139 (1936 & Supp. 1948). Words commonly used in a conveyance to denote the presence of a fee simple estate subject to a condition subsequent include "upon express condition that," "upon condition that," "provided that," or "if." Restatement of Property § 45 comments j through o at 139-143 (1936). In *J.M. Carey & Brother v. City of Casper*, 66 Wyo. 437, 213 P.2d 263, 268 (1950), we quoted 19 Am.Jur. Estates § 65 at 527 (1939), which said:

> It is a well-settled rule that conditions tending to destroy estates, such as conditions subsequent, are not favored in law. They are strictly construed. Accordingly, no provision will be interpreted to create such a condition if the language will bear any other reasonable interpretation, or unless the language, used unequivocally, indicates an intention upon the part of the grantor or devisor to that effect and plainly admits of such construction. [Citations.]

That rule has not lost its potency. Applying it to this case, we hold that the plain language of the 1948 warranty deed, while articulating that the land conveyed was to be used for a county hospital, does not clearly state an intent of the grantors to retain a discretionary power to reenter the land if the land ceased to be used for the stated purpose. Appellants did not convey a fee simple subject to a condition subsequent, and we will not create one by construction some forty years after the conveyance took place.

Summary judgment is affirmed.

---

1. Chief Justice, Retired, June 30, 1988.↩

White v. Brown,

559 S.W.2d 938 (Tenn. 1977)

Ted H. Lowe, Knoxville, for appellants.

Wallace F. Burroughs, Charles H. Child, Knoxville, E. T. Hollins, Jr., Nashville, for appellees.

Brock, Justice.

This is a suit for the construction of a will. The Chancellor held that the will passed a life estate, but not the remainder, in certain realty, leaving the remainder to pass by inheritance to the testatrix's heirs at law. The Court of Appeals affirmed.

Mrs. Jessie Lide died on February 15, 1973, leaving a holographic will which, in its entirety, reads as follows:

> April 19, 1972
>
> I, Jessie Lide, being in sound mind declare this to be my last will and testament. I appoint my niece Sandra White Perry to be the executrix of my estate. I wish Evelyn White to have my home to live in and *not* to be *sold*.
>
> I also leave my personal property to Sandra White Perry. My house is not to be sold.

(Underscoring by testatrix).

Mrs. Lide was a widow and had no children. Although she had nine brothers and sisters, only two sisters residing in Ohio survived her. These two sisters quitclaimed any interest they might have in the residence to Mrs. White. The nieces and nephews of the testatrix, her heirs at law, are defendants in this action.

Mrs. White, her husband, who was the testatrix's brother, and her daughter, Sandra White Perry, lived with Mrs. Lide as a family for some twenty-five years. After Sandra married in 1969 and Mrs. White's husband died in 1971, Evelyn White continued to live with Mrs. Lide until Mrs. Lide's death in 1973 at age 88.

Mrs. White, joined by her daughter as executrix, filed this action to obtain construction of the will, alleging that she is vested with a fee simple title to the home. The defendants contend that the will conveyed only a life estate to Mrs. White, leaving the remainder to go to them under our laws of intestate succession. The Chancellor held that the will unambiguously conveyed only a life interest in the home to Mrs. White and refused to consider extrinsic evidence concerning Mrs. Lide's relationship with her surviving relatives. Due to the debilitated condition of the property and in accordance with the desire of all parties, the Chancellor ordered the property sold with the proceeds distributed in designated shares among the beneficiaries.

I.

Our cases have repeatedly acknowledged that the intention of the testator is to be ascertained from the language of the entire instrument when read in the light of surrounding circumstances. *See, e.g., Harris v. Bittikofer*, 541 S.W.2d 372, 384 (Tenn. 1976); *Martin v. Taylor*, 521 S.W.2d 581, 584 (Tenn. 1975); *Hoggatt v. Clopton*, 142 Tenn. 184, 192, 217 S.W. 657, 659 (1919). But, the practical difficulty in this case, as in so many other cases involving wills drafted by lay persons, is that the words chosen by the testatrix are not specific enough to clearly state her intent. Thus, in our opinion, it is not clear whether Mrs. Lide intended to convey a life estate in the home to Mrs. White, leaving the remainder interest to descend by operation of law, or a fee interest with a restraint on alienation. Moreover, the will might even be read as conveying a fee interest subject to a condition subsequent (Mrs. White's failure to live in the home).

In such ambiguous cases it is obvious that rules of construction, always yielding to the cardinal rule of the testator's intent, must be employed as auxiliary aids in the courts' endeavor to ascertain the testator's intent.

In 1851 our General Assembly enacted two such statutes of construction, thereby creating a statutory presumption against partial intestacy.

Chapter 33 of the Public Acts of 1851 (now codified as T.C.A. ss 64-101 and 64-501) reversed the common law presumption[1] that a life estate was intended unless the intent to pass a fee simple was clearly expressed in the instrument.T.C.A. § 64-501 provides:

> Every grant or devise of real estate, or any interest therein, shall pass all the estate or interest of the grantor or devisor, unless the intent to pass a less estate or interest shall appear by express terms, or be necessarily implied in the terms of the instrument.

Chapter 180, Section 2 of the Public Acts of 1851 (now codified as T.C.A. § 32-301) was specifically directed to the operation of a devise. In relevant part, T.C.A. s 32-301 provides:

> A will … shall convey all the real estate belonging to (the testator) or in which he had any interest at his decease, unless a contrary intention appear by its words and context.

Thus, under our law, unless the "words and context" of Mrs. Lide's will clearly evidence her intention to convey only a life estate to Mrs. White, the will should be construed as passing the home to Mrs. White in fee. "'If the expression in the will is doubtful, the doubt is resolved against the limitation and in favor of the absolute estate.'" *Meacham v. Graham*, 98 Tenn. 190, 206, 39 S.W. 12, 15 (1897) (quoting *Washbon v. Cope*, 144 N.Y. 287, 39 N.E. 388); *Weiss v. Broadway Nat'l Bank*, 204 Tenn. 563, 322 S.W.2d 427 (1959); *Cannon v. Cannon*, 182 Tenn. 1, 184 S.W.2d 35 (1945).

Several of our cases demonstrate the effect of these statutory presumptions against intestacy by construing language which might seem to convey an estate for life, without provision for a gift over after the termination of such life estate, as passing a fee simple instead. In *Green v. Young*, 163 Tenn. 16, 40 S.W.2d 793 (1931), the testatrix's disposition of all of her property to her husband "to be used by him for his support and comfort during his life" was held to pass a fee estate. Similarly, in *Williams v. Williams*, 167 Tenn. 26, 65 S.W.2d 561 (1933), the testator's devise of real property to his children "for and during their natural lives" without provision for a gift over was held to convey a fee. And, in *Webb v. Webb*, 53 Tenn. App. 609, 385 S.W.2d 295 (1964), a devise of personal property to the testator's wife "for her maintenance, support and comfort, for the full period of her natural life" with complete powers of alienation but without provision for the remainder passed absolute title to the widow.

II.

Thus, if the sole question for our determination were whether the will's conveyance of the home to Mrs. White "to live in" gave her a life interest or a fee in the home, a conclusion favoring the absolute estate would be clearly required. The question, however, is complicated somewhat by the caveat contained in the will that the home is "not to be sold" a restriction conflicting with the free alienation of property, one of the most significant incidents of fee ownership. We must determine, therefore, whether Mrs. Lide's will, when taken as a whole, clearly evidences her intent to convey only a life estate in her home to Mrs. White.

Under ordinary circumstances a person makes a will to dispose of his or her entire estate. If, therefore, a will is susceptible of two constructions, by one of which the testator disposes of the whole of his estate and by the other of which he disposes of only a part of his estate, dying intestate as to the remainder, this Court has always preferred that construction which disposes of the whole of the testator's estate if that construction is reasonable and consistent with the general scope and provisions of the will. See *Ledbetter v. Ledbetter*, 188 Tenn. 44, 216 S.W.2d 718 (1949); *Cannon v. Cannon*, *supra*; *Williams v. Williams*, *supra*; *Jarnagin v. Conway*, 21 Tenn. 50 (1840); 4 Page, *Wills* § 30.14 (3d ed. 1961). A construction which results in partial intestacy will not be adopted unless such intention clearly appears. *Bedford v. Bedford*, 38 Tenn. App. 370, 274 S.W.2d 528 (1954); *Martin v. Hale*, 167 Tenn. 438, 71 S.W.2d 211 (1934). It has been said that the courts will prefer any reasonable construction or any construction which does not do violence to a testator's language, to a construction which results in partial intestacy.Ledbetter, supra.

The intent to create a fee simple or other absolute interest and, at the same time to impose a restraint upon its alienation can be clearly expressed. If the testator specifically declares that he devises land to A "in fee simple" or to A "and his heirs" but that A shall not have the power to alienate the land, there is but one tenable construction, viz., the testator's intent is to impose a restraint upon a fee simple. To construe such language to create a life estate would conflict with the express specification of a fee simple as well as with the presumption of intent to make a complete testamentary disposition of all of a testator's property. By extension, as noted by Professor Casner in his treatise on the law of real property:

> Since it is now generally presumed that a conveyor intends to transfer his whole interest in the property, it may be reasonable to adopt the same construction, (conveyance of a fee simple) even in the absence of words of inheritance, if there is no language that can be construed to create a remainder.

6 American Law of Property § 26.58 (A. J. Casner ed. 1952).

In our opinion, testatrix's apparent testamentary restraint on the alienation of the home devised to Mrs. White does not evidence such a clear intent to pass only a life estate as is sufficient to overcome the law's strong presumption that a fee simple interest was conveyed.

Accordingly, we conclude that Mrs. Lide's will passed a fee simple absolute in the home to Mrs. White. Her attempted restraint on alienation must be declared void as inconsistent with the incidents and nature of the estate devised and contrary to public policy. *Nashville C & S.L. Ry. v. Bell*, 162 Tenn. 661, 39 S.W.2d 1026 (1931).

The decrees of the Court of Appeals and the trial court are reversed and the cause is remanded to the chancery court for such further proceedings as may be necessary, consistent with this opinion. Costs are taxed against appellees.

Harbison, Justice, dissenting.

With deference to the views of the majority, and recognizing the principles of law contained in the majority opinion, I am unable to agree that the language of the will of Mrs. Lide did or was intended to convey a fee simple interest in her residence to her sister-in-law, Mrs. Evelyn White.

The testatrix expressed the wish that Mrs. White was "to have my home to live in and *not* to be *sold*." The emphasis is that of the testatrix, and her desire that Mrs. White was not to have an unlimited estate in the property was reiterated in the last sentence of the will, to wit: "My house is not to be sold."

The testatrix appointed her niece, Mrs. Perry, executrix and made an outright bequest to her of all personal property.

The will does not seem to me to be particularly ambiguous, and like the Chancellor and the Court of Appeals, I am of the opinion that the testatrix gave Mrs. White a life estate only, and that upon the death of Mrs. White the remainder will pass to the heirs at law of the testatrix.

The cases cited by petitioners in support of their contention that a fee simple was conveyed are not persuasive, in my opinion. Possibly the strongest case cited by the appellants is *Green v. Young*, 163 Tenn. 16, 40 S.W.2d 793 (1931), in which the testatrix bequeathed all of her real and personal property to her husband "to be used by him for his support and comfort during his life." The will expressly stated that it included all of the property, real and personal, which the testatrix owned at the time of her death. There was no limitation whatever upon the power of the husband to use, consume, or dispose of the property, and the Court concluded that a fee simple was intended.

In the case of *Williams v. Williams*, 167 Tenn. 26, 65 S.W.2d 561 (1933), a father devised property to his children "for and during their natural lives" but the will contained other provisions not mentioned in the majority opinion which seem to me to distinguish the case. Unlike the provisions of the present will, other clauses in the Williams will contained provisions that these same children were to have "all the residue of my estate personal or mixed of

which I shall die possessed or seized, or to which I shall be entitled at the time of my decease, to have and to hold the same to them and their executors and administrators and assigns forever."

Further, following some specific gifts to grandchildren, there was another bequest of the remainder of the testator's money to these same three children. The language used by the testator in that case was held to convey the fee simple interest in real estate to the children, but its provisions hardly seem analogous to the language employed by the testatrix in the instant case.

In the case of *Webb v. Webb*, 53 Tenn. App. 609, 385 S.W.2d 295 (1964), the testator gave his wife all the residue of his property with a clear, unqualified and unrestricted power of use, sale or disposition. Thereafter he attempted to limit her interest to a life estate, with a gift over to his heirs of any unconsumed property. Again, under settled rules of construction and interpretation, the wife was found to have a fee simple estate, but, unlike the present case, there was no limitation whatever upon the power of use or disposition of the property by the beneficiary.

On the other hand, in the case of *Magevney v. Karsch*, 167 Tenn. 32, 65 S.W.2d 562 (1933), a gift of the residue of the large estate of the testator to his daughter, with power "at her demise (to) dispose of it as she pleases ... ." was held to create only a life estate with a power of appointment, and not an absolute gift of the residue. In other portions of the will the testator had given another beneficiary a power to use and dispose of property, and the Court concluded that he appreciated the distinction between a life estate and an absolute estate, recognizing that a life tenant could not dispose of property and use the proceeds as she pleased. 167 Tenn. at 57, 65 S.W.2d at 569.

In the present case the testatrix knew how to make an outright gift, if desired. She left all of her personal property to her niece without restraint or limitation. As to her sister-in-law, however, she merely wished the latter have her house "to live in", and expressly withheld from her any power of sale.

The majority opinion holds that the testatrix violated a rule of law by attempting to restrict the power of the donee to dispose of the real estate. Only by thus striking a portion of the will, and holding it inoperative, is the conclusion reached that an unlimited estate resulted.

In my opinion, this interpretation conflicts more greatly with the apparent intention of the testatrix than did the conclusion of the courts below, limiting the gift to Mrs. White to a life estate. I have serious doubt that the testatrix intended to create any illegal restraint on alienation or to violate any other rules of law. It seems to me that she rather emphatically intended to provide that her sister-in-law was not to be able to sell the house during the lifetime of the latter a result which is both legal and consistent with the creation of a life estate.

In my opinion the judgment of the courts below was correct and I would affirm.

I am authorized to state that Chief Justice HENRY joins in this opinion.

---

1. Because the feudal lord granted land solely as compensation for personal services, the grant was for no longer than the life of the grantee. Later the grant was extended to the sons and other issue of the grantee under the designation of "heirs." Heirs were thus entitled to stand in the place of their ancestor after his death if mentioned in the grant but only if specifically mentioned. Thereafter, the word "heirs," when used in a conveyance to a man "and his heirs," came to include collateral as well as lineal heirs, ultimately indicating that such grantee took an estate which would pass to his heirs or the heirs of anyone to whom he aliened it. That is, "heirs" ceased to be a word of purchase and became a word of limitation. 1 Tiffany, *Real Property* § 28 (3d ed. 1939).↩

John R. Edwards, Individually and as Executor, etc., et al. v. Beverly E. Bradley,

315 S.E.2d 196 (Va. 1984)

Daniel Hartnett, Accomac (Ayres, Hartnett & Custis, Accomac, on briefs), for appellants.

William King Mapp, Keller (Mapp & Mapp, Keller, on brief), for appellee.

Before Carrico, C.J., and Cochran, Poff, Compton, Stephenson, Russell and Thomas, JJ.

Cochran, Justice.

In this appeal, the question presented to us is whether by certain provisions in her will a testatrix devised a fee simple estate or a life estate in real property therein described.

Viva Parker Lilliston died testate in 1969. Her will dated January 12, 1957, duly probated with a 1958 codicil irrelevant to this case, provided in part as follows:

> Item Twelve: I give and devise my farm situated on the Seaside from Locustville, in the County of Accomack, State of Virginia ... to my daughter, Margaret Lilliston Edwards, upon the conditions, set out in Item Fourteen....
>
> ....
>
> Item Fourteen: all gifts made to my daughter, Margaret L. Edwards, individually and personally, under Items Eleven and Twelve of this Will, whether personal estate or real estate, are conditioned upon the said Margaret L. Edwards keeping the gift or devise herein free from encumbrances of every description, and in the event the said Margaret L. Edwards shall attempt to encumber same or sell her interest, or in the event any creditor or creditors of said Margaret L. Edwards shall attempt to subject her interest in the gift or devise herein made to the payment of the debts of the said Margaret L. Edwards, then and in that event the interest of said Margaret L. Edwards therein shall immediately cease and determine, and the gift or devise shall at once become vested in her children, viz: Betty Belle Branch, Beverly Bradley, John R. Edwards, Bruce C. Edwards, Jill A. Edwards and Jackie L. Edwards, in equal shares in fee simple....

Margaret L. Jones, formerly Margaret L. Edwards, qualified as executrix under her mother's will. In 1979, Jones sought to have her children and their spouses execute an agreement to consent to her selling the farm devised to her. Only a daughter, Beverly Bradley, and the latter's husband declined to execute the agreement. In 1980, Jones died testate; in her will, executed in 1979, she left Bradley $1.00, and directed that the farm be sold and the proceeds distributed equally among her other children. The executors named in the will duly qualified. Bradley filed a bill of complaint in the trial court against these personal representatives and her five brothers and sisters,[1] alleging that under the Lilliston will a life estate was devised to Jones with remainder to Jones's children. Bradley sought to enjoin the sale or encumbrance of the farm without her consent and asked that her interest therein be determined.

After hearing evidence presented by Bradley, the trial court determined that Jones had not violated any of the conditions specified in the Lilliston will. Edwards presented no evidence. The trial judge issued a letter opinion in which he stated his conclusion that under the Lilliston will a life estate in the farm was devised to Jones with remainder to her six named children in fee simple. A final decree, incorporating the opinion by reference, was entered March 25, 1981. On appeal, Edwards argued before us that Jones had fee simple title subject to valid conditions subsequent or conditional limitations[2] and, having not violated the conditions, could freely dispose of the farm by will as she chose. Edwards argued in the alternative on brief that if the conditions were invalid Jones

was vested with fee simple title without restrictions or conditions even though such unconditional vesting would have been contrary to her mother's intent to protect the farm from Jones's creditors.

There is no conflict in the evidence. Jones was in financial difficulties when the Lilliston will was executed. The will was prepared by an experienced attorney. One provision, referring specifically to the enabling statute, established a spendthrift trust for the benefit of another child of the testatrix.

The trial judge, in his opinion, noted that the "able and experienced" draftsman had used the words "fee simple" at least seven times in the will and codicil. Apparently, the judge reasoned that if a fee simple estate had been intended for Jones, the draftsman would have used that terminology in Item Twelve. Moreover, the judge stated that under Edwards's theory that Jones died vested with fee simple title, a creditor could then bring a creditor's suit to subject the land to the satisfaction of the debt contrary to the testamentary conditions and the intent of Lilliston. The judge further stated that the conditions set forth in Item Fourteen were repugnant to a fee simple estate but not to an estate for life. For these reasons, he ruled that a life estate was created under the Lilliston will.

As a general rule, a condition totally prohibiting the alienation of a vested fee simple estate or requiring a forfeiture upon alienation is void. *See Dunlop v. Dunlop's Ex'rs*, 144 Va. 297, 132 S.E. 351 (1926); *Hutchinson v. Maxwell*, 100 Va. 169, 40 S.E. 655 (1902); *In Re Anderson's Estate*, 267 Minn. 264, 126 N.W.2d 250 (1964); 1 Minor § 553; Restatement of Property, § 406 (1944). As an exception to the rule, conditions prohibiting alienation of land granted to corporate entities for their special purposes are valid. 1 Minor § 557; *see Fairfax Park Authority v. Brundage*, 208 Va. 622, 159 S.E.2d 831 (1968). A conditional limitation imposed upon a life estate, however, is valid. *Mears v. Taylor*, 142 Va. 824, 128 S.E. 264 (1925); *Camp v. Cleary*, 76 Va. 140 (1882); 1 Minor § 559. *See also* Restatement on Property § 409 (1944), where such limitations, therein classified as forfeiture restraints, are said to be valid as to life estates.

It is apparent, therefore, that if Lilliston's will vested fee simple title to the farm in Jones, the unqualified restraint on alienation would be invalid and the property from the time of vesting would be subject to sale, encumbrance, or devise by her and subject to the claims of her creditors, results contrary to the express intent of the testatrix. On the other hand, if Lilliston's will vested a life estate in Jones, the unqualified restraint on alienation imposed by the testatrix would be valid. Jones could not acquire, as Edwards suggested, a life estate which, upon compliance with the testamentary conditions, became a fee simple estate at the time of her death. Jones acquired under the Lilliston will either a fee simple estate free of conditions and thus inconsistent with the testatrix's intent or a life estate subject to conditions and thus consistent with such intent.

The draftsman of the Lilliston will carefully avoided using in either Item Twelve or Item Fourteen the words "fee simple" which he had used elsewhere in the instrument. It is true, as Edwards observed, that he also did not use the words "life estate" in those clauses of the will. Under Code § 55-11 it is not necessary to use the words "in fee simple" to create a fee simple estate where real estate is devised without words of limitation unless a contrary intention shall appear by the will. In the present case, however, the real estate was devised with words of limitation and a contrary intention appears in the will. Moreover, unless there is a power of disposal in the first taker (Code § 55-7), a life estate may be created by implication as well as by explicit language, provided the will shows the requisite intent. *Robinson v. Caldwell*, 200 Va. 353, 105 S.E.2d 852 (1958).

Since the testatrix established a spendthrift trust in another provision of her will, she was aware of the availability of that device but did not choose to use it for the benefit of Jones. Moreover, under Code § 55-7, the testatrix could have devised the land to Jones for life with a power of appointment under which Jones could have disposed of the property by will. She did not do so.

The intention of the testatrix is to be upheld if the will can be reasonably construed to effectuate such intent and if it is not inconsistent with an established rule of law. *Powell v. Holland*, 224 Va. 609, 615, 299 S.E.2d 509, 512 (1983); *Hurt v. Hurt*, 121 Va. 413, 420, 93 S.E. 672, 674 (1917). In addition, the language of the will is "to be understood in the sense in which the circumstances of the case show" that the testatrix intended. *Gray v. Francis*, 139

Va. 350, 361-62, 124 S.E. 446, 450 (1924). Here, the testatrix intended that Jones have the use and benefit of the real estate free of the claims of her creditors. The ultimate beneficiaries were Jones's children. Although the will did not expressly designate the children as remaindermen, the conditional limitation to them indicated that they were intended to take the farm when their mother's interest terminated, whether by violation of the conditions or otherwise. Accordingly, we conclude that the trial court properly ruled that Jones acquired a life estate in the property with remainder at her death in fee simple to her six children.

We will affirm the decree of the trial court.

Affirmed.

---

1. Named as defendants were John R. Edwards, individually and as executor of the estate of Margaret L. Jones; Betty Belle Branch, individually and as executrix of the estate of Margaret L. Jones; Henry P. Custis, Jr., executor of the estate of Margaret L. Jones; Bruce E. Edwards, Jill E. Godwin, and Jackie L. Spicer. They will be referred to herein collectively as Edwards.↩

1. The terms "condition subsequent" and "conditional limitation" are not interchangeable. A conditional limitation provides for the future estate of freehold vested in one person to shift to another upon the happening of a contingency. An estate upon condition subsequent terminates upon the happening of a contingency, but instead of shifting to another, it returns to the grantor. 1 Minor on Real Property § 526 (2d ed. Ribble 1928) (hereinafter Minor). Thus, we are dealing with conditional limitations in the present case.↩

2.1.3. Problems

Estates Problems

In each problem, identify the interests. You may also practice applying the Rule Against Perpetuities and reform the grant if necessary. If the name of the interest or its validity depends on information not supplied, state what information is needed and how it would affect your answer.

1. O to A so long as A stays in school.
1. O to A for life, then to B if B survives A.
1. O to A for life, then to B and his children.
1. I grant Blackacre to A so that he may raise his children there.
1. I grant Blackacre to A, but if A dies in the next twenty years, I want the property to go to B.
1. To A and his heirs so long as used as a residence.
1. To A, but if A dies, then to B.
1. To A for life when A marries, then to A's widow for life if she survives A, otherwise to B for life, then to C.
1. To A for so long as A lives on the property.
1. To A for life, then to B if B lives at least one year after A's death.
1. I give Blackacre to A and his heirs, but if A ever drinks or smokes, then Blackacre is to go to B.
1. To A so long as illegal drugs are not used on the premises, and if illegal drugs are used on the premises, then to B.

1. To A, but if illegal drugs are ever used on the premises, then to B.

1. To A, but if illegal drugs are used on the premises within 21 years of the death of Ewan McGregor, then to B.

1. To A, but if illegal drugs are used on the premises within 21 years of the death of the last surviving member of the cast and crew of Star Wars Episode Three, then to B.

1. To A for life, then to any of A's children who graduate from high school.

1. After a long life blessed with good fortune, I feel it is time to give something back. Thus, I leave Blackacre to the United Way. However, if Blackacre is ever used for commercial gain, the United Way's interest will terminate.

1. In a (long) will: Blackacre has been in my family for 200 years. It is my honor to leave this property to my good friend Melinda Marsh so that she can raise her children there. All interests not specifically devised above are to go to the Red Cross, but if the Red Cross ever engages in lobbying, then to UNICEF.

1. To A for life, then to A's children for life, then, after all of A's children have died, to Habitat for Humanity for housing volunteers. A has no children at the time of the grant.

1. To A for life, then to such of A's children who graduate from college before A's death for their lives, then to the first child born to my daughter C.

1. To A for five years, then to my oldest great-grandchild then living for life, then to B.

1. To A for life so long as no trees are cleared from the grounds, then to B, but if B clears trees from the grounds, then to C and his heirs.

1. To A for life, then to A's children for life, then to ACME Corp.

Answers to Estates Problems

1. O to A so long as A stays in school.

A has a fee simple determinable, and (therefore) O has a possibility of reverter. The "so long as" durational language is interpreted as a clear intent to create a fee simple determinable.

That said, one might argue that A can only stay in school during A's life – and so this is at most a life estate. If that were the case, we'd have a life estate determinable in A, a possibility of reverter in O (becoming possessory on violation of the condition), and a reversion in O (becoming possessory on A's death). I'd give credit for this.

But I think the court's presumption in favor of a fee simple interest would lead a court to interpret this grant as meaning that A could keep the property if he or she did not drop out of school. That is, dropping out would be a condition that should terminate the A's interest.

2. O to A for life, then to B if B survives A.

A has a life estate. B has a contingent remainder (there's a condition precedent to B's taking, and the "if B survives A" bit is part of the "to B" clause, not separate). But that's not all! O has a reversion. (To see this, think about what happens if B does not survive A.)

3. O to A for life, then to B and his children.

A has a life estate. B and any of B's children alive at the time of the grant have a vested remainder subject to open. (B's alive and named – he or she will definitely get something when A dies. But that something may become less as B has more children.)

4. I grant Blackacre to A so that he may raise his children there.

A has a fee simple absolute. The extra language is just a statement of purpose and desire. It is not explicit enough, in light of the presumption against conditions, to conclude that grantor intended to create a condition that could lead to termination of A's ownership. In other words, the extra language is precatory, and as in *Wood* will not be interpreted to create a defeasible fee.

5. I grant Blackacre to A, but if A dies in the next twenty years, I want the property to go to B.

A has a fee simple subject to B's shifting executory interest. Note that A has more than a life estate. If A does not die in the next twenty years, the property will never go to B. Just because the condition involves A's death does not automatically turn this into a life estate.

6. To A and his heirs so long as used as a residence.

A has a fee simple determinable. O has a possibility of reverter. (I'll use O to refer to the grantor throughout.)

7. To A, but if A dies, then to B.

This grant has the form of a fee simple subject to an executory limitation. But a fee simple is an estate of potentially infinite duration, whereas A's interest will terminate when A dies – presumably an event certain to happen within a finite amount of time. This grant will be interpreted as a life estate in A with an indefeasibly vested remainder in B.

8. To A for life when A marries, then to A's widow for life if she survives A, otherwise to B for life, then to C.

A has a springing executory interest for life. Note that O has the fee simple at the time of the grant and that A only takes when A marries. Taking the grant in order, we next have a contingent remainder for life in A's widow. We don't know who this person might be or whether this person will satisfy the condition of surviving A. B has an alternative contingent remainder for life and only takes if A's widow fails to survive A. C has an indefeasibly vested remainder, since whether A's widow or B takes after A dies, C is sure to take after their deaths.

An aside: the merger doctrine will result in the destruction of a contingent remainder in the following circumstance. When a vested estate and the next vested estate following are owned by the same person, the estates are merged, destroying an intervening contingent remainder – unless the two vested interests were placed in the same person by the same grant. Upshot. O to A for life, then to the first child of A to graduate high school before A's death for life, then to C. If C later acquires A's life estate, or if A later acquires C's absolutely vested remainder, the life estate and vested remainder are merged into a fee simple absolute, and the contingent remainder is destroyed. I won't ask you to apply this doctrine, but I wanted to flag the issue here.

9. To A for so long as A lives on the property.

What did O intend to give A? One way to read this is as a fee simple determinable (with corresponding possibility of reverter in O). If A lives on the property A's whole life, then A will have continuously satisfied the condition, and the property will be distributed on A's death according to A's will – free of the condition. After all, once A dies, it will not be possible for A to live anywhere else.

On the other hand, the grant could be read to give to A the property but only while A lives on it and no longer. So A would get a life estate determinable, as if the grant had said: To A for life so long as A lives on the property. O has a reversion (remember that a "remainder" in the grantor is called a reversion) and a possibility of reverter (the interest that will cut short A's life estate if A violates the condition).

10. To A for life, then to B if B lives at least one year after A's death.

A has a life estate. B has what looks like a contingent remainder. However, B will not take immediately on A's death. A remainder interest is that interest that follows immediately after the end of the prior life estate. Here there's a gap, and that's enough to make this interest something other than a remainder.

Thinking about what will happen here, we see that A has a life estate, then O has a reversion – We know that O (or O's heirs) will get the property back for at least a year. B has a springing executory interest, with B cutting short O's ownership if B satisfies the condition of surviving A by at least one year.

11. I give Blackacre to A and his heirs, but if A ever drinks or smokes, then Blackacre is to go to B.

A has a fee simple subject to B's shifting executory interest.

12. To A so long as illegal drugs are not used on the premises, and if illegal drugs are used on the premises, then to B.

A has a fee simple subject to B's shifting executory interest.

13. To A, but if illegal drugs are ever used on the premises, then to B.

The interests are identical to those in problems 6 and 7, but the language of the grant is different. These three problems are mainly interesting for their treatment under the Rule Against Perpetuities.

14. To A, but if illegal drugs are used on the premises within 21 years of the death of Ewan McGregor, then to B.

Same.

15. To A, but if illegal drugs are used on the premises within 21 years of the death of the last surviving member of the cast and crew of Jaws, then to B.

Same.

16. To A for life, then to any of A's children who graduate from high school.

This grant could arise in several factual circumstances.

(1) A has no children alive at the time of the grant. Then, A has a life estate, and there is a contingent remainder in A's children. O has a reversion. (Though one might be tempted to label the future interest in O a "possibility of reverter," since it will only be realized in possession if the condition is satisfied, the texts refer to O's interest, like all interests in grantors following life estates, as a reversion. I suppose the idea is that the happening of the contingency would divest O's reversion interest.)

(2) A has a child at the time of the grant, but the child has not yet graduated from high school. The remainder is still contingent.

(3) At the time of the grant, A has a child, B, who has graduated high school. In this case, A has a life estate, and B has a vested remainder subject to open (also called a vested remainder subject to partial defeasance).

17. After a long life blessed with good fortune, I feel it is time to give something back. Thus, I leave Blackacre to the United Way. However, if Blackacre is ever used for commercial gain, the United Way's interest will terminate.

The second sentence appears to leave Blackacre to the United Way in fee simple absolute. The third sentence then sets out a condition under which that interest may terminate. As we've seen, many courts read grants with a presumption against automatic forfeiture – and so might even interpret grants that use the durational language characteristic of fee simple determinable grants as fees simple subject to conditions subsequent.

However, this grant makes pretty clear that the interest will terminate immediately on violation of the condition. In other words, there is language in the grant indicating grantor intended forfeiture. So I would interpret this as a fee simple determinable in the United Way. O retains a possibility of reverter. However, it's possible to argue that the grant did not say "immediately" or that magic words like "so long as" or "until" were not used to describe the present interest. So you could argue that we have a f.s.s.c / right of entry here.

18. In a (long) will: Blackacre has been in my family for 200 years. It is my honor to leave this property to my good friend Melinda Marsh so that she can raise her children there. All interests not specifically devised above are to go to the Red Cross, but if the Red Cross ever engages in lobbying, then to UNICEF.

The issue in this problem is whether the phrase "so that she can raise her children there" is merely precatory or is meant to have substantive bite. If it's precatory, then Melinda takes a fee simple absolute. The language disposing of any residual property doesn't apply to this grant (but perhaps to other interests in other property devised in this "long" will). Grantor's indications of hope or purpose are not read to limit the interest conveyed unless an

intent to limit is found. There's a good argument that here the grantor was merely explaining why Melinda got Blackacre. It would be helpful to compare this grant with others in the "long" will to see whether this was grantor's style. If you called this precatory and stopped here, that would be fine.

An argument could also be made, though by far the weaker one unless a look at the whole will makes this intent clearer, that the gift of Blackacre was saddled with the condition that Melinda raise her children there. If this were a condition, so that the phrase is read to mean: To Melinda while she raises her children there – then Melinda might have a fee simple determinable with a possibility of reverter in O. But there are two problems with this. First, the fee simple is an estate of potentially infinite duration. Melinda cannot possibly raise her children on Blackacre after her death. So the grant is better read as a life estate – subject to earlier defeasance if Melinda stops raising children on the property. Second, the residual clause gives all undevised interests to the Red Cross. So grantor, under this interpretation, probably intended for the Red Cross to take both the remainder and the shifting executory interest. Let's rewrite the grant according to these interpretations:

To Melinda for life and while she raises her children there, but if she stops raising children there or if she dies, then to the Red Cross, but if the Red Cross ever engages in lobbying then to UNICEF.

I think this is a far less plausible reading of grantor's intent than the "precatory interpretation" above, but let's analyze it nonetheless just to get practice. Melinda has a life estate subject to Red Cross's shifting executory interest. Red Cross has, in addition to the shifting executory interest, a vested remainder subject to divestment, and UNICEF has a shifting executory interest.

19. To A for life, then to A's children for life, then, after all of A's children have died, to Habitat for Humanity for housing volunteers. A has no children at the time of the grant.

A has a life estate. There is a contingent remainder in A's children, because A has no children now but could in the future. Habitat Humanity has a vested remainder – whether it's indefeasibly vested or subject to divestment depends on whether the "for housing volunteers" language is precatory. I think it would be so considered.

20. To A for life, then to such of A's children who graduate from college before A's death for their lives, then to the first child born to my daughter C.

A has a life estate. The gift to A's children is either a contingent remainder or a vested remainder subject to open (if there's at least one child who has met the condition).

If C already has a child at the time of the grant, then that (first) child has an indefeasibly vested remainder. If the child dies, the child's heirs will take – even if C has subsequent children before the remainder becomes possessory.

If C has no children at the time of the grant, then there is contingent remainder in the unascertained child.

21. To A for five years, then to my oldest great-grandchild then living for life, then to B.

We haven't covered the kind of interest A has yet. But you do know enough to know what it is not. It is not a kind of fee interest. Fees are estates of potentially infinite duration. This is an estate of finite duration. It is also not a life estate. Instead, it's a term of years.

There is a contingent remainder for life in the oldest great-grandchild then living. It's a remainder interest because it follows the natural termination of the prior estate. (And it's a remainder rather than a reversion because it's in someone other than the grantor.) It's contingent because the grant is to an unascertained person. We don't know who the oldest great-grandchild will be after the five-year period, or even if there will be any great-grandchild alive at that time.

B has an indefeasibly vested remainder.

22. To A for life so long as no trees are cleared from the grounds, then to B, but if B clears trees from the grounds, then to C and his heirs.

This grant is a little tricky to interpret. A has a life estate subject to a condition. But what did grantor intend to happen upon violation of the condition? The phrase "then to B" might indicate that B gets the remainder or that B has an executory interest – or both.

In my mind, the most natural reading is that A has a life estate subject to B's executory limitation and B has, in addition, a vested remainder subject to divestment. C has an executory interest. That is, A has a life estate, but if the condition is violated, then the property goes to B, and in any event B gets the property at A's death.

C's executory interest is also tricky to interpret. Does C take if anyone clears trees or only if B clears trees? We might argue that grantor clearly intended that no one should clear trees. But if that's the case why did grantor write "if B clears trees" in the condition on B's estate but not "if A clears trees" in the condition on A's estate?

To see why grantor probably did this, we first need to know how to apply the Rule Against Perpetuities. As in the Edwards v. Bradley case, a court is likely to interpret a grant to avoid a rule violation where possible.

23. To A for life, then to A's children for life, then to ACME Corp.

A has a life estate. The remainder interest in A's children is either contingent or a vested remainder subject to open (if A has children at the time of the grant). ACME Corp. has an absolutely vested remainder.

2.2. Rule Against Perpetuities

Old Port Cove Holdings, Inc. v. Old Port Cove Condominium Association One, Inc.,

986 So.2d 1279 (Fla. 2008)

Jack J. Aiello and Nicole K. Atkinson of Gunster, Yoakley and Stewart, P.A., West Palm Beach, FL, for Petitioners.

Daniel S. Rosenbaum, Richard Valuntas and John M. Siracusa of Becker and Poliakoff, P.A., West Palm Beach, FL, for Respondent.

Cantero, J.

We consider the parameters of a doctrine that has been "long cherished by law school professors and dreaded by most law students: the infamous rule against perpetuities." *Byke Constr. Co. v. Miller*, 140 Ariz. 57, 680 P.2d 193, 194 (Ct.App.1984); *see also Shaver v. Clanton*, 26 Cal.App.4th 568, 31 Cal.Rptr.2d 595, 596 (1994) (describing the rule against perpetuities as "every first-year law student's worst nightmare"). Specifically, we must decide whether section 689.225, Florida Statutes (2000), which addresses the same rule, retroactively abrogated the common law rule. We also consider whether the rule applies to rights of first refusal, which are at issue here... . .

I. FACTS AND PROCEDURAL HISTORY

This case stems from an agreement ("the Agreement") executed over thirty years ago (in 1977) in which Old Port Cove Investment granted Old Port Cove Condominium Association One, Inc. ("the Association") a right of first refusal in a parcel of property. The Agreement provides, in pertinent part:

> In the event that OPCI elects to sell the real property ... other than to the persons or corporations which form the OPCI JOINT VENTURE, or to any corporation or other entity owned or controlled by OPCI or by any member of said JOINT VENTURE, or a successor or successors "to the interest of any member in the JOINT VENTURE", the ASSOCIATION shall have the right of first refusal for the purchase of said real property upon the same terms and conditions as are proposed for its sale and purchase by OPCI, said right of first refusal to be exercised by the ASSOCIATION within thirty (30) days following written notice to it of such proposed sale, following which said right of first refusal shall terminate.

Old Port Cove Holdings, Inc. and Old Port Cove Equities, Inc. ("Owners") the successors-in-interest to the OPCI Joint Venture, now own the property, which is used as a parking lot for an adjacent marina they own.

Twenty-five years after the Agreement, in 2002, the Owners sued to obtain a declaratory judgment and to quiet title to the property, arguing that the right of first refusal violates the common law rule against perpetuities. The Association contested the suit, raising several defenses and counterclaiming for a declaratory judgment and reformation of the Agreement. The trial court declared the right of first refusal void *ab initio* and quieted title in the Owners' favor.... . . On appeal, the Fourth District Court of Appeal reversed. *Old Port Cove*, 954 So.2d at 743.... . .

II. THE HISTORY OF THE RULE AGAINST PERPETUITIES

The rule against perpetuities developed through a series of English cases beginning in 1682 and spanning about 150 years. *See* 10 Richard R. Powell, *Powell on Real Property* § 71.02 (Michael Allan Wolf ed.2007). At one time, the common law rule was a part of the law of nearly every jurisdiction in the United States. *Id.* § 71.03. By the end of the twentieth century, however, only a handful of jurisdictions still followed it. *Id.* Today, perpetuities law varies from state to state. *See* Lynn Foster, *Fifty-One Flowers: Post-Perpetuities War Law and Arkansas's Adoption of USRAP*, 29 U. Ark. Little Rock L.Rev. 411, 411-13 (2007); Frederick R. Schneider, *A Rule Against Perpetuities for the Twenty-First Century*, 41 Real Prop. Prob. & Tr. J. 743, 747-48 (2007).

In Florida, the rule has had a rocky history. It was first adopted judicially, as part of the common law. It was later adopted legislatively, then replaced with a uniform rule, and now it has been legislatively abolished. To provide context for our discussion, we briefly discuss this history.

A. The Common Law Rule against Perpetuities

The rule against perpetuities is generally stated with deceptive simplicity as follows: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." *Iglehart v. Phillips*, 383 So.2d 610, 614 (Fla.1980) (quoting John Chipman Gray, *The Rule Against Perpetuities*, § 201 (4th ed.1942)). The rule "was designed to prevent the perpetual entailment of estates and give them over to free and unhampered conveyance." *Story v. First Nat'l Bank & Trust Co.*, 115 Fla. 436, 156 So. 101, 104 (1934); *see also Iglehart*, 383 So.2d at 613 (recognizing that the rule's "purpose is to ensure that property is reasonably available for development by prohibiting restraints that remove property from a beneficial use for an extended period of time"). We have explained that the rule is "more accurately speaking, the rule against remoteness or remote vesting of an estate or interest therein." *Adams v. Vidal*, 60 So.2d 545, 549 (Fla.1952). "It is not a rule that invalidates interests which last too long, but interests which vest too remotely. In other words, the rule is concerned not with the duration of estates but with the time of their vesting." *Iglehart*, 383 So.2d at 614.

B. The Statutory Rule and Its Various Amendments

The rule against perpetuities has been adopted by statute, amended, and later abrogated. The Legislature first codified the rule in 1977. The statutory rule provided:

> STATEMENT OF THE RULE. – No interest in real or personal property is valid unless it must vest, if at all, not later than 21 years after one or more lives in being at the creation of the interest and any period of gestation involved. The lives measuring the permissible period of vesting must not be so numerous or designated in such a manner as to make proof of their end unreasonably difficult.

Ch. 77-23, § 1, Laws of Fla. (codified at § 689.22(1), Fla. Stat. (1979)). The statute exempted various interests, including "[o]ptions to purchase in gross or in a lease or preemptive rights in the nature of a right of first refusal," but limited them to forty years. Ch. 77-23, § 1, Laws of Fla. (codified at § 689.22(3)(a)(7) (1979)).[1]

In 1988, the Legislature "replac[ed] the existing statutory rule with the 'Florida Uniform Statutory Rule Against Perpetuities.'" Ch. 88-40, Laws of Fla. It states the rule as follows:

(2) STATEMENT OF THE RULE.–

(a) A nonvested property interest in real or personal property is invalid unless:

1. When the interest is created, it is certain to vest or terminate no later than 21 years after the death of an individual then alive; or

2. The interest either vests or terminates within 90 years after its creation.

Id. § 1 (codified at § 689.225(2), Fla. Stat. (1989)). With eight exceptions, the statute excludes nonvested property interests and powers of appointment arising out of "a nondonative transfer." *Id.* (codified at § 689.225(5)(a), Fla. Stat. (1989)). The law also added, among other things, a provision through which interests created before October 1, 1988, that violate the rule against perpetuities could be reformed "in the manner that most closely approximates the transferor's manifested plan … and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created." *Id.* (codified at § 689.225(6)(c), Fla. Stat. (1989)).

In 2000, the Legislature added the following language to section 689.225(7): "This section is the sole expression of any rule against perpetuities or remoteness in vesting in this state. No common-law rule against perpetuities or remoteness in vesting shall exist with respect to any interest or power regardless of whether such interest or power is governed by this section." Ch. 2000-245, § 1, Laws of Fla. (codified at § 689.225(7), Fla. Stat. (2001)). The Fourth District relied primarily on this language to conclude that "[r]etroactive application could hardly have been stated more clearly." *Old Port Cove*, 954 So.2d at 745.

Having explained the history of the rule in Florida, we now address the issues presented.

III. ANALYSIS

We address two issues involving the rule against perpetuities. The first – the issue on which the district court certified conflict – is whether the legislative abrogation of the rule applies retroactively. We resolve the conflict by holding that, based on the language of the statute itself, abrogation of the rule does *not* apply retroactively. The second issue, on which conflict also exists (albeit in dictum), is whether the common law rule against perpetuities even applies to rights of first refusal. On that issue, we conclude that, because the same concerns about remote vesting do not exist with respect to rights of first refusal, the rule does not apply to such rights.

A. Retroactive Abrogation

… .

In the absence of clear legislative intent to the contrary, a law is presumed to operate prospectively. *State v. Lavazzoli*, 434 So.2d 321, 323 (Fla.1983); *see also Metro. Dade County v. Chase Fed. Hous. Corp.*, 737 So.2d 494, 499 (Fla.1999) ("[R]equiring clear intent assures that [the legislature] has itself affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." (quoting *Arrow Air, Inc. v. Walsh*, 645 So.2d 422, 425 (Fla.1994))). In determining whether a statute applies retroactively, we consider two factors: (1) whether the statute itself expresses an intent that it apply retroactively; and, if so, (2) whether retroactive application is constitutional. *See, e.g., Chase Fed.*, 737 So.2d at 499. We conclude that the plain language of section 689.225 does not evince an intent that the statute apply retroactively. We therefore need not address the second prong. *See, e.g., Memorial Hosp.-W. Volusia, Inc. v. News-Journal Corp.*, 784 So.2d 438, 441 (Fla.2001) (finding it unnecessary to reach the second prong of the retroactivity analysis absent clear legislative intent to apply the statute retroactively).

… .

B. The Rule Against Perpetuities Does Not Apply to Rights of First Refusal

While we have resolved the certified conflict, the decisive question in this case is whether rights of first refusal are subject to the common law rule in the first place. Rights of first refusal are not subject to the statutory rule. *See* § 689.225(5)(a), Fla. Stat. (2007). We conclude they are not subject to the common law rule, either.

To decide whether a right of first refusal violates the rule, we must first define a right of first refusal. As one court has explained it,

> A right of first refusal is a right to elect to take specified property at the same price and on the same terms and conditions as those contained in a good faith offer by a third person if the owner manifests a willingness to accept the offer. The right of first refusal ripens into an option once an owner manifests a willingness to accept a good faith offer.

Pearson v. Fulton, 497 So.2d 898, 900 (Fla. 2d DCA 1986). Rights of first refusal are also known as preemptive rights. *See* 6 Am. L. Prop. § 26.66 (1952). Such rights vary in form: some require offering the property at a fixed price (or some price below market value), while others (like the one here) simply allow the holder to purchase the property on the same terms as a third party. *See Shiver v. Benton*, 251 Ga. 284, 304 S.E.2d 903, 905 (1983). They are akin to – and sometimes confused with – options. *See Steinberg v. Sachs*, 837 So.2d 503, 505 (Fla. 3d DCA 2003); *Points v. Barnes*, 301 So.2d 102, 104 (Fla. 4th DCA 1974). An option contract is "a unilateral contract which gives the option holder the right to purchase under the terms and conditions of the option agreement." *S. Inv. Corp. v. Norton*, 57 So.2d 1, 2 (Fla. 1952). Unlike an option, however, a right of first refusal does not grant the power to compel an unwilling owner to sell. *See, e.g.*, 6 Am. L. Prop. § 26.64.

Whether the common law rule against perpetuities applies to a right of first refusal is a question of first impression in this Court. The district courts are divided on the issue. *Compare Old Port Cove*, 954 So.2d at 743 (doubting that the rule applied to rights of first refusal); *and Warren v. City of Leesburg*, 203 So.2d 522, 526 (Fla. 2d DCA 1967) (suggesting that the rule does not apply to rights of first refusal); *with Fallschase*, 696 So.2d at 835 (holding that the rule does apply to rights of first refusal); *Reagan*, 321 So.2d at 133 (same); *and Points*, 301 So.2d at 104 (same).

Other jurisdictions are likewise split. Of those that have considered this issue, a majority have concluded that the rule applies to rights of first refusal.[2] A notable minority, however, has held otherwise.[3] We find the minority view more consistent with Florida law.

Where they discuss the rationale, courts adopting the majority view generally conclude that an option or right of first refusal creates an interest in property. *Ferrero*, 536 A.2d at 1139 ("As rights of first refusal are interests in property, the great majority of American jurisdictions have applied the Rule Against Perpetuities to such rights."); *see, e.g., Stuart Kingston*, 596 A.2d at 1384; *Gore*, 867 P.2d at 338; *Martin*, 348 N.E.2d at 309; *Pace*, 347 So.2d at 1317; *Melcher*, 435 P.2d at 114; *McHugh*, 380 S.E.2d at 874; *Smith*, 296 S.E.2d at 854. In Florida, however, an option does *not* create a legal or equitable interest in property. As we explained over fifty years ago, "until an optionee exercises the right to purchase in accordance with the terms of his option he has no estate, either legal or equitable, in the lands involved." *Gautier v. Lapof*, 91 So.2d 324, 326 (Fla.1956). We have since reiterated that principle. *See Leon County Educ. Facilities Auth. v. Hartsfield*, 698 So.2d 526, 530 (Fla.1997) ("[T]his Court has long held that the status of parties to the ordinary lease with an option to purchase remains that of landlord and tenant until the option is exercised and that the lessee has no equitable interest in the property."); *BancFlorida v. Hayward*, 689 So.2d 1052, 1054 (Fla.1997) ("Under Florida law, an option to purchase property creates neither an equitable interest nor an equitable remedy.").

As these cases show, Florida law has consistently held that an option does not create an interest in land. Therefore, a right of first refusal – which may or may not ripen into an option depending on whether the owner decides

to sell, *see, e.g., Pearson*, 497 So.2d at 900 – cannot create an interest in land, either. *See Randolph*, 727 N.W.2d at 392 ("Because the right of first refusal gives the holder fewer rights than an option, we conclude that if the latter does not create an interest in land, neither does the former."); *Robroy*, 622 P.2d at 370 ("The holder of a right of first refusal has far less of an interest in land than the holder of an ordinary option.").

This conclusion is consistent with our approach in *Iglehart*, 383 So.2d 610. There, we considered whether a fixed-price right of first refusal for an unlimited duration should be analyzed under the rule against perpetuities or under the rule against unreasonable restraints on alienation. *Id.* at 613. We concluded that it was more appropriately analyzed under the rule against unreasonable restraints: "Although we conclude that the option in this case might be subject to the rule against perpetuities, such a finding is not necessary to answer the first question since *we find this repurchase option is more appropriately classified as an unreasonable restraint on the use of the subject property.*" *Id.* at 614 (emphasis added). We held that the fixed-price repurchase option at issue violated the rule against unreasonable restraints, but recognized that "the law is clear that a repurchase option at market or appraised value for unlimited duration is not an unreasonable restraint." *Id.* at 615.

Although in *Iglehart* we found it unnecessary to address whether a right of first refusal is subject to the rule against perpetuities, our opinion noted our preference for analyzing rights of first refusal under the rule against unreasonable restraints. *Id.* at 616; *see also* 6 Am. L. Prop. § 26.66 (arguing that courts should have analyzed options and preemptions under the rule against unreasonable restraints on alienation rather than the rule against perpetuities because "[e]verything of value in the option device could have been preserved, and its evils combated more effectively than can be done through the rule against perpetuities").

We reaffirm our holding in *Iglehart* that rights of first refusal should be analyzed under the rule against unreasonable restraints, and close the door left open there by concluding that rights of first refusal are not subject to the common law rule against perpetuities.[4] A right of first refusal is a contractual right. The rule against perpetuities, on the other hand, is "a rule of property law, not of contract law." *Iglehart*, 383 So.2d at 614; *see also Warren*, 203 So.2d at 526 (stating that an option does not vest the holder with an interest in the land, but is "strictly a contractual right, not a property right, while the rule against perpetuities is a rule of property rather than a rule of contract").[5]

In holding that the rule against perpetuities does not apply to rights of first refusal, we recognize that we are adopting the minority view. It also, however, appears to be the more modern one. *See* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 Cal. L.Rev. 1867, 1908 (1986) ("The modern trend … has been to free preemptive options from the Rule and to subject them instead to the rule against unreasonable restraints on alienation."). For example, the First Restatement of Property identified an option as subject to the rule. *See* Restatement (First) of Property § 413(1) (1944); *see also id.* cmt. e ("Preemptive provisions, being analogous to options upon a condition precedent, must comply with the rule against perpetuities in so far as their maximum duration is concerned."). The Third Restatement, however, reversed course, stating that the rule does *not* apply to options or rights of first refusal. Restatement (Third) of Property: Servitudes, § 3.3 (2000). The historical development is explained:

> In the late 19th century … courts began to apply [the rule] to commercial land transactions, including options [and] rights of first refusal…. The virtue of the rule was that it invalidated all interests that lacked a durational limit, thus clearing titles without any need to inquire into the utility of the arrangement. Its vice was that it operated arbitrarily, applying a time period totally unsuited to commercial transactions….
>
> Although commentators had long complained that the rule against perpetuities should not be applied to commercial transactions, it was not until the 1980s that courts in any number followed suit…. While

> some courts continue to adhere to the old view, there is authority to support using restraints-on-alienation doctrine rather than the rule against perpetuities, which blindly invalidates transactions without regard to merit.

Id. cmt. b (emphasis added). We agree that applying the rule to rights of first refusal does not serve the rule's purposes, which is "to ensure that property is reasonably available for development by prohibiting restraints that remove property from a beneficial use for an extended period of time." *Iglehart*, 383 So.2d at 613. They are better analyzed under the rule prohibiting unreasonable restraints on alienation. *See, e.g., Cambridge Co.*, 700 P.2d at 542 ("Because the preemptive right… poses no threat to … free alienability… we perceive no reason to invalidate the right under the rule against perpetuities."); *Bortolotti*, 866 N.E.2d at 889 ("Because the holder of a right of first refusal may only choose to purchase property on the same terms as a bona fide offer…. the rule against perpetuities logically should not apply. In our view, this position is better suited for business transactions, such as the one here, in which the right of first refusal was created."); *Metro. Transp. Auth.*, 501 N.Y.S.2d 306, 492 N.E.2d at 385 (recognizing that, at least in commercial settings, rights of first refusal are "best regulated by the rule against unreasonable restraints on alienation").

[Note: We will study the rule against unreasonable restraints on alienation in the context of covenants. This rule, which attempts to protect the free alienability of property, applies to conditions in grants and to covenants, which are promises concerning one's use of land that do are enforceable as agreements rather than as conditions of continued title.]

---

1. The effective date of the statute was January 1, 1979. Ch. 77-23, § 2, Laws of Fla. The parties executed the Agreement in 1977, so this statute does not apply.↩

1. *See, e.g., HSL Linda Gardens Props., Ltd. v. Seymour*, 163 Ariz. 396, 788 P.2d 129, 130 (Ct.App.1990); *Estate of Johnson v. Carr*, 286 Ark. 369, 691 S.W.2d 161, 161 (1985); *Strong v. Theis*, 187 Cal.App.3d 913, 232 Cal.Rptr. 272, 276 (1986); *Neustadt v. Pearce*, 145 Conn. 403, 143 A.2d 437, 438 (1958); *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1383 (Del. 1991); *Martin v. Prairie Rod & Gun Club*, 39 Ill.App.3d 33, 348 N.E.2d 306, 309 (1976); *Buck v. Banks*, 668 N.E.2d 1259, 1261 (Ind.Ct.App. 1996); *Trecker v. Langel*, 298 N.W.2d 289, 291 (Iowa 1980); *Gore v. Beren*, 254 Kan. 418, 867 P.2d 330, 338 (1994); *Low v. Spellman*, 629 A.2d 57, 58 (Me. 1993); *Ferrero Constr. Co. v. Dennis Rourke Corp.*, 311 Md. 560, 536 A.2d 1137, 1139 (1988); *Pace v. Culpepper*, 347 So.2d 1313, 1317 (Miss.1977); *Nickels v. Cohn*, 764 S.W.2d 124, 132 (Mo.Ct.App.1989); *Mazzeo v. Kartman*, 234 N.J.Super. 223, 560 A.2d 733, 737 (App.Div.1989); *Village of Pinehurst v. Reg'l Inv. of Moore, Inc.*, 330 N.C. 725, 412 S.E.2d 645, 646 (1992); *Schafer v. Deszcz*, 120 Ohio App.3d 410, 698 N.E.2d 60, 62 (1997); *Webb v. Reames*, 326 S.C. 444, 485 S.E.2d 384, 385 (Ct.App.1997); *Clark v. Shelton*, 584 P.2d 875, 877 (Utah 1978); *Lake of the Woods Ass'n v. McHugh*, 238 Va. 1, 380 S.E.2d 872, 874 (1989); *Smith v. VanVoorhis*, 170 W.Va. 729, 296 S.E.2d 851, 854 (1982); *Browe v. Rasmussen*, 121 Wis.2d 697, 359 N.W.2d 181, 1984 WL 180227 (Wis.Ct.App. 1984); *see also Hansen v. Stroecker*, 699 P.2d 871, 873 (Alaska 1985) (recognizing that under the traditional approach options in gross are subject to the rule, but adopting the "wait-and-see" approach); *Byke*, 680 P.2d at 195 (finding the rule applicable to an option, but imposing a reasonable timeframe to avoid a violation); *Campbell v. Campbell*, 313 Ky. 249, 230 S.W.2d 918, 920 (1950) ("The general rule recognized by the great majority of courts is that an option … extending beyond the period limited by the rule against perpetuities, violates such rule…."); *Melcher v. Camp*, 435 P.2d 107, 115 (Okla.1967) ("[T]he interest sufficient to invoke the … rule against perpetuities is created and transferred in the ordinary option."); *Hall v. Crocker*, 192 Tenn. 506, 241 S.W.2d 548, 549 (1951) (recognizing that a fixed price right to repurchase must not violate the rule).↩

1. *See, e.g., Robertson v. Murphy*, 510 So.2d 180, 182 (Ala. 1987); *Cambridge Co. v. East Slope Inv. Corp.*, 700 P.2d 537, 542 (Colo. 1985); *Shiver*, 304 S.E.2d at 906; *Bortolotti v. Hayden*, 449 Mass. 193, 866 N.E.2d 882, 889 (2007); *Randolph v. Reisig*, 272 Mich.App. 331, 727 N.W.2d 388, 392 (2006); *Metro. Transp. Auth. v. Bruken Realty Corp.*, 67 N.Y.2d 156, 501 N.Y.S.2d 306, 492 N.E.2d 379, 385 (1986); *Cherokee Water Co. v. Forderhause*, 641 S.W.2d 522, 526 (Tex.1982); *Robroy Land Co. v. Prather*, 95 Wash.2d 66, 622 P.2d 367, 369 (1980); *Hartnett v. Jones*, 629 P.2d 1357, 1360 (Wyo.1981); *see also Weber v. Texas Co.*, 83 F.2d 807, 808 (5th Cir.1936) ("The option under consideration is within neither the purpose nor the reason for the rule."); *cf. Great Bay Sch. & Training Ctr. v. Simplex Wire & Cable Co.*, 131 N.H. 682, 559 A.2d 1329, 1331 (1989)(stating that the rule does not apply to all preemptive rights, just those that "pose a substantial restraint on alienation"); *Power Gas Mktg. & Transmission, Inc. v. Cabot Oil & Gas Corp.*, 2008 Pa. Super 54, 948 A.2d 807 (2008) (holding that a right of first refusal in an oil and gas lease agreement is not subject to the rule against perpetuities; stating "we also question whether, in the first instance, rights of first refusal… ever concern propertied estates such that they should be brought within the rule against perpetuities").↩

1. Neither party has addressed whether the right of first refusal at issue here is an unreasonable restraint on alienation. We agree with the Fourth District, however, that because it is not for a fixed price, it is not an unreasonable restraint. *Old Port Cove*, 954 So.2d at 746; *see Iglehart*, 383 So.2d at 615 ("[T]he law is clear that a repurchase option at market or appraised value for unlimited duration is not an unreasonable restraint.").↩

1. Because a right of first refusal is a contractual right, not a property interest, we need not consider section 689.225(6)(c), Florida Statutes, which permits reformation of "nonvested *property* interests" created before October 1, 1988.↩

Texaco Refining and Marketing, Inc. v. Jack Samowitz et al.,

213 Conn. 676 (1990)

Walter R. Hampton, Jr., with whom were Donald L. Mackie and, on the brief, Lawrence H. Lissitzyn, for the appellants (defendants).

Jerome A. Mayer, with whom was Kim E. Nolan, for the appellee (plaintiff).

Peters, C.J.

This appeal concerns the validity, under General Statutes § 47-33a and the common law rule against perpetuities, of an option to purchase real property contained in a long-term commercial lease. The named plaintiff, Texaco Refining and Marketing, Inc., brought an action for specific performance of an option contract against the defendants, Jack Samowitz, Alex Klein, Sheila Klein, Gloria Walkoff and Marilyn Moss, as successors in interest to the lessor of a lease executed and recorded in 1964. The trial court rendered judgment for the plaintiff, and the defendants have appealed. We transferred their appeal here in accordance with Practice Book § 4023. We find no reversible error.

The trial court relied on a stipulation between the parties for its finding of facts. On June 3, 1964, the named plaintiff and Kay Realty Corporation, the predecessor in interest of the defendants, executed a lease for property in Southington. The term of the leasehold was fifteen years, subject to renewal by the lessee, the plaintiff, for three additional five year periods. The plaintiff exercised two of these options for renewal.

The provision of the lease at issue in this appeal granted the plaintiff "the exclusive right, at lessee's option, to purchase the demised premises … at any time during the term of this lease or an extension or renewal thereof, from and after the 14th year of the initial term for the sum of $125,000." On August 14, 1987, during the second renewal

period under the lease, the plaintiff gave notification, by certified mail, of its exercise of its option to purchase. When the defendants refused to transfer the property, the plaintiff brought this action, on December 30, 1987, for a judicial order of specific performance.

The trial court found that the plaintiff had demonstrated that it was ready, willing and able to perform its obligations under the contract, and that the option contained in its lease was supported by consideration. Noting that the terms of the lease had originally been negotiated by two corporations bargaining at arm's length, the court concluded that the option was enforceable. The court expressly considered and rejected both the statutory and the common law defenses that the defendants reassert in this appeal. Although we do not necessarily subscribe to the trial court's reasoning, we concur in its judgment on alternate grounds. *Bernstein v. Nemeyer*, 213 Conn. 665, 669, 570 A.2d 164 (1990); *Favorite v. Miller*, 176 Conn. 310, 317, 407 A.2d 974 (1978).

[The court rejected the the statutory defense to specific performance].

The defendants rely on the common law rule against perpetuities as their second argument for the unenforceability of the plaintiff's option to purchase their property. The rule against perpetuities states that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." J. Gray, The Rule Against Perpetuities (4th Ed. 1942) p. 191; *Connecticut Bank & Trust Co. v. Brody*, 174 Conn. 616, 623, 392 A.2d 445 (1978). The defendants maintain that the option in this case did not vest within the time span mandated by the rule. We disagree.

The trial court determined that the option in the lease agreement did not violate the rule against perpetuities by construing the lease agreement as a series of discrete undertakings, first for an initial fourteen year term, and thereafter for each renewal term. Because the option could be exercised only within one of these discrete terms, none of which exceeded twenty-one years in length, the court held that the interest in the option would necessarily vest within the time period specified by the rule against perpetuities.

Whatever might be the merits of the trial court's construction of the lease agreement, we prefer to consider a more basic question: do options in long-term leases fall within the jurisdiction of the rule against perpetuities? Our precedents indicate that the rule applies to an unrestricted option to purchase real property; *Neustadt v. Pearce*, 145 Conn. 403, 405, 143 A.2d 437 (1958); *H. J. Lewis Oyster Co. v. West*, 93 Conn. 518, 530, 107 A. 138 (1919); but not to an option to renew the term of a real property lease. *Lonergan v. Connecticut Food Store, Inc.*, 168 Conn. 122, 124, 357 A.2d 910 (1975). We have not, however, previously considered the relationship between the rule against perpetuities and an option to purchase contained in a long-term commercial lease of real property.

The defendants have offered no reason of policy why we should extend the ambit of the rule against perpetuities to cover an option to purchase contained in a commercial lease. "The underlying and fundamental purpose of the rule is founded on the public policy in favor of free alienability of property and against restricting its marketability over long periods of time by restraints on its alienation." *Connecticut Bank & Trust Co. v. Brody*, supra, 624; 4 Restatement, Property (1944) pp. 2129-33. An option coupled with a long-term commercial lease is consistent with these policy objectives because it stimulates improvement of the property and thus renders it more rather than less marketable. 3 L. Simes & A. Smith, The Law of Future Interests (2d Ed. 1956) p. 162. Any extension of the rule against perpetuities would, furthermore, be inconsistent with the legislative adoption of the "second look" doctrine, pursuant to which an interest subject to the rule may be validated, contrary to the common law, by the occurrence of events subsequent to the ereation of the interest. See General Statutes § 45-95; *Connecticut Bank & Trust Co. v. Brody*, supra, 627-28.

We therefore conclude that an option to purchase contained in a commercial lease, at least if the option must be exercised within the leasehold term, is valid without regard to the rule against perpetuities. This position is consistent with the weight of authority in the United States. See, e.g., *Dozier v. Troy Drive-in-Theatres*, 265 Ala. 93, 101-103, 89 So. 2d 537 (1956); *Cambridge Co. v. East Slope Investment Corporation*, 700 P.2d 537, 540 (Colo. 1985);

Wing, Inc. v. Arnold, 107 So. 2d 765, 768-69 (Fla. App. 1959); *St Regis Paper Co. v. Brown*, 247 Ga. 361, 363-64, 276 S.E.2d 24 (1981); *Keogh v. Peck*, 316 Ill. 318, 333-35, 147 N.E. 266 (1925); *Hollander v. Central Metal Co.*, 109 Md. 131, 157-61, 71 A. 442 (1908); *Quarto Mining Co. v. Litman*, 42 Ohio St. 2d 73, 78, 326 N.E.2d 676, cert. denied, 423 U.S. 866, 96 S. Ct. 128, 46 L. Ed. 2d 96 (1975); *Producers Oil Co. v. Gore*, 610 P.2d 772, 775 (Okla. 1980); *Hoover* v. *Ford's Prairie Coal Co.*, 145 Wash. 295, 306, 259 P. 1079 (1927); contra *First Huntington National Bank v. Gideon-Broh Realty Co.*, 139 W. Va. 130, 152-53, 79 S.E.2d 675 (1953). The commentators have, for a long time, unanimously supported what has become the majority view. See, e.g., E. Abbot, "Leases and the Rule against Perpetuities," 27 Yale L.J. 878, 885-89 (1918); 6 American Law of Property (A. Casner ed. 1952) § 24.57; A. Langeluttig, "Options to Purchase and the Rule against Perpetuities," 17 Va. L. Rev. 461, 464-71 (1931); 5A R. Powell, Real Property (1989) § 771 [2]; 4 Restatement, Property (1944) § 395; 3 L. Simes & A. Smith, supra, p. 162; 4A G. Thompson, Real Property (1979) p. 618. The plaintiff's option in this case was, therefore, enforceable.

2.3. Restraints on Marriage

Shapira v. Union National Bank,

39 Ohio Misc. 28 (Ohio Probate Ct. 1974)

Mr. Dennis Haines, for plaintiff.

Mr. Martin Novak, for defendant State of Israel.

Mr. Irwin I. Kretzer, for defendant Union National Bank.

Henderson, J.

This is an action for a declaratory judgment and the construction of the will of David Shapira, M. D., who died April 13, 1973, a resident of this county. By agreement of the parties, the case has been submitted upon the pleadings and the exhibit.

The portions of the will in controversy are as follows:

"Item VIII. All the rest, residue and remainder of my estate, real and personal, of every kind and description and wheresoever situated, which I may own or have the right to dispose of at the time of my decease, I give, devise and bequeath to my three (3) beloved children, to wit: Ruth Shapira Aharoni, of Tel Aviv, Israel, or wherever she may reside at the time of my death; to my son Daniel Jacob Shapira, and to my son Mark Benjamin Simon Shapira in equal shares, with the following qualifications: * * *

"(b) My son Daniel Jacob Shapira should receive his share of the bequest only, if he is married at the time of my death to a Jewish girl whose both parents were Jewish. In the event that at the time of my death he is not married to a Jewish girl whose both parents were Jewish, then his share of this bequest should be kept by my executor for a period of not longer than seven (7) years and if my said son Daniel Jacob gets married within the seven year period to a Jewish girl whose both parents were Jewish, my executor is hereby instructed to turn over his share of my bequest to him. In the event, however, that my said son Daniel Jacob is unmarried within the seven (7) years after my death to a Jewish girl whose both parents were Jewish, or if he is married to a non Jewish girl, then his share of my estate, as provided in item 8 above should go to The State of Israel, absolutely."

The provision for the testator's other son Mark, is conditioned substantially similarly. Daniel Jacob Shapira, the plaintiff, alleges that the condition upon his inheritance is unconstitutional, contrary to public policy and unenforceable because of its unreasonableness, and that he should be given his bequest free of the restriction. Daniel is 21 years of age, unmarried and a student at Youngstown State University.

The provision in controversy is an executory devise or legacy, under which vesting of the estate of Daniel Jacob Shapira or the State of Israel is not intended to take place necessarily at the death of the testator, but rather conditionally, at a time not later than seven years after the testator's death. The executory aspect of the provision, though rather unusual, does not render it invalid. *Heath* v. *City of Cleveland* (1926), 114 Ohio St. 535.

CONSTITUTIONALITY

Plaintiff's argument that the condition in question violates constitutional safeguards is based upon the premise that the right to marry is protected by the Fourteenth Amendment to the Constitution of the United States… . . The court concludes … that the upholding and enforcement of the provisions of Dr. Shapira's will conditioning the bequests to his sons upon their marrying Jewish girls does not offend the Constitution of Ohio or of the United States.

PUBLIC POLICY

The condition that Daniel's share should be "turned over to him if he should marry a Jewish girl whose both parents were Jewish" constitutes a partial restraint upon marriage. If the condition were that the beneficiary not marry anyone, the restraint would be general or total, and, at least in the case of a first marriage, would be held to be contrary to public policy and void. A partial restraint of marriage which imposes only reasonable restrictions is valid, and not contrary to public policy: 5 Bowe-Parker: Page on Wills 460, Section 44.25; 56 Ohio Jurisprudence 2d 243, Wills, Section 729; 52 American Jurisprudence 2d 1023, Marriage, Section 181. The great weight of authority in the United States is that gifts conditioned upon the beneficiary's marrying within a particular religious class or faith are reasonable. 5 Bowe-Parker; Page on Wills 461, Section 44.25; 52 American Jurisprudence 2d 1025, Marriage, Section 183. 56 Ohio Jurisprudence 2d 245, Wills, Section 731; 1 Prentice-Hall, Estate Planning, Law of Wills, 373, Paragraph 375.20; 1 Restatement of the Law, Trusts 2d, 166, Section 62 (h); *National Bank v. Snodgrass (supra)*, annotation, 50 A. L. R. 2d 740; *Gordon v. Gordon, supra*; In re Harris (1955), 143 N. Y. Supp. 2d 746; *Matter of Seaman* (1916), 218 N. Y. 77, 112 N. E. 576; *Matter of Liberman* (1939), 279 N. Y. 458, 18 N. E. 2d 658; *In re Silverstein's Will* (1956), 155 N. Y. Supp. 2d 598; *In re Clayton's Estate* (Phila. Co. Pa. 1930), 13 D. & C. 413; *Pacholder v. Rosenheim* (1916), 129 Md. 455, 99 A. 672.

Plaintiff contends, however, that in Ohio a condition such as the one in this case is void as against the public policy of this state. In Ohio, as elsewhere, a testator may not attach a condition to a gift which is in violation of public policy. 56 Ohio Jurisprudence 2d 238, Wills, Section 722; *Neidler v. Donaldson* (P. C. Seneca 1966), 9 Ohio Misc. 208, 224 N. E. 2d 404, 38 O. O. 2d 360. There can be no question about the soundness of plaintiff's position that the public policy of Ohio favors freedom of religion and that it is guaranteed by Section 7, Article I of the Ohio Constitution, providing that "all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience." Plaintiff's position that the free choice of religious practice cannot be circumscribed or controlled by contract is substantiated by *Hackett v. Hackett* (C. A. Lucas 1958), 78 Ohio Law Abs. 485, 150 N. E. 2d 431. This case held that a covenant in a separation agreement, incorporated in a divorce decree, that the mother would rear a daughter in the Roman Catholic faith was unenforceable. However, the controversial condition in the case at bar is a partial restraint upon marriage and not a covenant to restrain the freedom of religious practice; and, of course, this court is not being asked to hold the plaintiff in contempt for failing to marry a Jewish girl of Jewish parentage.

Counsel contends that if "Dr. David Shapira, during his life, had tried to impose upon his son those restrictions set out in his Will he would have violated the public policy of Ohio as shown in *Hackett* v. *Hackett.* The public policy is equally violated by the restrictions Dr. Shapira has placed on his son by his Will." This would be true, by analogy, if Dr. Shapira, in his lifetime, had tried to force his son to marry a Jewish girl as the condition of a completed gift. But it is not true that if Dr. Shapira had agreed to make his son an inter-vivos gift if he married a Jewish girl within seven years, that his son could have forced him to make the gift free of the condition.

It is noted, furthermore, in this connection, that the courts of Pennsylvania distinguish between testamentary gifts conditioned upon the religious faith of the beneficiary and those conditioned upon marriage to persons of a particular religious faith. In *In Re Clayton's Estate, supra* (13 D. & C. 413), the court upheld a gift of a life estate conditioned upon the beneficiary's not marrying a woman of the Catholic faith. In its opinion the court distinguishes the earlier case of *Drace* v. *Klinedinst* (1922), 275 Pa. 266, 118 A. 907, in which a life estate willed to grandchildren, provided they remained faithful to a particular religion, was held to violate the public policy of Pennsylvania. In *Clayton's Estate*, the court said that the condition concerning marriage did not affect the faith of the beneficiary, and that the condition, operating only on the choice of a wife, was too remote to be regarded as coercive of religious faith.

But counsel relies upon an Ohio case much more nearly in point, that of *Moses* v. *Zook* (C. A., Wayne 1934), 18 Ohio Law Abs. 373. This case involves a will in which the testatrix gave the income of her residual estate in trust to her niece and nephews for two years and then the remainder to them. Item twelve provides as follows: "If any of my nieces or nephews should marry outside of the Protestant Faith, then they shall not receive any part of my estate devised or bequeathed to them." The will contained no gift over upon violation of the marriage condition. The holding of the trial court was that item twelve was null and void as being against public policy and the seven other items of the will should be administered as specified in detail by the court. There is nothing in the reported opinion to show to what extent, if at all, the question of public policy was in issue or contested in the trial court; only one of the several other unrelated holdings of the trial court (not including the public policy holding) was assigned as error; and although the Court of Appeals adopted the unexcepted-to holdings of the trial court, there is no citation of authorities or discussion concerning the public policy question itself. The case was apparently not appealed to the Supreme Court, and no other cases in Ohio have been cited or found. *Moses v. Zook* differs in its facts in not containing a gift over upon breach of the condition, and appears not to have been a sufficiently litigated or reasoned establishment of the public policy of Ohio which this court should be obliged to follow.

The only cases cited by plaintiff's counsel in accord with the holding in *Moses v. Zook* are some English cases and one American decision. In England the courts have held that partial restrictions upon marriage to persons not of the Jewish faith, or of Jewish parentage, were not contrary to public policy or invalid. *Hodgson v. Halford* (1879 Eng.) L. R. 11 Ch. Div. 959, 50 A. L. R. 2d 742. Other cases in England, however, have invalidated forfeitures of similarly conditioned provisions for children upon the basis of uncertainty or indefiniteness. *Re Blaiberg* [1940] Ch. 385, [1940] 1 All. Eng. 632, 50 A. L. R. 2d 746; *Clayton v. Ramsden* [1943], A. C. 320 [1943], 1 All. Eng. 16-H. L., 50 A. L. R. 2d 746; *Re Donn* [1944], Ch. 8 [1943], 2 All. Eng. 564, 50 A L. R. 2d 746; *Re Moss' Trusts* [1945], 1 All. Eng. 207, 61 Times L. 147, 50 A. L. R. 2d 747. Since the foregoing decisions, a later English case has upheld a condition precedent that a granddaughter-beneficiary marry a person of Jewish faith and the child of Jewish parents. The court distinguished the cases cited above as not applicable to a condition precedent under which the legatee must qualify for the gift by marrying as specified, and there was found to be no difficulty with indefiniteness where the legatee married unquestionably outside the Jewish faith. *Re Wolffe*[1953], 1 Week L. R. 1211 [1953] 2 All. Eng. 697, 50 A. L. R.2d 747.

The American case cited by plaintiff is that of *Maddox v. Maddox* (1854), 52 Va. (11 Grattan's)804. The testator in this case willed a remainder to his nice if she remain a member of the Socity of Friends. When the niece arrived at a marriageable age there were but five or six unmarried men of the society in the neighborhood in which she lived. She married a non-member and thus lost her own membership. The court held the condition to be an unreasonable restraint upon marriage and void, and that there being no gift over upon breach of the condition, the condition was in terrorem, and did not avoid the bequest. It can be seen that while the court considered the testamentary condition to be a restraint upon marriage, it was primarily one in restraint of religious faith. The court said that with the small number of eligible bachelors in the area the condition would have operated as a virtual

prohibition of the niece's marrying, and that she could not be expected to "go abroad" in search of a helpmate or to be subjected to the chance of being sought after by a stranger. The court distinguished the facts of its case from those in England upholding conditions upon marriage by observing that England was "already overstocked with inhabitants" while this country had "an unbounded extent of territory, a large portion of which is yet unsettled, and in which increase of population is one of the main elements of national prosperity." The other ground upon which the Virginia court rested its decision, that the condition was in terrorem because of the absence of a gift over, is clearly not applicable to the case at bar, even if it were in accord with Ohio law, because of the gift over to the State of Israel contained in the Shapira will.

In arguing for the applicability of the *Maddox v. Maddox* test of reasonableness to the case at bar, counsel for the plaintiff asserts that the number of eligible Jewish females in this county would be an extremely small minority of the total population especially as compared with the comparatively much greater number in New York, whence have come many of the cases comprising the weight of authority upholding the validity of such clauses. There are no census figures in evidence. While this court could probably take judicial notice of the fact that the Jewish community is a minor, though important segment of our total local population, nevertheless the court is by no means justified in judicial knowledge that there is an insufficient number of eligible young ladies of Jewish parentage in this area from which Daniel would have a reasonable latitude of choice. And of course, Daniel is not at all confined in his choice to residents of this county, which is a very different circumstance in this day of travel by plane and freeway and communication by telephone, from the horse and buggy days of the 1854 *Maddox v. Maddox* decision. Consequently, the decision does not appear to be an appropriate yardstick of reasonableness under modern living conditions.

Plaintiff's counsel contends that the Shapira will falls within the principle of *Fineman* v. *Central National Bank* (1961), 87 Ohio Law Abs. 236, 175 N.E. 2d 837, 18 O.O. 2d 33, holding that the public policy of Ohio does not countenance a bequest or devise conditioned on the beneficiary's obtaining a separation or divorce from his wife. Counsel argues that the Shapira condition would encourage the beneficiary to marry a qualified girl just to receive the bequest, and then to divorce her afterward. This possibility seems too remote to be a pertinent application of the policy against bequests conditioned upon divorce. Most other authorities agree with *Fineman v. Bank* that as a general proposition, a testamentary gift effective only on condition that the recipient divorce or separate from his or her spouse is against public policy and invalid. 14 A. L. R. 3d 1222. But no authorities have been found extending the principle to support plaintiff's position. Indeed, in measuring the reasonableness of the condition in queston, both the father and the court should be able to assume that the son's motive would be proper. And surely the son should not gain the advantage of the avoidance of the condition by the possibility of his own impropriety.

Finally, counsel urges that the Shapira condition tends to pressure Daniel, by the reward of money, to marry within seven years without opportunity for mature reflection, and jeopardizes his college education. It seems to the court, on the contrary, that the seven year time limit would be a most reasonable grace period, and one which would give the son ample opportunity for exhaustive reflection and fulfillment of the condition without constraint or oppression. Daniel is no more being "blackmailed into a marriage by immediate financial gain," as suggested by counsel, than would be the beneficiary of a living gift or conveyance upon consideration of a future marriage – an arrangement which has long been sanctioned by the courts of this state. *Thompson v. Thompson* (1867), 17 Ohio St. 649.

In the opinion of this court, the provision made by the testator for the benefit of the State of Israel upon breach or failure of the condition is most significant for two reasons. First, it distinguishes this case from the bare forfeitures in *Moses v. Zook*, and in *Maddox v. Maddox* (including the technical in terrorem objection), and, in a way, from the vagueness and indefiniteness doctrine of some of the English cases. Second, and of greater importance, it demonstrates the depth of the testator's conviction. His purpose was not merely a negative one designed to punish

his son for not carrying out his wishes. His unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine. But it is the duty of this court to honor the testator's intention within the limitations of law and of public policy. The prerogative granted to a testator by the laws of this state to dispose of his estate according to his conscience is entitled to as much judicial protection and enforcement as the prerogative of a beneficiary to receive an inheritance.

It is the conclusion of this court that public policy should not, and does not preclude the fulfillment of Dr. Shapira's purpose, and that in accordance with the weight of authority in this country, the conditions contained in his will are reasonable restrictions upon marriage, and valid.

2.4. Waste

Moore v. Phillips,

627 P.2d 831 (Kan. Ct. App. 1981).

Morgan Wright, Larned, for appellant.

Richard L. Friedeman, of Conner & Opie, Great Bend, for appellees.

Before Prager, Justice Presiding, Abbott, J., and J. Patrick Brazil, District Judge, Assigned.

Prager, Justice Presiding:

This is a claim for waste asserted against the estate of a life tenant by remaindermen, seeking to recover damages for the deterioration of a farmhouse resulting from neglect by the life tenant. The life tenant was Ada C. Brannan. The defendant-appellant is her executrix, Ruby F. Phillips. The claimants-appellees are Dorothy Moore and Kent Reinhardt, the daughter and grandson of Ada C. Brannan.

The facts in the case are essentially as follows: Leslie Brannan died in 1962. By his will, he left his wife, Ada C. Brannan, a life estate in certain farmland containing a farmhouse, with remainder interests to Dorothy Moore and Kent Reinhardt. Ada C. Brannan resided in the farmhouse until 1964. She then rented the farmhouse until August 1, 1965, when it became unoccupied. From that point on, Ada C. Brannan rented all of the farmland but nobody lived in the house. It appears that from 1969 to 1971 it was leased to the remaindermen, but they did not live there. It is undisputed that the remaindermen inspected the premises from time to time down through the years. In 1973, Ada C. Brannan petitioned for a voluntary conservatorship because of physical infirmities. In 1976, Ada C. Brannan died testate, leaving her property to others. Dorothy Moore and Kent Reinhardt were not included in Ada's bounty. From the record, it is clear that Ada C. Brannan and her daughter, Dorothy Moore, were estranged from about 1964 on. This estrangement continued until Ada Brannan's death, although there was minimal contact between them from time to time.

After Ada Brannan's death, Dorothy Moore and Kent Reinhardt filed a demand against the estate of Ada Brannan on the theory of waste to recover damages for the deterioration of the farmhouse. The total damages alleged were in the amount of $16,159. Both the district magistrate and the district judge inspected the premises and found deterioration due to neglect by the life tenant. The district court found the actual damages to the house to be $10,433. The executrix of Ada's estate denied any neglect or breach of duty by Ada Brannan as life tenant. She asserted the defenses of laches or estoppel, the statute of limitation, and abandonment. These affirmative defenses were rejected by the district magistrate and the district judge, except the defense of laches or estoppel which the district magistrate sustained. On appeal, the district judge found that the defense of laches or estoppel was not

applicable against the remaindermen in this case. Following entry of judgment in favor of the remaindermen, the executrix appealed.

It is important to note that the executrix does not contend, as points of error, that the life tenant was not responsible for deterioration of the farmhouse or that the action is barred by a statute of limitations. The amount of damages awarded is not contested. In her brief, the executrix-appellant asserts four points which essentially present a single issue: Whether the remaindermen, by waiting eleven years until the death of the life tenant before filing any claim or demand against the life tenant for neglect of the farmhouse, are barred by laches or estoppel?

The executrix contends, in substance, that laches and estoppel, although considered to be equitable defenses, are available in an action at law to recover damages. She points out that, under K.S.A. 58-2523, a remainderman may sue to prevent waste during the life of the tenant while the life tenancy is still in existence. She then notes that the remaindermen inspected the premises on numerous occasions during the eleven years the property was vacant; yet they made no demand that the farmhouse be kept in repair. They waited until the death of the life tenant to bring the action, because then they would not be faced with Ada's testimony which might defeat their claim.

The remaindermen, in their brief, dispute certain factual statements made by the executrix. They agree that the remaindermen had very limited contact with the life tenant after the estrangement. They contend that there is evidence to show the vast majority of the damage to the house occurred during the last two or three years of the life tenancy and that Dorothy Moore did, in fact, express concern to her mother about the deterioration of the house 15 to 20 times during the eleven-year period. They contend that mere passage of time does not constitute laches and that, in order to have laches or estoppel, the person claiming the same must show a detrimental change of position or prejudice of some kind. They argue that the executrix has failed to show any prejudice, since the fact of waste and deterioration is clear and undisputed and there is nothing the testimony of the life tenant could have added on that issue had she been at the trial. As to the failure of the remaindermen to file an action in the lifetime of the life tenant, the remaindermen argue that claimants had been advised to avoid contact with Ada Brannan unless it was absolutely necessary and that they did not want to make a claim during her lifetime since it would have only made a bad situation worse. They maintain that they had good reasons to wait until Ada's death to assert the claim.

In order to place this case in proper perspective, it would be helpful to summarize some of the basic principles of law applicable where a remainderman asserts a claim of waste against a life tenant. They are as follows:

> (1) A life tenant is considered in law to be a trustee or quasi-trustee and occupies a fiduciary relation to the remaindermen. The life tenant is a trustee in the sense that he cannot injure or dispose of the property to the injury of the rights of the remaindermen, but he differs from a pure trustee in that he may use the property for his exclusive benefit and take all the income and profits. *Windscheffel v. Wright*, 187 Kan. 678, 686, 360 P.2d 178 (1961); *In re Estate of Miller*, 225 Kan. 655, 594 P.2d 167 (1979).
>
> (2) It is the duty of a life tenant to keep the property subject to the life estate in repair so as to preserve the property and to prevent decay or waste. 51 Am.Jur.2d, Life Tenants and Remaindermen s 259, pp. 546-548. Stated in another way, the law imposes upon a tenant the obligation to return the premises to the landlord or remaindermen at the end of the term unimpaired by the negligence of the tenant. *Salina Coca-Cola Bottling Corp. v. Rogers*, 171 Kan. 688, 237 P.2d 218 (1951); *In re Estate of Morse*, 192 Kan. 691, 391 P.2d 117 (1964).

(3) The term "waste" implies neglect or misconduct resulting in material damages to or loss of property, but does not include ordinary depreciation of property due to age and normal use over a comparatively short period of time. *First Federal Savings & Loan Ass'n v. Moulds*, 202 Kan. 557, 451 P.2d 215 (1969).

(4) Waste may be either voluntary or permissive. Voluntary waste, sometimes spoken of as commissive waste, consists of the commission of some deliberate or voluntary destructive act. Permissive waste is the failure of the tenant to exercise the ordinary care of a prudent man for the preservation and protection of the estate.78 Am.Jur.2d, Waste s 3, p. 397.

(5) The owner of a reversion or remainder in fee has a number of remedies available to him against a life tenant who commits waste. He may recover compensatory damages for the injuries sustained. He may have injunctive relief in equity, or, in a proper case, may obtain a receivership. The same basic remedies are available against either a tenant for years or a life tenant. *Kimberlin v. Hicks*, 150 Kan. 449, 456, 94 P.2d 335 (1939).

(6) By statute in Kansas, K.S.A. 58-2523, "(a) person seized of an estate in remainder or reversion may maintain an action for waste or trespass for injury to the inheritance, notwithstanding an intervening estate for life or years."Thus a remainderman does not have to wait until the life tenant dies in order to bring an appropriate action for waste.

(7) Where the right of action of the remainderman or landlord is based upon permissive waste, it is generally held that the injury is continuing in nature and that the statute of limitations does not commence to run in favor of the tenant until the expiration of the tenancy. Under certain state statutes, it has been held that the period of limitation commences at the time the waste is committed. *Prescott, Exor. of Mary E. Prescott v. Grimes*, 143 Ky. 191, 136 S.W. 206 (1911); *In Re Stout's Estate*, 151 Or. 411, 50 P.2d 768 (1935).

(8) There is authority which holds that an action for waste may be lost by laches. *Harcourt v. White*, 28 Beavan's 303, 54 Eng.Reprint 382 (1860); 78 Am.Jur.2d, Waste s 38, p. 424. Likewise, estoppel may be asserted as a defense in an action for waste. The doctrine of laches and estoppel are closely related, especially where there is complaint of delay which has placed another at a disadvantage. Laches is sometimes spoken of as a species of estoppel. Laches is a wholly negative thing, the result of a failure to act; estoppel on the other hand may involve an affirmative act on the part of some party of the lawsuit. The mere passage of time is not enough to invoke the doctrine of laches. Each case must be governed by its own facts, and what might be considered a lapse of sufficient time to defeat an action in one case might be insufficient in another. Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. *Clark v. Chipman*, 212 Kan. 259, 510 P.2d 1257 (1973). The defense of laches may be applied in actions at law as well as in equitable proceedings. *McDaniel v. Messerschmidt*, 191 Kan. 461, 464, 382 P.2d 304 (1963). In *Osincup v. Henthorn*, 89 Kan. 58, 130 P. 652 (1913), it was held that laches is an equitable defense and will not bar a recovery from mere lapse of time nor where there is a reasonable excuse for nonaction of a party in making inquiry as to his rights or in asserting them.

The basic question for our determination is whether the district court erred in holding that the defense of laches or estoppel should not be applied in this case. We have concluded that the district court did not commit error in its rejection of the defense of laches or estoppel under the circumstances of this case. In reaching this conclusion, we have noted the following factors: The evidence is clear that the life tenant, Ada Brannan, failed to carry out

her duty as life tenant and quasi-trustee to keep the property in reasonable repair. The claim of waste does not arise out of any act on the part of the remaindermen. Preservation of the property was the responsibility of the life tenant. There was evidence to show that the vast majority of the damage to the farmhouse occurred during the last two or three years of the life tenancy. The fact that permissive waste occurred was proved beyond question. If the life tenant had been alive, she could not very well have disputed the fact that the property has been allowed to deteriorate. Hence, any delay in filing the action until after Ada's death could not have resulted in prejudice to her executrix. There is no evidence in the record to support the defense of estoppel.

Furthermore, the evidence was undisputed that the life tenant was an elderly woman who died in August of 1976 at the age of 83. The position of Dorothy Moore was that she did not wish to file an action which would aggravate her mother and take funds which her mother might need during her lifetime. Even though Dorothy Moore was estranged from her mother, the law should not require her to sue her mother during her lifetime under these circumstances. As noted above, it was the tenant's obligation to see that the premises were turned over to the remaindermen in good repair at the termination of the life estate. Under all the circumstances in this case, we hold that the district court did not err in rejecting the defense of laches or estoppel.

The judgment of the district court is affirmed.

Melms v. Pabst Brewing Co.,

104 Wis. 7 (1899)

Bloodgood, Kemper & Bloodgood, for appellants.

Winkler, Flanders, Smith, Bottum & Vilas, for respondent.

Winslow, J.

This is an action for waste, brought by reversioners against the defendant, which is the owner of an estate for the life of another in a quarter of an acre of land in the city of Milwaukee. The waste claimed is the destruction of a dwelling house upon the land, and the grading of the same down to the level of the street. The complaint demands double damages, under section 3176, Rev. St. 1898.

The quarter of an acre of land in question is situated upon Virginia street, in the city of Milwaukee, and was the homestead of one Charles T. Melms, deceased. The house thereon was a large brick building, built by Melms in the year 1864, and cost more than $20,000. At the time of the building of the house, Melms owned the adjoining real estate, and also owned a brewery upon a part of the premises. Charles T. Melms died in the year 1869, leaving his estate involved in financial difficulties. After his decease, both the brewery and the homestead were sold and conveyed to the Pabst Brewing Company, but it was held in the action of *Melms v. Brewing Co.*, 93 Wis. 140, 66 N. W. 244, that the brewing company only acquired Mrs. Melms' life estate in the homestead, and that the plaintiffs in this action were the owners of the fee, subject to such life estate. As to the brewery property, it was held in an action under the same title, decided at the same time, and reported in 93 Wis. 153, 66 N. W. 518, that the brewing company acquired the full title in fee.

The homestead consists of a piece of land 90 feet square, in the center of which the aforesaid dwelling house stood; and this parcel is connected with Virginia street on the south by a strip 45 feet wide and 60 feet long, making an exact quarter of an acre. It clearly appears by the evidence that after the purchase of this land by the brewing company the general character of real estate upon Virginia street about the homestead rapidly changed, so that soon after the year 1890 it became wholly undesirable and unprofitable as residence property. Factories and railway tracks increased in the vicinity, and the balance of the property was built up with brewing buildings, until the

quarter of an acre homestead in question became an isolated lot and building, standing from 20 to 30 feet above the level of the street, the balance of the property having been graded down in order to fit it for business purposes.

The evidence shows without material dispute that, owing to these circumstances, the residence, which was at one time a handsome and desirable one, became of no practical value, and would not rent for enough to pay taxes and insurance thereon; whereas, if the property were cut down to the level of the street, so that it was capable of being used as business property, it would again be useful, and its value would be largely enhanced. Under these circumstances, and prior to the judgment in the former action, the defendant removed the building, and graded down the property to about the level of the street, and these are the acts which it is claimed constitute waste.

The action was tried before the court without a jury, and the court found, in addition to the facts above stated, that the removal of the building and grading down of the earth was done by the defendant in 1891 and 1892, believing itself to be the owner in fee simple of the property, and that by said acts the estate of the plaintiffs in the property was substantially increased, and that the plaintiffs have been in no way injured thereby. Upon these findings the complaint was dismissed, and the plaintiffs appeal.

Opinion

Our statutes recognize waste, and provide a remedy by action, and the recovery of double damages therefor (Rev. St. 1898, § 3170 et seq.); but they do not define it. It may be either voluntary or permissive, and may be of houses, gardens, orchards, lands, or woods (*Id.* § 3171); but, in order to ascertain whether a given act constitutes waste or not, recourse must be had to the common law as expounded by the text-books and decisions.

In the present case a large dwelling house, expensive when constructed, has been destroyed, and the ground has been graded down, by the owner of the life estate, in order to make the property serve business purposes. That these acts would constitute waste under ordinary circumstances cannot be doubted. It is not necessary to delve deeply into the Year Books, or philosophize extensively as to the meaning of early judicial utterances, in order to arrive at this conclusion. The following definition of "waste" was approved by this court in *Bandlow v. Thieme*, 53 Wis. 57, 9 N. W. 920:

> It may be defined to be any act or omission of duty by a tenant of land which does a lasting injury to the freehold, tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance, or to destroy the identity of the property, or impair the evidence of title."In the same case it was also said: "The damage being to the inheritance, and the heir of the reversioner having the right of action to recover it, imply that the injury must be of a lasting and permanent character.

And in *Brock v. Dole*, 66 Wis. 142, 28 N. W. 334, it was also said that

> any material change in the nature and character of the buildings made by the tenant is waste, although the value of the property should be enhanced by the alteration.

These recent judicial utterances in this court settle the general rules which govern waste without difficulty, and it may be said, also, that these rules are in accord with the general current of the authorities elsewhere. But, while they are correct as general expressions of the law upon the subject, and were properly applicable to the cases under consideration, it must be remembered that they are general rules only, and, like most general propositions, are not to be accepted without limitation or reserve under any and all circumstances.

Thus the ancient English rule which prevented the tenant from converting a meadow into arable land was early softened down, and the doctrine of meliorating waste was adopted, which, without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the

betterment of the estate. Bewes, *Waste*, p. 134, and cases cited. Again, and in accordance with this same principle, the rule that any change in a building upon the premises constitutes waste has been greatly modified, even in England; and it is now well settled that, while such change may constitute technical waste, still it will not be enjoined in equity when it clearly appears that the change will be, in effect, a meliorating change, which rather improves the inheritance than injures it. *Doherty v. Allman*, 3 App. Cas. 709; *In re McIntosh*, 61 Law J. Q. B. 164.

Following the same general line of reasoning, it was early held in the United States that, while the English doctrine as to waste was a part of our common law, still that the cutting of timber in order to clear up wild land and fit it for cultivation, if consonant with the rules of good husbandry, was not waste, although such acts would clearly have been waste in England. *Tied. Real Prop.* (Eng. Ed.) § 74; Rice, *Mod. Law Real Prop.* §§ 160, 161; *Wilkinson v. Wilkinson*, 59 Wis. 557, 18 N. W. 527.

These familiar examples of departure from ancient rules will serve to show that, while definitions have remained much the same, the law upon the subject of waste is not an unchanging and unchangeable code, which was crystallized for all time in the days of feudal tenures, but that it is subject to such reasonable modifications as may be demanded by the growth of civilization and varying conditions. And so it is now laid down that the same act may be waste in one part of the country while in another it is a legitimate use of the land, and that the usages and customs of each community enter largely into the settlement of the question. *Tied. Real Prop.* (Eng. Ed.) § 73.

This is entirely consistent with, and in fact springs from, the central idea upon which the disability of waste is now, and always has been, founded, namely, the preservation of the property for the benefit of the owner of the future estate without permanent injury to it. This element will be found in all the definitions of waste, namely, that it must be an act resulting in permanent injury to the inheritance or future estate. It has been frequently said that this injury may consist either in diminishing the value of the inheritance, or increasing its burdens, or in destroying the identity of the property, or impairing the evidence of title.

The last element of injury so enumerated, while a cogent and persuasive one in former times, has lost most, if not all, of its force, at the present time. It was important when titles were not registered, and descriptions of land were frequently dependent upon natural monuments, or the uses to which the land was put; but since the universal adoption of accurate surveys, and the establishment of the system of recording conveyances, there can be few acts which will impair any evidence of title. *Doherty v. Allman*, *supra*; Bewes, *Waste*, pp. 129, 130, et seq. But the principle that the reversioner or remainder-man is ordinarily entitled to receive the identical estate, or, in other words, that the identity of the property is not to be destroyed, still remains, and it has been said that changes in the nature of buildings, though enhancing the value of the property, will constitute waste if they change the identity of the estate. *Brock v. Dole*, *supra*.

This principle was enforced in the last-named case, where it was held that a tenant from year to year of a room in a frame building would be enjoined from constructing a chimney in the building against the objection of his landlord. The importance of this rule to the landlord or owner of the future estate cannot be denied. Especially is it valuable and essential to the protection of a landlord who rents his premises for a short time. He has fitted his premises for certain uses. He leases them for such uses, and he is entitled to receive them back at the end of the term still fitted for those uses; and he may well say that he does not choose to have a different property returned to him from that which he leased, even if, upon the taking of testimony, it might be found of greater value by reason of the change.

Many cases will be found sustaining this rule; and that it is a wholesome rule of law, operating to prevent lawless acts on the part of tenants, cannot be doubted, nor is it intended to depart therefrom in this decision. The case now before us, however, bears little likeness to such a case, and contains elements so radically different from those present in *Brock v. Dole* that we cannot regard that case as controlling this one.

There are no contract relations in the present case. The defendants are the grantees of a life estate, and their rights may continue for a number of years. The evidence shows that the property became valueless for the purpose of residence property as the result of the growth and development of a great city. Business and manufacturing interests advanced and surrounded the once elegant mansion, until it stood isolated and alone, standing upon just enough ground to support it, and surrounded by factories and railway tracks, absolutely undesirable as a residence, and incapable of any use as business property. Here was a complete change of conditions, not produced by the tenant, but resulting from causes which none could control. Can it be reasonably or logically said that this entire change of condition is to be completely ignored, and the ironclad rule applied that the tenant can make no change in the uses of the property because he will destroy its identity? Must the tenant stand by, and preserve the useless dwelling house, so that he may at some future time turn it over to the reversioner, equally useless?

Certainly, all the analogies are to the contrary. As we have before seen, the cutting of timber, which in England was considered waste, has become in this country an act which may be waste or not, according to the surrounding conditions and the rules of good husbandry; and the same rule applies to the change of a meadow to arable land. The changes of conditions which justify these departures from early inflexible rules are no more marked nor complete than is the change of conditions which destroys the value of residence property as such, and renders it only useful for business purposes.

Suppose the house in question had been so situated that it could have been remodeled into business property; would any court of equity have enjoined such remodeling under the circumstances here shown, or ought any court to render a judgment for damages for such an act? Clearly, we think not. Again, suppose an orchard to have become permanently unproductive through disease or death of the trees, and the land to have become far more valuable, by reason of new conditions, as a vegetable garden or wheat field, is the life tenant to be compelled to preserve or renew the useless orchard, and forego the advantages to be derived from a different use? Or suppose a farm to have become absolutely unprofitable by reason of change of market conditions as a grain farm, but very valuable as a tobacco plantation, would it be waste for the life tenant to change the use accordingly, and remodel a now useless barn or granary into a tobacco shed? All these questions naturally suggest their own answer, and it is certainly difficult to see why, if change of conditions is so potent in the case of timber, orchards, or kind of crops, it should be of no effect in the case of buildings similarly affected.

It is certainly true that a case involving so complete a change of situation as regards buildings has been rarely, if ever, presented to the courts, yet we are not without authorities approaching very nearly to the case before us. Thus, in the case of *Doherty v. Allman*, before cited, a court of equity refused an injunction preventing a tenant for a long term from changing storehouses into dwelling houses, on the ground that by change of conditions the demand for storehouses had ceased, and the property had become worthless, whereas it might be productive when fitted for dwelling houses.

Again, in the case of *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588, which was an action for permissive waste against a tenant in dower, who had permitted large barns and outbuildings upon a plantation to fall into decay, it was held that, as these buildings had been built before the Civil War to accommodate the operation of the plantation by slaves, it was not necessarily waste to tear them down, or allow them to remain unrepaired, after the war, when the conditions had completely changed by reason of the emancipation, and the changed methods of use resulting therefrom; and that it became a question for the jury whether a prudent owner of the fee, if in possession, would have suffered the unsuitable barns and buildings to have fallen into decay, rather than incur the cost of repair.

This last case is very persuasive and well reasoned, and it well states the principle which we think is equally applicable to the case before us. In the absence of any contract, express or implied, to use the property for a specified purpose, or to return it in the same condition in which it was received, a radical and permanent change of

surrounding conditions, such as is presented in the case before us, must always be an important, and sometimes a controlling, consideration upon the question whether a physical change in the use of the buildings constitutes waste. In the present case this consideration was regarded by the trial court as controlling, and we are satisfied that this is the right view.

This case is not to be construed as justifying a tenant in making substantial changes in the leasehold property, or the buildings thereon, to suit his own whim or convenience, because, perchance, he may be able to show that the change is in some degree beneficial. Under all ordinary circumstances the landlord or reversioner, even in the absence of any contract, is entitled to receive the property at the close of the tenancy substantially in the condition in which it was when the tenant received it; but when, as here, there has occurred a complete and permanent change of surrounding conditions, which has deprived the property of its value and usefulness as previously used, the question whether a life tenant, not bound by contract to restore the property in the same condition in which he received it, has been guilty of waste in making changes necessary to make the property useful, is a question of fact for the jury under proper instructions, or for the court, where, as in the present case, the question is tried by the court.

Judgment affirmed.

Baker v. Weedon,

262 So.2d 641 (Miss. 1972)

Smith, Downs, Coleman & Ross, Corinth, for appellant.

Sharp & Fisher, Corinth, for appellee.

Patterson, Justice:

This is an appeal from a decree of the Chancery Court of Alcorn County. It directs a sale of land affected by a life estate and future interests with provision for the investment of the proceeds. The interest therefrom is to be paid to the life tenant for her maintenance. We reverse and remand.

John Harrison Weedon was born in High Point, North Carolina. He lived throughout the South and was married twice prior to establishing his final residence in Alcorn County. His first marriage to Lula Edwards resulted in two siblings, Mrs. Florence Weedon Baker and Mrs. Delette Weedon Jones. Mrs. Baker was the mother of three children, Henry Baker, Sarah Baker Lyman and Louise Virginia Baker Heck, the appellants herein. Mrs. Delette Weedon Jones adopted a daughter, Dorothy Jean Jones, who has not been heard from for a number of years and whose whereabouts are presently unknown.

John Weedon was next married to Ella Howell and to this union there was born one child, Rachel. Both Ella and Rachel are now deceased.

Subsequent to these marriages John Weedon bought Oakland Farm in 1905 and engaged himself in its operation. In 1915 John, who was then 55 years of age, married Anna Plaxico, 17 years of age. This marriage, though resulting in no children, was a compatible relationship. John and Anna worked side by side in farming this 152.95-acre tract of land in Alcorn County. There can be no doubt that Anna's contribution to the development and existence of Oakland Farm was significant. The record discloses that during the monetarily difficult years following World War I she hoed, picked cotton and milked an average of fifteen cows per day to protect the farm from financial ruin.

While the relationship of John and Anna was close and amiable, that between John and his daughters of his first marriage was distant and strained. He had no contact with Florence, who was reared by Mr. Weedon's sister in North Carolina, during the seventeen years preceding his death. An even more unfortunate relationship existed

between John and his second daughter, Delette Weedon Jones. She is portrayed by the record as being a nomadic person who only contacted her father for money, threatening on several occasions to bring suit against him.

With an obvious intent to exclude his daughters and provide for his wife Anna, John executed his last will and testament in 1925. It provided in part:

> Second; I give and bequeath to may beloved wife, Anna Plaxco Weedon all of my property both real, personal and mixed during her natural life and upon her death to her children, if she has any, and in the event she dies without issue then at the death of my wife Anna Plaxco Weedon I give, bequeath and devise all of my property to my grandchildren, each grandchild sharing equally with the other.
>
> Third; In this will I have not provided for my daughters, Mrs. Florence Baker and Mrs. Delett Weedon Jones, the reason is, I have given them their share of my property and they have not looked after and cared for me in the latter part of my life.

Subsequent to John Weedon's death in 1932 and the probate of his will, Anna continued to live on Oakland Farm. In 1933 Anna, who had been urged by John to remarry in the event of his death, wed J. E. Myers. This union lasted some twenty years and produced no offspring which might terminate the contingent remainder vested in Weedon's grandchildren by the will.

There was no contact between Anna and John Weedon's children or grandchildren from 1932 until 1964. Anna ceased to operate the farm in 1955 due to her age and it has been rented since that time. Anna's only income is $1000 annually from the farm rental, $300 per year from sign rental and $50 per month by way of social security payments. Without contradiction Anna's income is presently insufficient and places a severe burden upon her ability to live comfortably in view of her age and the infirmities therefrom.

In 1964 the growth of the city of Corinth was approaching Oakland Farm. A right-of-way through the property was sought by the Mississippi State Highway Department for the construction of U.S. Highway 45 bypass. The highway department located Florence Baker's three children, the contingent remaindermen by the will of John Weedon, to negotiate with them for the purchase of the right-of-way. Dorothy Jean Jones, the adopted daughter of Delette Weedon Jones, was not located and due to the long passage of years, is presumably dead. A decree pro confesso was entered against her.

Until the notice afforded by the highway department the grandchildren were unaware of their possible inheritance. Henry Baker, a native of New Jersey, journeyed to Mississippi to supervise their interests. He appears, as was true of the other grandchildren, to have been totally sympathetic to the conditions surrounding Anna's existence as a life tenant. A settlement of $20,000 was completed for the right-of-way bypass of which Anna received $7500 with which to construct a new home. It is significant that all legal and administrative fees were deducted from the shares of the three grandchildren and not taxed to the life tenant. A contract was executed in 1970 for the sale of soil from the property for $2500. Anna received $1000 of this sum which went toward completion of payments for the home.

There was substantial evidence introduced to indicate the value of the property is appreciating significantly with the nearing completion of U.S. Highway 45 bypass plus the growth of the city of Corinth. While the commercial value of the property is appreciating, it is notable that the rental value for agricultural purposes is not. It is apparent that the land can bring no more for agricultural rental purposes than the $100 per year now received.

The value of the property for commercial purposes at the time of trial was $168,500. Its estimated value within the ensuing four years is placed at $336,000, reflecting the great influence of the interstate construction upon the land. Mr. Baker, for himself and other remaindermen, appears to have made numerous honest and sincere efforts

to sell the property at a favorable price. However, his endeavors have been hindered by the slowness of the construction of the bypass.

Anna, the life tenant and appellee here, is 73 years of age and although now living in a new home, has brought this suit due to her economic distress. She prays that the property, less the house site, be sold by a commissioner and that the proceeds be invested to provide her with an adequate income resulting from interest on the trust investment. She prays also that the sale and investment management be under the direction of the chancery court.

The chancellor granted the relief prayed by Anna under the theory of economic waste. His opinion reflects:

> … (T)he change of the economy in this area, the change in farming conditions, the equipment required for farming, and the age of this complainant leaves the real estate where it is to all intents and purposes unproductive when viewed in light of its capacity and that a continuing use under the present conditions would result in economic waste.

The contingent remaindermen by the will, appellants here, were granted an interlocutory appeal to settle the issue of the propriety of the chancellor's decree in divesting the contingency title of the remaindermen by ordering a sale of the property.

The weight of authority reflects a tendency to afford a court of equity the power to order the sale of land in which there are future interests. Simes, *Law of Future Interest*, section 53 (2d ed. 1966), states:

> By the weight of authority, it is held that a court of equity has the power to order a judicial sale of land affected with a future interest and an investment of the proceeds, where this is necessary for the preservation of all interests in the land. When the power is exercised, the proceeds of the sale are held in a judicially created trust. The beneficiaries of the trust are the persons who held interests in the land, and the beneficial interests are of the same character as the legal interests which they formally held in the land.

See also Simes and Smith, *The Law of Future Interest*, § 1941 (2d ed. 1956).

This Court has long recognized that chancery courts do have jurisdiction to order the sale of land for the prevention of waste. *Kelly v. Neville*, 136 Miss. 429 (1924). In *Riley v. Norfleet*, 167 Miss. 420, 436-437 (1933), Justice Cook, speaking for the Court and citing *Kelly*, *supra*, stated:

> … The power of a court of equity on a plenary bill, with adversary interest properly represented, to sell contingent remainders in land, under some circumstances, though the contingent remaindermen are not then ascertained or in being, as, for instance, to preserve the estate from complete or partial destruction, is well established.

While Mississippi and most jurisdictions recognize the inherent power of a court of equity to direct a judicial sale of land which is subject to a future interest, nevertheless the scope of this power has not been clearly defined. It is difficult to determine the facts and circumstances which will merit such a sale.

It is apparent that there must be "necessity" before the chancery court can order a judicial sale. It is also beyond cavil that the power should be exercised with caution and only when the need is evident. *Lambdin v. Lambdin*, 209 Miss. 672 (1950). These cases, *Kelly*, *Riley* and *Lambdin*, *supra*, are all illustrative of situations where the freehold estate was deteriorating and the income therefrom was insufficient to pay taxes and maintain the property. In each of these this Court approved a judicial sale to preserve and maintain the estate. The appellants argue,

therefore, that since Oakland Farm is not deteriorating and since there is sufficient income from rental to pay taxes, a judicial sale by direction of the court was not proper.

The unusual circumstances of this case persuade us to the contrary. We are of the opinion that deterioration and waste of the property is not the exclusive and ultimate test to be used in determining whether a sale of land affected by future interest is proper, but also that consideration should be given to the question of whether a sale is necessary for the best interest of all the parties, that is, the life tenant and the contingent remaindermen. This "necessary for the best interest of all parties" rule is gleaned from Rogers, *Removal of Future Interest Encumbrances-Sale of the Fee Simple Estate*, 17 Vanderbilt L. Rev. 1437 (1964); Simes, *Law of Future Interest*, *supra*; Simes and Smith, *The Law of Future Interest*, § 1941 (1956); and appears to have the necessary flexibility to meet the requirements of unusual and unique situations which demand in justice an equitable solution.

Our decision to reverse the chancellor and remand the case for his further consideration is couched in our belief that the best interest of all the parties would not be served by a judicial sale of the entirety of the property at this time. While true that such a sale would provide immediate relief to the life tenant who is worthy of this aid in equity, admitted by the remaindermen, it would nevertheless under the circumstances before us cause great financial loss to the remaindermen.

We therefore reverse and remand this cause to the chancery court, which shall have continuing jurisdiction thereof, for determination upon motion of the life tenant, if she so desires, for relief by way of sale of a part of the burdened land sufficient to provide for her reasonable needs from interest derived from the investment of the proceeds. The sale, however, is to be made only in the event the parties cannot unite to hypothecate the land for sufficient funds for the life tenant's reasonable needs. By affording the options above we do not mean to suggest that other remedies suitable to the parties which will provide economic relief to the aging life tenant are not open to them if approved by the chancellor. It is our opinion, shared by the chancellor and acknowledged by the appellants, that the facts suggest an equitable remedy. However, it is our further opinion that this equity does not warrant the remedy of sale of all of the property since this would unjustly impinge upon the vested rights of the remaindermen.

Reversed and remanded.

Rodgers, P.J., and Jones, Inzer, and Robertson, JJ., concur.

3. Leaseholds

Christian Turner

3.1. Eviction

Berg v. Wiley,

264 N.W.2d 145 (Minn. 1978).

Leonard, Street and Deinard and Lowell J. Noteboom and David C. Zalk, Minneapolis, for appellants.

Mannikko & Swenson, Joseph L. Mannikko, Robert P. Larson, Wayzata, Robert G. Share, Minneapolis, for respondents.

Heard before Rogosheske, Peterson, and Wahl, JJ., and considered and decided by the court en banc.

Rogosheske, Justice.

Defendant landlord, Wiley Enterprises, Inc., and defendant Rodney A. Wiley (hereafter collectively referred to as Wiley) appeal from a judgment upon a jury verdict awarding plaintiff tenant, A Family Affair Restaurant, Inc., damages for wrongful eviction from its leased premises. The issues for review are whether the evidence was sufficient to support the jury's finding that the tenant did not abandon or surrender the premises and whether the trial court erred in finding Wiley's reentry forcible and wrongful as a matter of law. We hold that the jury's verdict is supported by sufficient evidence and that the trial court's determination of unlawful entry was correct as a matter of law, and affirm the judgment.

On November 11, 1970, Wiley, as lessor and tenant's predecessor in interest as lessee, executed a written lease agreement letting land and a building in Osseo, Minnesota, for use as a restaurant. The lease provided a 5-year term beginning December 1, 1970, and specified that the tenant agreed to bear all costs of repairs and remodeling, to "make no changes in the building structure" without prior written authorization from Wiley, and to "operate the restaurant in a lawful and prudent manner."Wiley also reserved the right "at (his) option (to) retake possession" of the premises "(s)hould the Lessee fail to meet the conditions of this Lease."[1] In early 1971, plaintiff Kathleen Berg took assignment of the lease from the prior lessee, and on May 1, 1971, she opened "A Family Affair Restaurant" on the premises. In January 1973, Berg incorporated the restaurant and assigned her interest in the lease to "A Family Affair Restaurant, Inc." As sole shareholder of the corporation, she alone continued to act for the tenant.

The present dispute has arisen out of Wiley's objection to Berg's continued remodeling of the restaurant without procuring written permission and her consequent operation of the restaurant in a state of disrepair with alleged health code violations. Strained relations between the parties came to a head in June and July 1973. In a letter dated June 29, 1973, Wiley's attorney charged Berg with having breached lease items 5 and 6 by making changes in the building structure without written authorization and by operating an unclean kitchen in violation of health

regulations. The letter demanded that a list of eight remodeling items be completed within 2 weeks from the date of the letter, by Friday, July 13, 1973, or Wiley would retake possession of the premises under lease item 7. Also, a June 13 inspection of the restaurant by the Minnesota Department of Health had produced an order that certain listed changes be completed within specified time limits in order to comply with the health code. The major items on the inspector's list, similar to those listed by Wiley's attorney, were to be completed by July 15, 1973.

During the 2-week deadline set by both Wiley and the health department, Berg continued to operate the restaurant without closing to complete the required items of remodeling. The evidence is in dispute as to whether she intended to permanently close the restaurant and vacate the premises at the end of the 2 weeks or simply close for about 1 month in order to remodel to comply with the health code. At the close of business on Friday, July 13, 1973, the last day of the 2-week period, Berg dismissed her employees, closed the restaurant, and placed a sign in the window saying "Closed for Remodeling." Earlier that day, Berg testified, Wiley came to the premises in her absence and attempted to change the locks. When she returned and asserted her right to continue in possession, he complied with her request to leave the locks unchanged. Berg also testified that at about 9:30 p. m. that evening, while she and four of her friends were in the restaurant, she observed Wiley hanging from the awning peering into the window. Shortly thereafter, she heard Wiley pounding on the back door demanding admittance. Berg called the county sheriff to come and preserve order. Wiley testified that he observed Berg and a group of her friends in the restaurant removing paneling from a wall. Allegedly fearing destruction of his property, Wiley called the city police, who, with the sheriff, mediated an agreement between the parties to preserve the status quo until each could consult with legal counsel on Monday, July 16, 1973.

Wiley testified that his then attorney advised him to take possession of the premises and lock the tenant out. Accompanied by a police officer and a locksmith, Wiley entered the premises in Berg's absence and without her knowledge on Monday, July 16, 1973, and changed the locks. Later in the day, Berg found herself locked out. The lease term was not due to expire until December 1, 1975. The premises were re-let to another tenant on or about August 1, 1973. Berg brought this damage action against Wiley and three other named defendants, including the new tenant, on July 27, 1973.[2] A second amended complaint sought damages for lost profits, damage to chattels, intentional infliction of emotional distress, and other tort damages based upon claims in wrongful eviction, contract, and tort. Wiley answered with an affirmative defense of abandonment and surrender and counterclaimed for damage to the premises and indemnification on mechanics lien liability incurred because of Berg's remodeling. At the close of Berg's case, all defendants other than Rodney A. Wiley and Wiley Enterprises, Inc., were dismissed from the action. Only Berg's action for wrongful eviction and intentional infliction of emotional distress and Wiley's affirmative defense of abandonment and his counterclaim for damage to the premises were submitted by special verdict to the jury. With respect to the wrongful eviction claim, the trial court found as a matter of law that Wiley did in fact lock the tenant out, and that the lockout was wrongful.

The jury, by answers to the questions submitted, found no liability on Berg's claim for intentional infliction of emotional distress and no liability on Wiley's counterclaim for damages to the premises, but awarded Berg $31,000 for lost profits and $3,540 for loss of chattels resulting from the wrongful lockout. The jury also specifically found that Berg neither abandoned nor surrendered the premises. The trial court granted Wiley's post-trial motion for an order decreeing that Berg indemnify Wiley for any mechanics lien liability incurred due to Berg's remodeling by way of set-off from Berg's judgment and ordered the judgment accordingly amended.

On this appeal, Wiley seeks an outright reversal of the damages award for wrongful eviction, claiming insufficient evidence to support the jury's finding of no abandonment or surrender and claiming error in the trial court's finding of wrongful eviction as a matter of law.

The first issue before us concerns the sufficiency of evidence to support the jury's finding that Berg had not abandoned or surrendered the leasehold before being locked out by Wiley. Viewing the evidence to support the jury's special verdict in the light most favorable to Berg, as we must,[3] we hold it amply supports the jury's finding of no abandonment or surrender of the premises. While the evidence bearing upon Berg's intent was strongly contradictory, the jury could reasonably have concluded, based on Berg's testimony and supporting circumstantial evidence, that she intended to retain possession, closing temporarily to remodel. Thus, the lockout cannot be excused on ground that Berg abandoned or surrendered the leasehold.

The second and more difficult issue is whether Wiley's self-help repossession of the premises by locking out Berg was correctly held wrongful as a matter of law.

Minnesota has historically followed the common-law rule that a landlord may rightfully use self-help to retake leased premises from a tenant in possession without incurring liability for wrongful eviction provided two conditions are met: (1) The landlord is legally entitled to possession, such as where a tenant holds over after the lease term or where a tenant breaches a lease containing a reentry clause; and (2) the landlord's means of reentry are peaceable. *Mercil v. Broulette*, 66 Minn. 416, 69 N.W. 218 (1896). Under the common-law rule, a tenant who is evicted by his landlord may recover damages for wrongful eviction where the landlord either had no right to possession or where the means used to remove the tenant were forcible, or both. *See, e. g., Poppen v. Wadleigh*, 235 Minn. 400, 51 N.W.2d 75 (1952); *Sweeney v. Meyers*, 199 Minn. 21, 270 N.W. 906 (1937); *Lobdell v. Keene*, 85 Minn. 90, 88 N.W. 426 (1901). See, also, Minn.St. 566.01 (statutory cause of action where entry is not "allowed by law" or, if allowed, is not made "in a peaceable manner").

Wiley contends that Berg had breached the provisions of the lease, thereby entitling Wiley, under the terms of the lease, to retake possession, and that his repossession by changing the locks in Berg's absence was accomplished in a peaceful manner. In a memorandum accompanying the post-trial order, the trial court stated two grounds for finding the lockout wrongful as a matter of law: (1) It was not accomplished in a peaceable manner and therefore could not be justified under the common-law rule, and (2) any self-help reentry against a tenant in possession is wrongful under the growing modern doctrine that a landlord must always resort to the judicial process to enforce his statutory remedy against a tenant wrongfully in possession. Whether Berg had in fact breached the lease and whether Wiley was hence entitled to possession was not judicially determined. That issue became irrelevant upon the trial court's finding that Wiley's reentry was forcible as a matter of law because even if Berg had breached the lease, this could not excuse Wiley's nonpeaceable reentry. The finding that Wiley's reentry was forcible as a matter of law provided a sufficient ground for damages, and the issue of breach was not submitted to the jury.[4]

In each of our previous cases upholding an award of damages for wrongful eviction, the landlord had in fact been found to have no legal right to possession. In applying the common-law rule, we have not before had occasion to decide what means of self-help used to dispossess a tenant in his absence will constitute a nonpeaceable entry, giving a right to damages without regard to who holds the legal right to possession. Wiley argues that only actual or threatened violence used against a tenant should give rise to damages where the landlord had the right to possession. We cannot agree.

It has long been the policy of our law to discourage landlords from taking the law into their own hands, and our decisions and statutory law have looked with disfavor upon any use of self-help to dispossess a tenant in circumstances which are likely to result in breaches of the peace. We gave early recognition to this policy in *Lobdell v. Keene*, 85 Minn. 90, 101, 88 N.W. 426, 430 (1901), where we said:

> The object and purpose of the legislature in the enactment of the forcible entry and unlawful detainer statute was to prevent those claiming a right of entry or possession of lands from redressing their own

> wrongs by entering into possession in a violent and forcible manner. All such acts tend to a breach of the peace, and encourage high-handed oppression. The law does not permit the owner of land, be his title ever so good, to be the judge of his own rights with respect to a possession adversely held, but puts him to his remedy under the statutes.

To facilitate a resort to judicial process, the legislature has provided a summary procedure in Minn.St. 566.02 to 566.17 whereby a landlord may recover possession of leased premises upon proper notice and showing in court in as little as 3 to 10 days. As we recognized in *Mutual Trust Life Ins. Co. v. Berg*, 187 Minn. 503, 505, 246 N.W. 9, 10 (1932), "(t)he forcible entry and unlawful detainer statutes were intended to prevent parties from taking the law into their own hands when going into possession of lands and tenements...." To further discourage self-help, our legislature has provided treble damages for forcible evictions, ss 557.08 and 557.09, and has provided additional criminal penalties for intentional and unlawful exclusion of a tenant.s 504.25. In *Sweeney v. Meyers*, supra, we allowed a business tenant not only damages for lost profits but also punitive damages against a landlord who, like Wiley, entered in the tenant's absence and locked the tenant out.

In the present case, as in Sweeney, the tenant was in possession, claiming a right to continue in possession adverse to the landlord's claim of breach of the lease, and had neither abandoned nor surrendered the premises. Wiley, well aware that Berg was asserting her right to possession, retook possession in her absence by picking the locks and locking her out. The record shows a history of vigorous dispute and keen animosity between the parties. Upon this record, we can only conclude that the singular reason why actual violence did not erupt at the moment of Wiley's changing of the locks was Berg's absence and her subsequent self-restraint and resort to judicial process. Upon these facts, we cannot find Wiley's means of reentry peaceable under the common-law rule. Our long-standing policy to discourage self-help which tends to cause a breach of the peace compels us to disapprove the means used to dispossess Berg. To approve this lockout, as urged by Wiley, merely because in Berg's absence no actual violence erupted while the locks were being changed, would be to encourage all future tenants, in order to protect their possession, to be vigilant and thereby set the stage for the very kind of public disturbance which it must be our policy to discourage.

Consistent with our conclusion that we cannot find Wiley's means of reentry peaceable under the common-law rule is *Gulf Oil Corp. v. Smithey*, 426 S.W.2d 262 (Tex.Civ.App.1968). In that case the Texas court, without departing from the common-law rule, held that a landlord's reentry in the tenant's absence by picking the locks and locking the tenant out, although accomplished without actual violence, was forcible as a matter of law.[5] The Texas courts, by continuing to embrace the common-law rule, have apparently left open the possibility that self-help may be available in that state to dispossess a tenant in some undefined circumstances which may be found peaceable.

We recognize that the growing modern trend departs completely from the common-law rule to hold that self-help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered the premises. Annotation, 6 A.L.R.3d 177, 186; 76 Dickinson L.Rev. 215, 227. This growing rule is founded on the recognition that the potential for violent breach of peace inheres in any situation where a landlord attempts by his own means to remove a tenant who is claiming possession adversely to the landlord. Courts adopting the rule reason that there is no cause to sanction such potentially disruptive self-help where adequate and speedy means are provided for removing a tenant peacefully through judicial process. At least 16 states[6] have adopted this modern rule, holding that judicial proceedings, including the summary procedures provided in those states' unlawful detainer statutes, are the exclusive remedy by which a landlord may remove a tenant claiming possession. *See, e. g., Kassan v. Stout*, 9 Cal.3d 39, 106 Cal.Rptr. 783, 507 P.2d 87 (1973); *Jordan v. Talbot*, 55 Cal.2d 597, 12 Cal.Rptr. 488, 361 P.2d 20 (1961); *Malcolm v. Little*, 295 A.2d 711 (Del.1972); *Teston v. Teston*, 135 Ga.App. 321, 217 S.E.2d 498

(1975); *Weber v. McMillan*, 285 So.2d 349 (La.App.1973); *Bass v. Boetel & Co.*, 191 Neb. 733, 217 N.W.2d 804 (1974); *Edwards v. C. N. Investment Co.*, 27 Ohio Misc. 57, 56 Ohio O.2d 261, 272 N.E.2d 652 (1971).[7]

While we would be compelled to disapprove the lockout of Berg in her absence under the common-law rule as stated, we approve the trial court's reasoning and adopt as preferable the modern view represented by the cited cases. To make clear our departure from the common-law rule for the benefit of future landlords and tenants, we hold that, subsequent to our decision in this case, the only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who claims possession adversely to a landlord's claim of breach of a written lease is by resort to judicial process. We find that Minn.St. 566.02 to 566.17 provide the landlord with an adequate remedy for regaining possession in every such[8] Where speedier action than provided in ss 566.02 to 566.17 seems necessary because of threatened destruction of the property or other exigent circumstances, a temporary restraining order under Rule 65, Rules of Civil Procedure, and law enforcement protection are available to the landlord. Considered together, these statutory and judicial remedies provide a complete answer to the landlord. In our modern society, with the availability of prompt and sufficient legal remedies as described, there is no place and no need for self-help against a tenant in claimed lawful possession of leased premises.

Applying our holding to the facts of this case, we conclude, as did the trial court, that because Wiley failed to resort to judicial remedies against Berg's holding possession adversely to Wiley's claim of breach of the lease, his lockout of Berg was wrongful as a matter of law. The rule we adopt in this decision is fairly applied against Wiley, for it is clear that, applying the older common-law rule to the facts and circumstances peculiar to this case, we would be compelled to find the lockout nonpeaceable for the reasons previously stated. The jury found that the lockout caused Berg damage and, as between Berg and Wiley, equity dictates that Wiley, who himself performed the act causing the damage, must bear the loss.

Affirmed.

---

1. The provisions of the lease pertinent to this case provide: "Item # 5 The Lessee will make no changes to the building structure without first receiving written authorization from the Lessor. The Lessor will promptly reply in writing to each request and will cooperate with the Lessee on any reasonable request."Item # 6 The Lessee agrees to operate the restaurant in a lawful and prudent manner during the lease period. "Item # 7 Should the Lessee fail to meet the conditions of this Lease the Lessor may at their option retake possession of said premises. In any such event such act will not relieve Lessee from liability for payment the rental herein provided or from the conditions or obligations of this lease."↩

1. Proceedings in this damage action were suspended for the duration of a separate unlawful detainer action in which Berg sought to recover possession of the premises under Minn.St. c. 566. In that action, this court reversed a judgment awarding possession of the premises to Berg, holding that an unlawful detainer action under Minn.St. c. 566 was not available to a tenant against his landlord. *Berg v. Wiley*, 303 Minn. 247, 226 N.W.2d 904 (1975). An amended complaint in this damage action was served on May 6, 1974. A second amended complaint was served on December 12, 1975, and proceedings were resumed.↩

1. *Kuehl v. National Tea Co., Minn.*, 245 N.W.2d 235 (1976).↩

1. Although not affirmatively pleaded by Wiley, the issue of whether Berg had breached the lease and Wiley's waiver thereof was litigated by consent with evidence presented by both parties, and Wiley on post-trial motion alleged as error the trial court's failure to submit the issue to the jury. We observe that upon the conflicting testimony in the record before us we would be unable to find as a matter of law that Berg breached the lease and that Wiley did not waive any claimed breach. Thus, even assuming that Wiley's reentry could be

found peaceable, we would be unable to resolve this dispute in Wiley's favor under the common-law rule, as he urges, without a remand to determine the issue of breach, which the parties do not desire.↩

1. California courts similarly implied force in certain nonviolent entries made in the tenant's absence. *See, e. g., Karp v. Margolis*, 159 Cal.App.2d 69, 323 P.2d 557 (1958); *McNeil v. Higgins*, 86 Cal.App.2d 723, 195 P.2d 470 (1948).↩

1. Annotation, 6 A.L.R.3d 177, 186, Supp. 13, shows this modern rule to have been adopted in California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Louisiana, Nebraska, North Carolina, Ohio, Tennessee, Texas, Utah, Vermont, and Washington.↩

1. We have examined the summary statutory procedures for repossession held exclusive in these other states and we find them comparable and on the whole no speedier than the summary judicial procedures by which a landlord may regain possession in as little as 3 to 10 days under Minn.St. 566.02 to 566.17.↩

1. Under ss 566.05 and 566.06, a landlord may regain possession in default proceedings against a tenant personally served with process in as little as 3 to 10 days. Default judgment against a tenant not present and served by posting may be procured in a week to 10 days. ss 566.05 and 566.06. Trial is by the court unless either party demands a jury trial. s 566.07. Proceedings are stayed on appeal except as against a holdover tenant. s 566.12. Upon execution of a writ of restitution, the tenant is allowed 24 hours to vacate the property. We are mindful that by s 566.04 the summary remedy of ss 566.02 to 566.17 is made unavailable against any tenant having been "in quiet possession for three years next before the filing of the complaint...." This reflects an appropriate policy choice by the legislature to require full litigation of the right to possession in a common-law ejectment action before judicially ousting a tenant of such long tenure. Our holding, disallowing self-help in such cases as well, is consistent with the legislative policy protecting the long-term tenant. The availability of temporary restraining orders, temporary injunctions against waste, and eventual damages for unlawful detainer or unpaid rent provides an adequate compensating remedy to the landlord for any delay in obtaining possession during judicial proceedings.↩

Rucker v. Wynn,

212 Ga. App. 69 (Ga. Ct. App. 1994)

Alan I. Begner, Penny M. Douglass, for appellants.

Alston & Bird, A. McCampbell Gibson, T. Michael Tennant, for appellee.

Andrews, Judge

After the tenants in a commercial lease agreement failed to pay rent when due under the lease terms, the landlord, without notice to the tenants, retook possession of the premises and rerented it pursuant to terms in the lease providing that the lease would remain in effect, and that the tenants would be liable for accruing rent less amounts collected on rerental. The tenants sued the landlord for wrongful eviction, trespass, breach of the implied covenant of quiet enjoyment of the premises, breach of the lease agreement, breach of an alleged oral contract to accept late payment of rent, and conversion of personal property. The landlord counterclaimed seeking the difference between past due rent accruing under the lease and rent generated by rerental. The trial court granted partial summary judgment in favor of the landlord eliminating all the tenants' claims except conversion of personal property, and granting summary judgment in favor of the landlord on the counterclaim for $248,830 for accrued rent, plus additional sums for attorney fees and interest. The tenants appeal from the order of summary judgment.

The lease agreement at issue provided for the lease of the premises for a restaurant business for a term of five years beginning July 1, 1990 for monthly rent of $7,000 for the first five months and $12,500 per month thereafter. Rent was due under the lease on the first day of each month. The tenants failed to pay the $12,500 rent payment due on January 1, 1991. On or about January 7, 1991, the tenants gave the landlord a check for $12,500, but informed the landlord that there were not sufficient funds in the bank to cover the check. According to the landlord, the tenants asked him to hold the check and allow them to operate the business through the next weekend so they could generate funds to cover the check, which the landlord agreed to do. According to the tenants, the landlord agreed to hold the check for two weekends. The landlord deposited the check on January 16, 1991, and it was refused for insufficient funds.

The lease defined a failure to pay rent as a default constituting a breach of the lease, and further provided that in the event of such default, and without notice, the "Landlord, as Tenant's agent, without terminating this lease may enter upon and rent the premises, in whole or in part, at the best price obtainable by reasonable effort, without advertisement and by private negotiations and for any term landlord deems proper, with Tenant being liable to Landlord for the deficiency, if any, between Tenant's rent hereunder and the price obtained by Landlord on reletting; provided, however, that Landlord shall not be considered to be under any duty by reason of this provision to take any action to mitigate damages by reason of Tenant's default." Pursuant to this lease provision, the landlord reentered the premises without notice on January 18, 1991 after business hours when the tenants were not present, evicted the tenants by changing the locks on the doors, and prepared and rerented the premises.

1. There is no merit to the tenants' claim that the landlord wrongfully evicted them without notice or resort to dispossessory proceedings. "[A] landlord *may* contract to avoid [the statutory notice and other requirements of dispossessory proceedings set forth in OCGA § 44-7-50 et seq.] when renting property which is not to be used as a dwelling-place." (Emphasis in original.) *Colonial Self Storage &c. v. Concord Properties*, 147 Ga. App. 493, 495 (249 SE2d 310) (1978). The landlord was entitled to rely upon the default provisions in the commercial lease agreement, which gave him the right to reenter and take possession without notice or resort to legal proceedings, and he acted pursuant to the terms of the lease in reentering and taking possession of the premises for rerental upon default by the tenants for nonpayment of rent. Id.; *Wilkerson v. Chattahoochee Parks*, 244 Ga. 472, 473-474 (260 SE2d 867) (1979); *Eason Publications v. Monson*, 163 Ga. App. 370, 371 (294 SE2d 585) (1982). Accordingly, we also conclude that the trial court properly granted summary judgment in favor of the landlord on the tenants' claims for trespass, breach of the implied covenant of quiet enjoyment of the premises, and breach of the terms of the lease agreement. Compare *Entelman v. Hagood*, 95 Ga. 390 (22 SE 545) (1894); *Real Estate Loan Co. v. Pugh*, 47 Ga. App. 443 (170 SE 698) (1933); *Teston v. Teston*, 135 Ga. App. 321 (217 SE2d 498) (1975); and *Forrest v. Peacock*, 185 Ga. App. 189 (363 SE2d 581) (1987), rev'd on other grounds 258 Ga. 158 (368 SE2d 519) (1988) (cases dealing with actions for trespass for wrongful eviction of residential tenants); compare *Albert Properties v. Watkins*, 143 Ga. App. 184 (237 SE2d 670) (1977) (action for breach of residential tenant's right to quiet enjoyment of the premises); compare *Swift Loan &c. Co. v. Duncan*, 195 Ga. App. 556 (394 SE2d 356) (1990) (action for trespass for self-help eviction of a commercial tenant, where there was also evidence that the landlord's actions were in violation of the terms of the commercial lease agreement).

2. There was no error in the trial court's grant of summary judgment in favor of the landlord on the claim that the landlord breached an oral agreement to accept late payment of the rent. There was no consideration to support such an agreement (see *Clark v. GMAC*, 185 Ga. App. 130, 136 (363 SE2d 813) (1987); *Phillips v. Atlantic Bank &c. Co.*, 168 Ga. App. 590, 591 (309 SE2d 813) (1983)), and any oral agreement was voided by the express provision of the lease stating that, "[t]his Lease contains the entire agreement of the parties hereto and no representations, inducements, promises or agreements, oral or otherwise, between the parties, not embodied herein, shall be of any force or effect." *Clark*, supra at 134; *Great American Builders v. Howard*, 207 Ga. App. 236, 240 (427 SE2d 588) (1993).

The tenants' additional claim on appeal that the landlord waived the right to timely payment of rent by previous acceptance of late payments was not raised in the trial court and presents nothing for appellate review. *Lamb v. Georgia-Pacific Corp.*, 194 Ga. App. 848, 850 (392 SE2d 307) (1990).

3. Contrary to the tenants' contentions, where under the terms of a commercial lease a landlord has the right to reenter and take possession of the premises without recourse to legal proceedings, he may do so and effect a self-help eviction if this can be accomplished without a breach of the peace. See generally *Moss v. Chappell*, 126 Ga. 196, 208 (54 SE 968) (1906); *Peacock & Hunt Naval Stores Co. v. Brooks Lumber Co.*, 96 Ga. 542, 545-546 (23 SE 835) (1895). There is no evidence in this case that the landlord's actions caused a breach of the peace. See *Hopkins v. First Union Bank of Savannah*, 193 Ga. App. 109, 110-111 (387 SE2d 144) (1989); *Hill v. Fed. Employees Credit Union*, 193 Ga. App. 44, 47-48 (386 SE2d 874) (1989); *Deavers v. Standridge*, 144 Ga. App. 673, 674-675 (242 SE2d 331) (1978).

4. Tenants claim the trial court erred in granting summary judgment for the landlord for rent accruing after they were evicted. Although "[g]enerally, when a landlord evicts a tenant and takes possession of the premises, the lease is terminated and the right to claim rent which accrues after eviction is extinguished," the lease may provide otherwise. *Peterson v. P. C. Towers, L.P.*, 206 Ga. App. 591 (426 SE2d 243) (1992). "[T]he parties to a lease agreement may contract in advance to hold the lessee liable for rent even after an eviction, deducting therefrom only the amounts recovered by the lessor from reletting the premises if such an agreement is premised on the existence of an explicit and detailed provision in the lease which clearly and unequivocally expressed the parties' intention to hold the lessee responsible for after-accrued rent even should an eviction take place." (Citations and punctuation omitted.) Id. at 591-592; *Hardin v. Macon Mall*, 169 Ga. App. 793 (315 SE2d 4) (1984).

The language used in the present lease was a clear expression of the parties' intention that after reentry by the landlord to take possession of the premises for rerental, the tenants remained liable for accruing rent and were responsible to the landlord for the difference between the tenants' rent accruing under the lease and the rent obtained by reletting. There is no merit to the tenants' contention that the lease provisions were ambiguous. As the record stands, it is undisputed that the tenants' rent accruing under the lease after eviction was $287,500, and that the landlord's efforts to relet the premises generated rentals of $38,670, leaving a deficiency of $248,830.[1] There was no error in the trial court's grant of summary judgment in favor of the landlord on his counterclaim.

---

1. The issue was not raised, and we do not address the contractual responsibility to mitigate damages which may be imposed on a landlord who reenters the premises pursuant to a lease provision as the tenant's agent for the purpose of reletting the premises.↩

3.2. Tenant Duties

Rios v. Carrillo,

861 N.Y.S.2d 129 (N.Y. App. Div. 2008)

Peter Piddoubny, Astoria, for appellant.

Goldberg, Scudieri, Lindenberg & Block, P.C., New York City (Robert H. Goldberg of counsel), for respondent.

Lifson, J.

At issue on this appeal is the question of whether the Supreme Court properly applied the doctrine of mitigation of damages in the context of a default on a residential lease. We reiterate the principle that, in the absence

of legislative direction to the contrary, common-law principles control and contrary to lower court authority, an assessment of damages should not require the prevailing party to mitigate damages.

In 2000 the plaintiff landlord leased a residential apartment to the defendant tenant for a term of two years. Around October 2001 the defendant vacated the apartment and ceased paying rent, which he contends was upon the plaintiff's consent. In 2003 the plaintiff commenced this action to recover damages consisting of the unpaid rent she claims was due under the terms of the parties' lease. After a nonjury trial before a Judicial Hearing Officer upon the parties' stipulation, the Supreme Court dismissed the complaint, determining that the plaintiff failed to prove that she made a serious attempt to mitigate damages. The plaintiff appeals from the judgment, and we reverse.

The Supreme Court improperly determined that the plaintiff owed the defendant a duty to mitigate damages upon the breach of the parties' residential lease. The Supreme Court relied on a line of cases stemming from the decision of the Appellate Term, Second and Eleventh Judicial Districts, in *Paragon Indus. v Williams* (122 Misc 2d 628, 629 [1983]), which, relying on federal case law, stated as follows:

> "However, following the landmark case of *Javins v First Nat. Realty Corp.* (428 F2d 1071, *cert den* 400 U.S. 925) ... [c]ourts in this State began to acknowledge that a lease of residential premises establishes a contractual relationship with mutual obligations and that there are rules of law applicable to other agreements that should apply to leases... Not long thereafter, some courts extended this reasoning to the issue of landlord's [*sic*] duty to mitigate, concluding that a landlord should indeed have such a duty ... We now hold that a landlord has such a duty" (citations omitted).

Even within the Appellate Term this view has not been uniformly applied (*see Callender v Titus*, 4 Misc 3d 126[A], 2004 NY Slip Op 50608[U] [2004] [landlord had no duty to mitigate damages by reletting premises]). Other courts in this Department have likewise opted to not impose such a duty on a prevailing landlord (*see Duda v Thompson*, 169 Misc 2d 649 [1996]).

The Supreme Court's reliance on *Paragon Indus. v Williams* (122 Misc 2d 628 [1983]) and its progeny is misplaced. Well-settled law in this state imposes no duty on a residential landlord to mitigate damages (*see Holy Props. v Cole Prods.*, 87 NY2d 130 [1995]; *Whitehouse Estates v Post*, 173 Misc 2d 558 [1997]). As noted by the Court of Appeals in *Holy Props. v Cole Prods.* (87 NY2d at 133):

> "The law imposes upon a party subjected to injury from breach of contract, the duty of making reasonable exertions to minimize the injury ... Leases are not subject to this general rule, however, for, unlike executory contracts, leases have been historically recognized as a present transfer of an estate in real property ... Once the lease is executed, the lessee's obligation to pay rent is fixed according to its terms and a landlord is under no obligation or duty to the tenant to relet, or attempt to relet abandoned premises in order to minimize damages."

Although *Holy Props.* involved a commercial lease, the broad language employed and the reliance on real property principles negate the possibility that the Court of Appeals was confining its determination only to commercial leases. There is simply no basis for limiting the broad language of *Holy Props.* Moreover, in *Holy Props.*, the Court of Appeals placed great weight on the fact that the parties' lease "expressly provided that plaintiff was under no duty to mitigate damages and that upon defendant's abandonment of the premises or eviction, it would remain liable for all monetary obligations arising under the lease" and therefore concluded that "[if] the lease provides that the tenant shall be liable for rent after eviction, the provision is enforceable" (87 NY2d at 134).

Similarly, in the matter now before us, the lease between the parties provided that the defendant remains liable for the rent upon the cancellation of the lease except as provided by law. Thus, the parties agreed at the onset of the tenancy that the defendant would remain liable for rent due under the lease for its duration.

Since the Court of Appeals has not modified its rule in *Holy Props.*, nor has there been any legislative enactment which requires a contrary result, we are constrained to follow what we perceive to be established precedent that a residential landlord is under no duty to mitigate damages where the terms of the lease do not indicate otherwise.... . .

Austin Hill Country Reality, Inc. v. Palisades Plaza, Inc.,

948 S.W.2d 293 (Tex. 1997)

William Rushing Hemphill, Geoffrey D. Weisbart, David F. Minton, Barry K. Bishop, Austin, for Petitioners.

Kenneth D. Lerner, Austin, for Respondent.

Spector, Justice, delivered the opinion for a unanimous Court.

We overrule the motion for rehearing. We withdraw our opinion of January 10, 1997, and substitute the following in its place.

The issue in this case is whether a landlord has a duty to make reasonable efforts to mitigate damages when a tenant defaults on a lease. The court of appeals held that no such duty exists at common law. 938 S.W.2d 469. We hold today that a landlord has a duty to make reasonable efforts to mitigate damages. Accordingly, we reverse the judgment of the court of appeals and remand for a new trial.

I.

Palisades Plaza, Inc., owned and operated an office complex consisting of four office buildings in Austin. Barbara Hill, Annette Smith, and David Jones sold real estate in Austin as a Re/Max real estate brokerage franchise operating through Austin Hill Country Realty, Inc. On September 15, 1992, the Palisades and Hill Country executed a five-year commercial office lease for a suite in the Palisades' office complex. An addendum executed in connection with the lease set the monthly base rent at $3,128 for the first year, $3,519 for the second and third years, and $3,910 for the fourth and fifth years. The parties also signed an improvements agreement that called for the Palisades to convert the shell office space into working offices for Hill Country. The lease was to begin on the "commencement date," which was defined in the lease and the improvements agreement as either (1) the date that Hill Country occupied the suite, or (2) the date that the Palisades substantially completed the improvements or would have done so but for "tenant delay." All parties anticipated that the lease would begin on November 15, 1992.

By the middle of October 1992, the Palisades had nearly completed the improvements. Construction came to a halt on October 21, 1992, when the Palisades received conflicting instructions about the completion of the suite from Hill on one hand and Smith and Jones on the other. By two letters, the Palisades informed Hill Country, Hill, Smith, and Jones that it had received conflicting directives and would not continue with the construction until Hill, Smith, and Jones collectively designated a single representative empowered to make decisions for the trio. Hill, Smith, and Jones did not reply to these letters.

In a letter dated November 19, 1992, the Palisades informed Hill Country, Hill, Smith, and Jones that their failure to designate a representative was an anticipatory breach of contract. The parties tried unsuccessfully to resolve their differences in a meeting. The Palisades then sued Hill Country, Hill, Smith, and Jones (collectively, "Hill Country") for anticipatory breach of the lease.

At trial, Hill Country attempted to prove that the Palisades failed to mitigate the damages resulting from Hill Country's alleged breach. In particular, Hill Country introduced evidence that the Palisades rejected an offer from

Smith and Jones to lease the premises without Hill, as well as an offer from Hill and another person to lease the premises without Smith and Jones. Hill Country also tried to prove that, while the Palisades advertised for tenants continuously in a local newspaper, it did not advertise in the commercial-property publication "The Flick Report" as it had in the past. Hill Country requested an instruction asking the jury to reduce the Palisades' damage award by "any amount that you find the [Palisades] could have avoided by the exercise of reasonable care." The trial judge rejected this instruction, stating, "Last time I checked the law, it was that a landlord doesn't have any obligation to try to fill the space." The jury returned a verdict for the Palisades for $29,716 in damages and $16,500 in attorney's fees. The court of appeals affirmed that judgment. 938 S.W.2d 469.

II.

In its only point of error, Hill Country asks this Court to recognize a landlord's duty to make reasonable efforts to mitigate damages when a tenant breaches a lease. This Court's most recent, and most thorough, discussion of mitigation appeared in *Brown v. RepublicBank First National Midland*, 766 S.W.2d 203 (Tex.1988). The issues in *Brown* were whether a termination right in one contract was impliedly included in a sublease agreement between the same parties and, if not, whether the landlord had a duty to mitigate damages upon the tenant's breach. *Id.* at 204. We held that the termination right was incorporated into the sublease. *Id.* The tenant thus had properly terminated the sublease agreement, and we did not reach the mitigation issue. *Id.*

Five justices of this Court, however, expressed that they would hold that a landlord has a duty to mitigate damages after a tenant defaults. *Id.* at 204 (Kilgarlin, J., concurring, joined by Spears, Gonzalez, and Mauzy, JJ.); *id.* at 207-08 (Phillips, C.J., dissenting). The concurrence emphasized the contractual nature of modern leases, noting that a covenant to pay rent is like any other contractual promise to pay. *Id.* at 206 (citing *Schneiker v. Gordon*, 732 P.2d 603, 610 (Colo.1987)). The concurring justices and the dissenting Chief Justice concluded that public policy requires a landlord, like all other aggrieved parties to a contract, to mitigate damages. *Id.* at 206 (Kilgarlin, J., concurring); *id.* at 207-08 (Phillips, C.J., dissenting).

Today we face the issue that *Brown* did not reach: whether a landlord has a duty to make reasonable efforts to mitigate damages upon the tenant's breach. Because there is no statute addressing this issue, we look to the common law. John F. Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L.REV. 443, 446-53 (1972).

The traditional common law rule regarding mitigation dictates that landlords have no duty to mitigate damages. *See* Dawn R. Barker, Note, *Commercial Landlords' Duty upon Tenants' Abandonment–To Mitigate?*, 20 J. Corp. L. 627, 629 (1995). This rule stems from the historical concept that the tenant is owner of the property during the lease term; as long as the tenant has a right to possses the land, the tenant is liable for rent. *See Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 902, 905 (Utah 1989). Under this rule, a landlord is not obligated to undertake any action following a tenant's abandonment of the premises but may recover rents periodically for the remainder of the term. *See Gruman v. Investors Diversified Servs.*, 247 Minn. 502, 78 N.W.2d 377, 379-80 (1956).

In Texas, the traditional common law rule was first adopted in *Racke v. Anheuser-Busch Brewing Ass'n*, 17 Tex.Civ.App. 167, 42 S.W. 774, 775 (Galveston 1897, no writ). In *Racke*, a landlord sued to determine the extent of the tenant's liability for holding over past the lease term. Concluding that the holdover rendered the tenant liable under a new tenancy for one year, the Court of Civil Appeals held that the landlord could not "be subjected to damages for failing to let the premises to another, to prevent rents accruing the [tenant]." *Id.*

Texas courts have consistently followed this no-mitigation rule in cases involving a landlord's suit for past due rent. *See, e.g., Metroplex Glass Ctr., Inc. v. Vantage Properties, Inc.*, 646 S.W.2d 263, 265 (Tex.App.– Dallas 1983, writ ref'd n.r.e.); *Apex Co. v. Grant*, 276 S.W. 445, 447 (Tex.Civ.App.– Dallas 1925, writ ref'd); *see generally* E.L. Kellett, Annotation, *Landlord's Duty, On Tenant's Failure to Occupy, or Abandonment of, Premises, to Mitigate Damages by Accepting or Procuring Another Tenant*, 21 A.L.R.3d 534, 555-56 (1968).

Some Texas courts have, however, required a landlord to mitigate damages when the landlord seeks a remedy that is contractual in nature, such as anticipatory breach of contract, rather than a real property cause of action. *See Employment Advisors, Inc. v. Sparks*, 364 S.W.2d 478, 480 (Tex.Civ.App.– Waco), *writ ref'd n.r.e. per curiam*, 368 S.W.2d 199, 200 (Tex.1963); *see also Evons v. Winkler*, 388 S.W.2d 265, 269 (Tex.Civ. App.-Corpus Christi 1965, writ ref'd n.r.e.). In *Sparks*, the landlord sued the tenant for anticipatory repudiation of the lease. The court of appeals observed that, because the landlord pursued a contractual remedy, the landlord's damage recovery was "subject, of course, to the usual rules concerning mitigation." 364 S.W.2d at 480. In refusing writ *per curiam*, this Court expressed no opinion on the appellate court's holding. 368 S.W.2d at 200.

Other Texas courts have required a landlord to mitigate damages when the landlord reenters or resumes control of the premises. *See John Church Co. v. Martinez*, 204 S.W. 486, 489 (Tex.Civ.App.–Dallas 1918, writ ref'd); *Robinson Seed & Plant Co. v. Hexter & Kramer*, 167 S.W. 749, 751 (Tex.Civ. App.–Dallas 1914, writ ref'd). Thus, a landlord currently may be subject to a mitigation requirement depending upon the landlord's actions following breach and the type of lawsuit the landlord pursues.

III.

In discerning the policy implications of a rule requiring landlords to mitigate damages, we are informed by the rules of other jurisdictions. Forty-two states and the District of Columbia have recognized that a landlord has a duty to mitigate damages in at least some situations: when there is a breach of a residential lease, a commercial lease, or both.[1]

Only six states have explicitly held that a landlord has no duty to mitigate in any situation.[2] In South Dakota, the law is unclear.[3]

Those jurisdictions recognizing a duty to mitigate have emphasized the change in the nature of landlord-tenant law since its inception in medieval times. At English common law, the tenant had only contractual rights against the landlord and therefore could not assert common-law real property causes of action to protect the leasehold. Over time, the courts recognized a tenant's right to bring real property causes of action, and tenants were considered to possess an estate in land. 2 R. POWELL, THE LAW OF REAL PROPERTY § 221[1], at 16-18 (1969). The landlord had to give the tenant possession of the land, and the tenant was required to pay rent in return. As covenants in leases have become more complex and the structures on the land have become more important to the parties than the land itself, courts have begun to recognize that a lease possesses elements of both a contract and a conveyance. *See, e.g., Schneiker v. Gordon*, 732 P.2d 603, 607-09 (Colo.1987); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 902, 904 (Utah 1989). Under contract principles, the lease is not a complete conveyance to the tenant for a specified term such that the landlord's duties are fulfilled upon deliverance of the property to the tenant. Rather, a promise to pay in a lease is essentially the same as a promise to pay in any other contract, and a breach of that promise does not necessarily end the landlord's ongoing duties. *Schneiker*, 732 P.2d at 610; *Wright v. Baumann*, 239 Or. 410, 398 P.2d 119, 121 (1965). Because of the contractual elements of the modern lease agreement, these courts have imposed upon the landlord the contractual duty to mitigate damages upon the tenant's breach.

Public policy offers further justification for the duty to mitigate. First, requiring mitigation in the landlord-tenant context discourages economic waste and encourages productive use of the property. As the Colorado Supreme Court has written:

> Under traditional property law principles a landlord could allow the property to remain unoccupied while still holding the abandoning tenant liable for rent. This encourages both economic and physical waste. In no other context of which we are aware is an injured party permitted to sit idly by and suffer

> avoidable economic loss and thereafter to visit the full adverse economic consequences upon the party whose breach initiated the chain of events causing the loss.

Schneiker, 732 P.2d at 610. A mitigation requirement thus returns the property to productive use rather than allowing it to remain idle. Public policy requires that the law "discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts." *Wright*, 398 P.2d at 121 (quoting C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES, § 33 (1935)).

Second, a mitigation rule helps prevent destruction of or damage to the leased property. If the landlord is encouraged to let the property remain unoccupied, "the possibility of physical damage to the property through accident or vandalism is increased." *Schneiker*, 732 P.2d at 610.

Third, the mitigation rule is consistent with the trend disfavoring contract penalties. *Reid*, 776 P.2d at 905-06. Courts have held that a liquidated damages clause in a contract must represent a reasonable estimate of anticipated damages upon breach. *See, e.g., Warner v. Rasmussen*, 704 P.2d 559, 561, 563 (Utah 1985). "Similarly, allowing a landlord to leave property idle when it could be profitably leased and forc[ing] an absent tenant to pay rent for that idled property permits the landlord to recover more damages than it may reasonably require to be compensated for the tenant's breach. This is analogous to imposing a disfavored penalty upon the tenant." *Reid*, 776 P.2d at 905-06.

Finally, the traditional justifications for the common law rule have proven unsound in practice. Proponents of the no-mitigation rule suggest that the landlord-tenant relationship is personal in nature, and that the landlord therefore should not be forced to lease to an unwanted tenant. *See Wohl v. Yelen*, 22 Ill.App.2d 455, 161 N.E.2d 339, 343 (1959). Modern lease arrangements, however, are rarely personal in nature and are usually business arrangements between strangers. Edwin Smith, Jr., Comment, *Extending the Contractual Duty to Mitigate Damages to Landlords when a Tenant Abandons the Lease*, 42 BAYLOR L.REV. 553, 559 (1990). Further, the landlord's duty to make reasonable efforts to mitigate does not require that the landlord accept replacement tenants who are financial risks or whose business was precluded by the original lease. Note, *Landlord and Tenant–Mitigation of Damages*, 45 Wash.L.Rev. 218, 225 (1970).

The overwhelming trend among jurisdictions in the United States has thus been toward requiring a landlord to mitigate damages when a tenant abandons the property in breach of the lease agreement. Those courts adopting a mitigation requirement have emphasized the contractual elements of a lease agreement, the public policy favoring productive use of property, and the practicalities of the modern landlord-tenant arrangement as supporting such a duty.

IV.

We are persuaded by the reasoning of those courts that recognize that landlords must mitigate damages upon a tenant's abandonment and failure to pay rent. This Court has recognized the dual nature of a lease as both a conveyance and a contract. *See Davidow v. Inwood North Prof'l Group–Phase I*, 747 S.W.2d 373, 375-76 (Tex.1988); *Kamarath v. Bennett*, 568 S.W.2d 658, 660-61 (Tex. 1978). Under a contract view, a landlord should be treated no differently than any other aggrieved party to a contract. Further, the public policy of the state of Texas calls for productive use of property as opposed to avoidable economic waste. *Brown*, 766 S.W.2d at 204 (Kilgarlin, J., concurring). As Professor McCormick wrote over seventy years ago, the law

> which permits the landlord to stand idly by the vacant, abandoned premises and treat them as the property of the tenant and recover full rent, [should] yield to the more realistic notions of social advantage which in other fields of the law have forbidden a recovery for damages which the plaintiff by reasonable efforts could have avoided.

Charles McCormick, *The Rights of the Landlord Upon Abandonment of the Premises by the Tenant*, 23 Mich.L.Rev. 211, 221-22 (1925). Finally, we have recognized that contract penalties are disfavored in Texas. *Stewart v. Basey*, 150 Tex. 666, 245 S.W.2d 484, 486 (1952) (landlord should not receive more or less than actual damages upon tenant's breach). A landlord should not be allowed to collect rent from an abandoning tenant when the landlord can, by reasonable efforts, relet the premises and avoid incurring some damages. We therefore recognize that a landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property, unless the commercial landlord and tenant contract otherwise.

V.

To ensure the uniform application of this duty by the courts of this state, and to guide future landlords and tenants in conforming their conduct to the law, we now consider several practical considerations that will undoubtedly arise. We first consider the level of conduct by a landlord that will satisfy the duty to mitigate. The landlord's mitigation duty has been variously stated in other jurisdictions. *See, e.g., Reid*, 776 P.2d at 906 ("objective commercial reasonableness"); *Schneiker*, 732 P.2d at 611 ("reasonable efforts"); Cal. Civ.Code § 1951.2(c)(2) ("reasonably and in a good-faith effort"). Likewise, the courts of this state have developed differing language regarding a party's duty to mitigate in other contexts. *See City of San Antonio v. Guidry*, 801 S.W.2d 142, 151 (Tex.App.–San Antonio 1990, no writ) (collecting cases). We hold that the landlord's duty to mitigate requires the landlord to use objectively reasonable efforts to fill the premises when the tenant vacates in breach of the lease.

We stress that this is not an absolute duty. The landlord is not required to simply fill the premises with any willing tenant; the replacement tenant must be suitable under the circumstances. Nor does the landlord's failure to mitigate give rise to a cause of action by the tenant. Rather, the landlord's failure to use reasonable efforts to mitigate damages bars the landlord's recovery against the breaching tenant only to the extent that damages reasonably could have been avoided. Similarly, the amount of damages that the landlord actually avoided by releasing the premises will reduce the landlord's recovery.

Further, we believe that the tenant properly bears the burden of proof to demonstrate that the landlord has mitigated or failed to mitigate damages and the amount by which the landlord reduced or could have reduced its damages. The traditional rule in other contexts is that the breaching party must show that the nonbreaching party could have reduced its damages. *See, e.g., Sorbus, Inc. v. UHW Corp.*, 855 S.W.2d 771, 775 (Tex.App.–El Paso 1993, writ denied) (mitigation of damages following tortious interference with contract); *Texas Dep't of Human Servs. v. Green*, 855 S.W.2d 136, 151 (Tex. App.–Austin 1993, writ denied) (mitigation of damages following wrongful discharge); *see generally* E. ALLEN FARNSWORTH, CONTRACTS § 12.12 (2d ed. 1990). In the landlord-tenant context, although there is some split of authority, many other jurisdictions have placed the burden of proving mitigation or failure to mitigate upon the breaching tenant. *See* Barker, 20 J. Corp. L. at 639 n. 86.

When the tenant contends that the landlord has actually mitigated damages, the breaching tenant need not plead the landlord's actual mitigation as an affirmative defense. Rather, the tenant's evidence of the landlord's mitigation tends to rebut the measure of damages under the landlord's claim of breach and may be admitted under a general denial. *See Greater Fort Worth & Tarrant County Community Action Agency v. Mims*, 627 S.W.2d 149, 151 (Tex.1982). The tenant's contention that the landlord failed to mitigate damages, in contrast, is similar to an avoidance defense; evidence of failure to mitigate is admissible only if the tenant pleads the failure to mitigate as an affirmative defense. *W.L. Moody & Co. v. Rowland*, 100 Tex. 363, 99 S.W. 1112, 1114-16 (1907); *see also Professional Servs., Inc. v. Amaitis*, 592 S.W.2d 396, 397 (Tex.Civ.App.–Dallas 1979, writ ref'd n.r.e.).

The final issue to resolve regarding the duty to mitigate is to which types of actions by the landlord the duty will apply. Traditionally, Texas courts have regarded the landlord as having four causes of action against a tenant for breach of the lease and abandonment. *See Speedee Mart v. Stovall*, 664 S.W.2d 174, 177 (Tex.App.–Amarillo 1983, no writ); Jerry D. Johnson, *Landlord Remedies in Texas: Confusion Reigns Where Certainty Should Prevail*, 33 S.

Tex. L.Rev. 417, 419-20 (1992). First, the landlord can maintain the lease, suing for rent as it becomes due. Second, the landlord can treat the breach as an anticipatory repudiation, repossess, and sue for the present value of future rentals reduced by the reasonable cash market value of the property for the remainder of the lease term. Third, the landlord can treat the breach as anticipatory, repossess, release the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant. Fourth, the landlord can declare the lease forfeited (if the lease so provides) and relieve the tenant of liability for future rent. *Speedee Mart*, 664 S.W.2d at 177.

The landlord must have a duty to mitigate when suing for anticipatory repudiation. Because the cause of action is contractual in nature, the contractual duty to mitigate should apply. The landlord's option to maintain the lease and sue for rent as it becomes due, however, is more troubling. To require the landlord to mitigate in that instance would force the landlord to reenter the premises and thereby risk terminating the lease or accepting the tenant's surrender. *See* Johnson, 33 S. Tex.L.Rev. at 437; Hicks, 24 Baylor L.Rev. at 517. We thus hold that, when exercising the option to maintain the lease in effect and sue for rent as it becomes due following the tenant's breach and abandonment, the landlord has a duty to mitigate only if (1) the landlord actually reenters, or (2) the lease allows the landlord to reenter the premises without accepting surrender, forfeiting the lease, or being construed as evicting the tenant. *See Robinson Seed & Plant Co. v. Hexter & Kramer*, 167 S.W. 749, 751 (Tex.Civ.App.–Dallas 1914, writ ref'd); 21 A.L.R.3d at 556-63. A suit for anticipatory repudiation, an actual reentry, or a contractual right of reentry subject to the above conditions will therefore give rise to the landlord's duty to mitigate damages upon the tenant's breach and abandonment.

VI.

In their first amended answer, Hill Country and Barbara Hill specifically contended that the Palisades failed to mitigate its damages. Because the court of appeals upheld the trial court's refusal to submit their mitigation instruction, we reverse the judgment of the court of appeals and remand for a new trial.

---

1. *Lennon v. United States Theatre Corp.*, 920 F.2d 996, 1000 (D.C.Cir.1990) (holding that both residential and commercial landlords have duty to mitigate); ALASKA STAT. § 34.03.230(c) (Michie 1990) (residential); ARIZ.REV.STAT.ANN. § 33-1370 (West 1974) (residential); *Tempe Corporate Office Bldg. v. Arizona Funding Servs.*, 167 Ariz. 394, 807 P.2d 1130, 1135 (App.1991)(commercial); *Baston v. Davis*, 229 Ark. 666, 318 S.W.2d 837, 841 (1958) (commercial); CAL.CIV.CODE § 1951.2(a)(2), (c)(2) (West 1985) (residential); *Sanders Constr. Co. v. San Joaquin First Fed. Sav. & Loan Ass'n*, 136 Cal.App.3d 387, 186 Cal.Rptr. 218, 226 (1982) (commercial); *Schneiker v. Gordon*, 732 P.2d 603, 611 (Colo.1987) (commercial); *Danpar Assocs. v. Somersville Mills Sales Room, Inc.*, 182 Conn. 444, 438 A.2d 708, 710 (1980) (commercial); DEL.CODE ANN. tit. 25, § 5507 (1996) (residential), DEL.CODE ANN. tit. 25, §§ 5101, 5507(d) (1996) (commercial); FLA.STAT. ANN. § 83.595 (West 1995) (residential); *In re PAVCO Enters., Inc.*, 172 B.R. 114, 117 (Bankr. M.D.Fla.1994) (commercial); HAW.REV.STAT. § 521-70(d) (Supp.1975) (residential); *Marco Kona Warehouse v. Sharmilo, Inc.*, 7 Haw.App. 383, 768 P.2d 247, 251, *cert. denied*, 70 Haw. 665, 796 P.2d 501 (1989) (commercial); *Olsen v. Country Club Sports, Inc.*, 110 Idaho 789, 718 P.2d 1227, 1232-33 (App.1985) (commercial); 735 ILL.COMP.STAT. 5/9-213.1 (West 1992) (residential and commercial); *Nylen v. Park Doral Apartments*, 535 N.E.2d 178, 183 (Ind.Ct.App. 1989) (residential); *Sandor Dev. Co. v. Reitmeyer*, 498 N.E.2d 1020, 1023 (Ind.Ct.App.1986) (commercial); *Hirsch v. Merchants Nat'l Bank & Trust Co. of Ind.*, 166 Ind.App. 497, 336 N.E.2d 833, 836 (1975) (commercial); IOWA CODE § 562A.29(3) (1996) (residential); *Harmsen v. Dr. MacDonald's, Inc.*, 403 N.W.2d 48, 51 (Iowa.Ct. App.1987) (commercial); KAN.STAT.ANN. §§ 58-2532 to -2567 (1976)(residential); *Gordon v. Consolidated Sun Ray, Inc.*, 195 Kan. 341, 404 P.2d 949, 953-54 (1965) (commercial); KY.REV. STAT.ANN. § 383.670(3) (Michie 1994) (residential); *Gray v.*

Kanavel, 508 So.2d 970, 973 (La.Ct. App.1987) (residential); LA.CIV.CODE ANN. art. 2002 (West 1990) (commercial); ME.REV.STAT. ANN. tit. 14, § 6010-A (West 1995) (residential and commercial); MD.CODE ANN., REAL PROP. § 8-207 (1995) (residential); *Atkinson v. Rosenthal*, 33 Mass.App.Ct. 219, 598 N.E.2d 666, 669 (1992) (commercial); *Jefferson Dev. Co. v. Heritage Cleaners*, 109 Mich.App. 606, 311 N.W.2d 426, 428 (1981) (commercial); *MRI Northwest Rentals Invs. v. Schnucks-Twenty-Five. Inc.*, 807 S.W.2d 531, 534 (Mo.Ct.App.1991)(limited duty in commercial leases); MONT.CODE ANN. § 70-24-426 (1995); *Properties Inv. Group of Mid-America v. JBA, Inc.*, 242 Neb. 439, 495 N.W.2d 624, 628-29 (1993) (commercial); NEV.REV.STAT. § 118.175 (1991) (residential); *Deasy v. Dernham Co. (In re Blondheim Modular Mfg., Inc.)*, 65 B.R. 856, 861 (Bankr.D.N.H.1986) (residential and commercial); *Sommer v. Kridel*, 74 N.J. 446, 378 A.2d 767, 768 (1977) (residential); *McGuire v. City of Jersey City*, 125 N.J. 310, 593 A.2d 309, 314 (1991) (commercial); N.M.STAT.ANN. § 47-8-6 (Michie 1978) (residential); *Isbey v. Crews*, 55 N.C.App. 47, 284 S.E.2d 534, 537 (1981)(residential); *Weinstein v. Griffin*, 241 N.C. 161, 84 S.E.2d 549, 552 (1954) (commercial); N.D.CENT. Code § 47-16-13.4 to .5 (1993) (residential); *MAR-SON, Inc. v. Terwaho Enters.*, 259 N.W.2d 289, 291-92 (N.D.1977) (commercial); *Stern v. Taft*, 49 Ohio App.2d 405, 361 N.E.2d 279, 281 (1976) (residential); *Master Lease of Ohio, Inc. v. Andrews*, 20 Ohio App.3d 217, 485 N.E.2d 820, 823 (1984) (commercial); OKLA.STAT.ANN. tit. 41, § 129 (West 1986) (residential); *Carpenter v. Riddle*, 527 P.2d 592, 594 (Okla.1974) (limited duty in commercial leases); OR.REV.STAT. § 90.410 (1995) (residential); *United States Nat'l Bank of Oregon v. Homeland, Inc.*, 291 Or. 374, 631 P.2d 761, 765 (1981) (commercial); *In re New York City Shoes, Inc.*, 86 B.R. 420, 424 (Bankr.E.D.Pa. 1988) (commercial); R.I. GEN. LAWS § 34-18-40 (1994) (residential); *Lovell v. Kevin J. Thornton Enters., Inc. (In re Branchaud)*, 186 B.R. 337, 340 (Bankr.D.R.I.1995) (commercial); S.C.Code Ann. § 27-40-730 (Law Co-op.1993) (residential); *United States Rubber Co. v. White Tire Co.*, 231 S.C. 84, 97 S.E.2d 403, 409 (1956) (commercial); TENN.CODE ANN. § 66-28-515 (1995) (residential); *Jaffe v. Bolton*, 817 S.W.2d 19, 26-27 (Tenn.Ct. App.1991) (commercial); *Reid v. Mutual of Omaha Ins. Co.*, 776 P.2d 896, 906 (Utah 1989) (residential and commercial); *O'Brien v. Black*, 162 Vt. 448, 648 A.2d 1374, 1376 (1994) (commercial); Va.Code Ann. tit. 55 § 248.35 (Michie 1995) (residential); WASH.REV.CODE § 59.18.310 (1990) (residential); *Hargis v. Mel-Mad Corp.*, 46 Wash. App. 146, 730 P.2d 76, 79 (1986) (commercial); WIS. STAT. § 704.29 (1993-94) (residential); *First Wis. Trust Co. v. L. Wiemann Co.*, 93 Wis.2d 258, 286 N.W.2d 360, 366 (1980) (commercial); *System Terminal Corp. v. Cornelison*, 364 P.2d 91, 95 (Wyo.1961) (commercial). *See generally* 52 C.J.S. *Landlord and Tenant* § 498 (1968); 21 AM.JUR. 3d *Damages–Mitigation by Landlord* §§ 1-9 (1968 & Supp.1994); 5 A. CORBIN, CORBIN ON CONTRACTS § 1039A (Supp.1993).↩

1. *Ryals v. Laney*, 338 So.2d 413, 415 (Ala.Civ. App.1976) (holding that there is no duty to mitigate in residential leases); *Crestline Ctr. v. Hinton*, 567 So.2d 393, 396 (Ala.Civ.App.1990) (commercial); *Love v. McDevitt*, 114 Ga.App. 734, 152 S.E.2d 705, 706 (1966) (residential); *Lamb v. Decatur Fed. Sav. & Loan Ass'n*, 201 Ga.App. 583, 411 S.E.2d 527, 530 (1991) (commercial); em>Markoe v. Naiditch & Sons, 303 Minn. 6, 226 N.W.2d 289, 291 (1975) (residential and commercial); *Alsup v. Banks*, 68 Miss. 664, 9 So. 895, 895 (1891) (residential); *Duda v. Thompson*, 169 Misc.2d 649, 647 N.Y.S.2d 401, 403-04 (N.Y.Sup.Ct.1996) (residential); *Holy Properties, Ltd. v. Kenneth Cole Prods., Inc.*, 87 N.Y.2d 130, 637 N.Y.S.2d 964, 661 N.E.2d 694, 696 (1995) (commercial); *Arbenz v. Exley, Watkins & Co.*, 52 W.Va. 476, 44 S.E. 149, 151 (1903) (commercial). Mississippi has reported no cases regarding a commercial landlord's duty to mitigate, and West Virginia has reported no cases regarding a residential landlord's duty to mitigate.↩

1. South Dakota has apparently reported no cases on this issue.↩

Nobles v. Jiffy Market Food Store Corp.,

579 S.E.2d 63 (Ga. Ct. App. 2003)

Ellis, Painter, Ratterree & Bart, Tracy A. O'Connell, Savannah, Ansley B. Threlkeld, for appellant.

Whelchel, Brown, Readdick & Bumgartner, Gregory T. Carter, Brunswick, for appellees.

Phipps, Judge.

Landlord Marcus H. Nobles, Jr. sued tenants the Jiffy Market Food Store Corporation, Keith Strickland, and Gladys Strickland (collectively Jiffy Market) for breach of several lease agreements. Among the damages Nobles sought were future lease payments under an acceleration clause in one of the agreements. The trial court granted in part Jiffy Market's motion for summary judgment, ruling that the acceleration clause was invalid. The court also denied Nobles's motion for partial summary judgment. Nobles appeals both rulings. Finding no error, we affirm.

The record shows that in September 1995, Jiffy Market acquired from Nobles the franchise rights to a Huddle House restaurant in Richmond Hill. As part of the transaction, Nobles leased Jiffy Market the restaurant premises for a period of 22 years. The lease required Jiffy Market to make graduated monthly payments, repair the premises, pay applicable taxes, and maintain insurance. In addition to the premises lease, the parties also entered into separate agreements for the lease of restaurant equipment and exterior signs.

The parties later amended the premises lease twice to decrease the monthly lease payments and to reflect Jiffy Market's sublease of the premises to a third party. Both amendments ratified the original lease agreement.

Two paragraphs of the premises lease agreement addressed Nobles's remedies in the event of a default by Jiffy Market. Under Paragraph 27, if Jiffy Market defaulted on its obligations after written notice by Nobles, then Nobles

> at his option may at once, or within six (6) months thereafter (but only once during continuance of such default or condition[)], terminate this lease by written notice to [Jiffy Market]; whereupon this Lease shall end.... Upon such termination by [Nobles, Jiffy Market] will at once surrender possession of the premises to [Nobles].... *In addition, [Nobles] may also collect, as damages, the remaining rent due or to become due under this Lease for the remainder of the term, less any amounts derived by [Nobles] from releasing the Premises.*[1]

Paragraph 28, titled "Reletting by Lessor," provided that

> [Nobles], as [Jiffy Market's] agent, without terminating this Lease, upon [Jiffy Market's] breach of this Lease, in such a manner as to authorize termination as provided herein, may at [Nobles's] option enter upon and rent Premises at the best price obtainable by reasonable effort, without advertisement and by private negotiations and for any term [Nobles] deems proper. [Nobles] shall make reasonable efforts to relet the Premises. [Jiffy Market] shall be liable to [Nobles] for the deficiency, if any, between [Jiffy Market's] rent hereunder and the price obtained by [Nobles] on reletting.

In September 2000, the restaurant ceased operations. On October 10, Nobles sent Jiffy Market a letter demanding that month's lease payment and stating that if payment was not received by October 20, he would declare default and seek "all sums due under the Lease." No payment was made. On February 15, Jiffy Market returned the premises to Nobles. Nobles claims that much of the equipment was broken or missing and that the signs required repair.

Nobles sued Jiffy Market for all future payments under the remaining 18 years of the lease term, totaling $865,596. Nobles later relet the premises to another tenant, and he acknowledged that any recovery of future rents under his lease with Jiffy Market would be offset by payments received under the new lease. In addition to future

rent, Nobles also sought damages from Jiffy Market for breach of the equipment and sign leases, repayment of the rent reductions allowed under the first lease amendment, and reimbursement of insurance and tax payments.

Nobles sought partial summary judgment, arguing that the record clearly showed that Jiffy Market had breached the lease agreements, entitling him to damages. Jiffy Market also moved for summary judgment, claiming that Paragraph 27 of the premises agreement providing for recovery of future rent was an unenforceable penalty clause and that Nobles terminated the lease when he sought recovery under that paragraph, thereby ending Jiffy Market's obligations. The trial court agreed that Paragraph 27 was unenforceable, but otherwise denied both motions.

We review the trial court's ruling de novo, considering the evidence and all reasonable conclusions and inferences drawn from it in the light most favorable to the nonmovant.[2]

1. Nobles first contends that the court erred in ruling that Paragraph 27 of the premises lease was an unenforceable penalty. We disagree.

This case is controlled by *Peterson v. P.C. Towers, L.P.*,[3] in which we examined a commercial lease provision similar to Paragraph 27.[4] We noted that while a tenant generally is not responsible for rent accruing after the landlord resumes possession, the parties may contract otherwise, provided that the lease agreement contains "an explicit and detailed provision … which clearly and unequivocally expresse[s] the parties' intention to hold the [tenant] responsible for after-accrued rent."[5] Such "accelerated rent" provisions are enforceable as valid liquidated damages clauses if (1) the injury caused by breach of the lease is difficult or impossible to estimate accurately; (2) the parties intend to provide for damages rather than a penalty; and (3) the stipulated sum is a reasonable pre-estimate of the landlord's probable loss.[6] If these requirements are not met, then the accelerated rent provision "fails as a penalty."[7] Whether an accelerated rent provision is enforceable is a question of law for the court.[8]

In analyzing whether the accelerated rent provision in *Peterson* met the three requirements for a valid liquidated damages clause, we noted that

> [t]he measure of damages in an action seeking to recover in advance for the full remaining term of a breached lease is the difference between what the tenant would have had to pay in rent for the balance of the term, and the fair rental value of the premises for the balance of the term. [Cit.][9]

Because these figures would be difficult to estimate accurately, we concluded that the first requirement was satisfied. But the accelerated rent provision failed to calculate damages "based on the future rental value of the premises, and the likelihood of reletting."[10] Therefore, it provided the landlord "with payment potentially bearing no reasonable relation to actual damages,"[11] and we held that it was an unenforceable penalty.

Paragraph 27 of the agreement between Nobles and Jiffy Market suffers from the same deficiency. It contained no "assessment of future market conditions for the premises to account for future rental value, and the probability of reletting the premises for all or part of the remaining term."[12] This deficiency is especially acute in light of the length of the lease. Nobles attempted to collect approximately 18 years of unaccrued rent–almost 200 payments–at once. But neither the lease nor any evidence cited to this court attempted to determine whether these up-front payments would bear any reasonable relationship to Nobles's actual future damages, and it is difficult to infer such a relationship given the lengthy lease period. The damages Nobles sought were entirely too speculative and uncertain.

Moreover, Paragraph 27 did not provide that the future rent be reduced to present value[13] –another indication of a potentially large gulf between the sums authorized by that paragraph and the amount of Nobles's actual damages. Finally, the lease did not require that Nobles try to relet the premises in the event of Jiffy Market's default. Rather, reletting was solely "at [Nobles's] option."[14] Thus, the lease gave Nobles both present possession of the premises and all future rent. This, as we noted in *Jones v. Clark*,[15] "is manifestly unreasonable and oppressive."[16] For these reasons, the trial court correctly ruled that the accelerated rent clause in Paragraph 27 operated as an unenforceable penalty rather than a valid liquidated damages provision.

Nobles cites *American Med. Transport Group v. Glo-An, Inc.*,[17] *Rucker v. Wynn*,[18] and *Hardin v. Macon Mall*,[19] in which we enforced accelerated rent provisions in commercial leases as valid liquidated damages provisions. But these cases are distinguishable.

In *American Med. Transport*, the tenant defaulted on two leases with 24-month terms after ten months of the terms had elapsed.[20] After placing a "for lease" sign on the premises and reletting one of the suites, the landlord sought twelve months of unaccrued rent on one lease and one month on the other.[21] In *Rucker*, the tenant defaulted on a five-year lease after six months had elapsed, and the landlord sought the difference between unaccrued rent for the remainder of the lease term and rent generated by reletting the premises.[22] In *Hardin*, the tenant defaulted after six years of a 15-year lease had elapsed, but after finding a new tenant, the landlord sought only two years of unaccrued rent under the lease's accelerated rent clause.[23] Because the landlords in these cases sought unaccrued rent only for relatively brief periods of time, it is far more likely that such rent represented a reasonable pre-estimate of the landlords' losses. These cases, therefore, did not involve the speculation and uncertainty inherent here, where Nobles wants unaccrued rent for the remarkable period of 18 years.

Nobles also cites *Ott v. Vineville Market*,[24] in which we upheld a landlord's charge of accelerated rent against a defaulting tenant, for the proposition that accelerated rent provisions are not liquidated damages provisions and thus cannot be rejected as unenforceable penalties. But *Ott* did not describe the lease provisions that authorized the charge of unaccrued rent, so its conclusion must be limited to its unspecified facts.[25] We follow our more recent decision in *Peterson*, which holds that an accelerated rent provision similar to the one here "either qualifies as an enforceable liquidated damages provision, or it fails as a penalty."[26]

2. Next, Nobles argues that even if Paragraph 27 did not entitle him to collect accelerated rent, Paragraph 28 did. Although the trial court did not address this argument, we will do so because it was presented below.

Paragraph 28 provided that if Nobles relet the premises without terminating the lease, Jiffy Market would be liable for any deficiency between the rent it owed under the lease and the price obtained by Nobles on reletting. Paragraph 27, on the other hand, allowed accelerated rent only if Nobles terminated the lease. Thus, either Nobles terminated the lease and Paragraph 27 applies, or he did not, and Paragraph 28 applies. Whether and when Nobles terminated the lease is a question of fact for the jury, and the trial court appropriately denied summary judgment on that issue.[27]

If Paragraph 28 applies, then we question whether it can be construed to authorize upfront collection of future, unaccrued rent for the 18-year remainder of the lease term. If it can be so construed, then it, too, is an unenforceable penalty. Like Paragraph 27, it fails to satisfy the requirements for a valid liquidated damages provision because it provides no assessment of future market conditions regarding the rental value of the property and the possibility of reletting.

3. Finally, Nobles contends that the trial court erred in failing to grant him summary judgment on his claim for two other kinds of damages. Again, we disagree.

(a) First, Nobles argues that he is entitled to repayment of a reduction in rent that Jiffy Market received under the first amendment to the lease agreement. That amendment decreased Jiffy Market's monthly rent by $700. It also provided that if Jiffy Market "cease[d] to operate" a Huddle House restaurant on the premises before September 30, 2000, then it would have to repay Nobles $700 per month for each month that the reduction was in place. Because there was conflicting testimony whether the restaurant "operated" through September 30, summary judgment was not appropriate on this claim.

(b) Second, Nobles seeks repayment of certain taxes and insurance that he paid on the property, but that Jiffy Market should have paid under the premises lease. To support this claim, Nobles submitted his affidavit, which stated that he "paid $5,142.56 to Franklin Insurance Agency for property insurance and $3,002.00 to Travelers for flood insurance" for an unspecified period of coverage. The affidavit also stated that Nobles paid $2,440.53 in county taxes and $565.92 in local taxes on the property for the year 2000. Jiffy Market contends that Nobles terminated the lease, so it cannot collect any sums due thereunder. As noted, however, whether and when Nobles terminated the lease is a jury question. Whether the sums expended by Nobles fell within Jiffy Market's obligations under the lease also is a jury question. The trial court properly denied summary judgment on this claim.

Judgment affirmed.

Andrews, P.J., and Mikell, J., concur.

---

1. (Emphasis supplied.)↩

1. See Sams v. Video Display Corp., 255 Ga.App. 478, 566 S.E.2d 28 (2002).↩

1. 206 Ga.App. 591, 426 S.E.2d 243 (1992).↩

1. The agreement in *Peterson* provided that if the lease was terminated due to the tenant's default, the landlord could "'declare the entire amount of the rent which would become due and payable during the remainder of the term of this lease to be due and payable immediately,'" with reduction to present cash value and offset by any rent the landlord received from reletting the premises. 206 Ga.App. at 592(2), 426 S.E.2d 243.↩

1. (Citations and punctuation omitted.) Id. at 591-592, 426 S.E.2d 243.↩

1. Id. at 593(3), 426 S.E.2d 243.↩

1. Id. at 592, 426 S.E.2d 243.↩

1. Id. at 592-593, 426 S.E.2d 243.↩

1. Id. at 593, 426 S.E.2d 243.↩

1. Id. at 594, 426 S.E.2d 243.↩

1. Id.↩

1. Id.↩

1. After filing the complaint, Nobles reduced its asserted damages for future rent to present value, but we evaluate the validity of Paragraph 27 as it was written.↩

1. After suing Jiffy Market for the full amount of all future rent, Nobles apparently did relet the premises, though for a shorter period of time and for less money than the Jiffy Market lease.↩

1. 147 Ga.App. 657, 249 S.E.2d 619 (1978).↩

1. Id. at 659(2), 249 S.E.2d 619; see also *Carter v. Tokai Financial Svcs.*, 231 Ga.App. 755, 759(2), 500 S.E.2d 638 (1998) (accelerated rent clause in personal property lease was unenforceable under *Peterson* because it allowed lessor, after lessee's default, to retain property yet collect all future rent payments).↩

1. 235 Ga.App. 464, 509 S.E.2d 738 (1998).↩

1. 212 Ga.App. 69, 441 S.E.2d 417 (1994).↩

1. 169 Ga.App. 793, 315 S.E.2d 4 (1984).↩

1. 235 Ga.App. at 464, 509 S.E.2d 738.↩

1. Id. at 465, 509 S.E.2d 738.↩

1. 212 Ga.App. at 69, 72(4), 441 S.E.2d 417.↩

1. 169 Ga.App. at 793, 315 S.E.2d 4.↩

1. 203 Ga.App. 80, 81(2), 416 S.E.2d 362 (1992).↩

1. *Ott* also did not relate the term of the lease, when the tenant defaulted, or how much future rent the landlord sought. See id. at 80-81, 416 S.E.2d 362.↩

1. 206 Ga.App. at 592, 426 S.E.2d 243.↩

1. See *Buford-Clairmont v. Jacobs Pharmacy Co.*, 131 Ga.App. 643, 647(1), 206 S.E.2d 674 (1974) (whether landlord's actions constituted termination of lease was question for jury).↩

3.3. Landlord Duties

Blackett v. Olanoff,

358 N.E.2d 817 (1977)

Philip S. Lapatin, Boston, for plaintiffs.

Sally A. Corwin, Boston (Jon C. Mazuy, Boston, with her), for defendants.

Before Hennessey, C.J., and Braucher, Kaplan, and Wilkins, JJ.

Wilkins, Justice

The defendant in each of these consolidated actions for rent successfully raised constructive eviction as a defense against the landlords' claim. The judge found that the tenants were 'very substantially deprived' of quiet enjoyment of their leased premises '*for a substantial time*' (emphasis original). He ruled that the tenants' implied warranty of quiet enjoyment was violated by late evening and early morning music and disturbances coming from nearby premises which the landlords leased to others for use as a bar or cocktail lounge (lounge). The judge further found that, although the landlords did not intend to create the conditions, the landlords 'had it within their control to correct the conditions which ... amounted to a constructive eviction of each (tenant).' He also found that the landlords promised each tenant to correct the situation, that the landlords made some attempt to remedy the problem, but they were unsuccessful, and that each tenant vacated his apartment within a reasonable time. Judgment was entered for each tenant; the landlords appealed; and we transferred the appeals here. We affirm the judgments.

The landlords argue that they did not violate the tenants' implied covenant of quiet enjoyment because they are not chargeable with the noise from the lounge. The landlords do not challenge the judge's conclusion that the noise emanating from the lounge was sufficient to constitute a constructive eviction, if that noise could be attributed to the landlords.[1] Nor do the landlords seriously argue that a constructive eviction could not be found as matter of law because the lounge was not on the same premises as the tenants' apartments. See 1 American Law of Property s 3.51 at 281 (A. J. Casner ed. 1952). The landlords' principal contention, based on the denial of certain requests for rulings, is that they are not responsible for the conduct of the proprietors, employees, and patrons of the lounge.

Our opinions concerning a constructive eviction by an alleged breach of an implied covenant of quiet enjoyment sometimes have stated that the landlord must perform some act with the intent of depriving the tenant of the enjoyment and occupation of the whole or part of the leased premises. *See Katz v. Duffy*, 261 Mass. 149, 151-152, 158 N.E. 264 (1927), and cases cited. There are occasions, however, where a landlord has not intended to violate a tenant's rights, but there was nevertheless a breach of the landlord's covenant of quiet enjoyment which flowed as the natural and probable consequence of what the landlord did, what he failed to do, or what he permitted to be done. *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124, 127, 163 N.E.2d 4 (1959) (failure to supply light, heat, power, and elevator services). *Westland Housing Corp. v. Scott*, 312 Mass. 375, 381, 44 N.E.2d 959 (1942) (intrusions of smoke and soot over a substantial period of time due to a defective boiler). *Shindler v. Milden*, 282 Mass. 32, 33-34, 184 N.E. 673 (1933) (failure to install necessary heating system, as agreed). *Case v. Minot*, 158 Mass. 577, 587, 33 N.E. 700 (1893) (landlord authorizing another lessee to obstruct the tenant's light and air, necessary for the beneficial enjoyment of the demised premises). *Skally v. Shute*, 132 Mass. 367, 370-371 (1882) (undermining of a leased building rendering it unfit for occupancy). Although some of our opinions have spoken of particular action or inaction by a landlord as showing a presumed intention to evict, the landlord's conduct, and not his intentions, is controlling. *See Westland Housing Corp. v. Scott, supra*, 312 Mass. at 382-383, 44 N.E. 959.

The judge was warranted in ruling that the landlords had it within their control to correct the condition which caused the tenants to vacate their apartments. The landlords introduced a commercial activity into an area where they leased premises for residential purposes. The lease for the lounge expressly provided that entertainment in the lounge had to be conducted so that it could not be heard outside the building and would not disturb the residents of the leased apartments. The potential threat to the occupants of the nearby apartments was apparent in the circumstances. The landlords complained to the tenants of the lounge after receiving numerous objections from residential tenants. From time to time, the pervading noise would abate in response to the landlord's complaints. We conclude that, as matter of law, the landlords had a right to control the objectionable noise coming from the lounge and that the judge was warranted in finding as a fact that the landlords could control the objectionable conditions.

This situation is different from the usual annoyance of one residential tenant by another where traditionally the landlord has not been chargeable with the annoyance. *See Katz v. Duffy*, 261 Mass. 149, 158 N.E. 264 (1927) (illegal sale of alcoholic beverages); *DeWitt v. Pierson*, 112 Mass. 8 (1873) (prostitution).[2] Here we have a case more like *Case v. Minot*, 158 Mass. 577, 33 N.E. 700 (1893), where the landlord entered into a lease with one tenant which the landlord knew permitted that tenant to engage in activity which would interfere with the rights of another tenant. There, to be sure, the clash of tenants' rights was inevitable, if each pressed those rights. Here, although the clash of tenants' interests was only a known potentiality initially, experience demonstrated that a decibel level for the entertainment at the lounge, acoustically acceptable to its patrons and hence commercially desirable to its proprietors, was intolerable for the residential tenants.

The rule in New York appears to be that the landlord may not recover rent if he has had ample notice of the existence of conduct of one tenant which deprives another tenant of the beneficial enjoyment of his premises and the landlord does little or nothing to abate the nuisance. *See Cohen v. Werner*, 85 Misc.2d 341, 342, 378 N.Y.S.2d 868 (N.Y.App.T.1975); *Rockrose Associates v. Peters*, 81 Misc.2d 971, 972, 366 N.Y.S.2d 567 (N.Y.Civ.Ct.1975) (office lease); *Home Life Ins. Co. v. Breslerman*, 168 Misc. 117, 118, 5 N.Y.S.2d 272 (N.Y.App.T.1938). But see comments in *Trustees of the Sailors' Snug Harbor in the City of New York v. Sugarman*, 264 App.Div. 240, 241, 35 N.Y.S.2d 196 (N.Y.1942) (no nuisance).

A tenant with sufficient bargaining power may be able to obtain an agreement from the landlord to insert and to enforce regulatory restrictions in the leases of other, potentially offending, tenants. See E. Schwartz, Lease Drafting in Massachusetts s 6.33 (1961).

Because the disturbing condition was the natural and probable consequence of the landlords' permitting the lounge to operate where it did and because the landlords could control the actions at the lounge, they should not be entitled to collect rent for residential premises which were not reasonably habitable. Tenants such as these should not be left only with a claim against the proprietors of the noisome lounge. To the extent that our opinions suggest a distinction between nonfeasance by the landlord, which has been said to create no liability (P. Hall, Massachusetts Law of Landlord and Tenant ss 90-91 (4th ed. 1949)), and malfeasance by the landlord, we decline to perpetuate that distinction where the landlord creates a situation and has the right to control the objectionable conditions.

Judgments affirmed.

---

1. There was evidence that the lounge had amplified music (electric musical instruments and singing, at various times) which started at 9:30 P.M. and continued until 1:30 A.M. or 2 A.M., generally on Tuesdays through Sundays. The music could be heard through the granite walls of the residential tenants' building, and was described variously as unbelievably loud, incessant, raucous, and penetrating. The noise interfered with conversation and prevented sleep. There was also evidence of noise from patrons' yelling and fighting.↩

1. The general, but not universal, rule, in this country is that a landlord is not chargeable because one tenant is causing annoyance to another (*A. H. Woods Theatre v. North American Union*, 246 Ill.App. 521, 526-527, (1927) (music from one commercial tenant annoying another commercial tenant's employees)), even where the annoying conduct would be a breach of the landlord's covenant of quiet enjoyment if the landlord were the miscreant. *See Paterson v. Bridges*, 16 Ala.App. 54, 55, 75 So. 260 (1917); *Thompson v. Harris*, 9 Ariz.App. 341, 345, 452 P.2d 122 (1969), and cases cited; 1 American Law of Property s 3.53 (A.J. Casner ed. 1952); Annot., 38 A.L.R. 250 (1925). *Contra Kesner v. Consumers Co.*, 255 Ill.App. 216, 228-229 (1929) (storage of flammables constituting a nuisance); *Bruckner v. Helfaer*, 197 Wis. 582, 585, 222 N.W. 790 (1929) (residential tenant not liable for rent where landlord, with ample notice, does not control another tenant's conduct).↩

Minjak Co. v. Randolph,

528 N.Y.S.2d 554 (App. Div. 1988).

H. Shapiro, New York City, for petitioner-landlord-respondent.

D. Ratner, New York City, for respondents-tenants-appellants.

Before Sandler, J.P., and Carro, Asch and Ellerin, JJ.

Memorandum Decision

Order of the Appellate Term, First Department (Sandifer, Parness, Ostrau, JJ.), entered March 3, 1987, which reversed a final judgment of Civil Court (David Saxe, J.), entered March 23, 1984, awarding rent abatements, punitive damages and attorney's fees to respondents-tenants-appellants, and ordered a new trial, is unanimously reversed, on the law, without costs, and the judgment of Civil Court reinstated except to eliminate any rent abatement for the period of time July through mid October 1981.

In July of 1983 petitioner-landlord commenced the within summary non-payment proceeding against respondents Randolph and Kikuchi, tenants of a loft space on the fourth floor of petitioner's building on West 20th Street in Manhattan, alleging non-payment of rent since July 1981. The tenants' answer set forth as affirmative defens-

es that because they were unable to use two-thirds of the loft space due to the landlord's renovations and other conditions, they were entitled to an abatement of two-thirds of the rent, and that as to the remaining one-third space, they were entitled to a further rent abatement due to the landlord's failure to supply essential services. The tenants also counterclaimed for breach of warranty of habitability, seeking both actual and punitive damages and attorney's fees.

A trial was held in Civil Court before Justice Saxe in November of 1983. It was stipulated that rent was due and owing from October 1981 through November 1983 in the amount of $12,787 ($200 due for October 1981, $450 due each month from November 1981 through December 1982, and $567 per month since January 1983).

Respondents commenced residency of the loft space in 1976 pursuant to a commercial lease. Petitioner offered a commercial lease even though at the time of the signing of the lease the building was used predominantly for residential purposes and the respondents had informed petitioner that they would use the loft as their residence. The loft space measures 1700 square feet, approximately two-thirds of which is used as a music studio for Mr. Kikuchi, where he composes, rehearses and stores his very expensive electronic equipment and musical instruments. The remainder of the space is used as the tenants' residence.

Late in 1977, the fifth floor tenant began to operate a health spa equipment business which included the display of fully working jacuzzis, bathtubs, and saunas. The jacuzzis and bathtubs were filled to capacity with water. From November 1977 through February 1982, respondents suffered at least 40 separate water leaks from the fifth floor. At times the water literally poured into the bedroom and bedroom closets of respondents' loft, ruining their clothes and other items. Water leaked as well into the kitchen, the bathroom and onto Mr. Kikuchi's grand piano and other musical instruments. Respondents' complaints to petitioner went unheeded.

In January of 1978 the fifth-floor tenant began to sandblast the walls, causing sand to seep through openings around pipes and cracks in the ceiling and into respondent's loft. The sand, which continued to fall into the loft even as the parties went to trial, got into respondent's clothes, bed, food and even their eyes.

In September of 1981 the landlord commenced construction work in the building to convert the building into a Class A multiple building. To convert the freight elevator into a passenger elevator, petitioner had the elevator shaft on respondent's side of the building removed. The workers threw debris down the elevator shaft, raising "huge clouds of dust" which came pouring into the loft and settled everywhere, on respondents' clothes, bed, food, toothbrushes and musical equipment. The musical equipment had to be covered at all times to protect it from the dust. Respondents began to suffer from eye and sinus problems, nausea, and soreness in their throats from the inhalation of the dust. Respondents attempted to shield themselves somewhat from the dust by putting up plastic sheets, only to have the workmen rip them down.

To demonstrate the hazardous nature of some of the construction work, respondents introduced evidence that as the landlord's workers were demolishing the stairs from the seventh floor down, no warning signs were posted, causing one visitor to come perilously close to falling through a hole in the stairs. The workers jackhammered a new entrance to the loft, permitting the debris to fall directly onto the floor of respondents' loft. The workmen would mix cement right on respondents' floor. A new entrance door to the loft was sloppily installed without a door sill, and loose bricks were left around the frame. A day later, brick fragments and concrete fell on tenant Randolph's head as she closed the door.

The record contains many more examples of dangerous construction and other conduct interfering with respondents' ability to use and enjoy possession of their loft. From 1981 until the time of trial, Kikuchi was completely unable to use the music studio portion of the loft. His musical instruments had been kept covered and protected against the sand and later the dust since 1978.

The jury rendered a verdict awarding respondents a rent abatement of 80% for July 1981 through November 1983, as compensatory damages on the theory of constructive eviction from the music studio portion of the loft; a

40% rent abatement for January 1981 through November 1983, on the remainder of the rent due for the residential portion of the premises, on a theory of breach of warranty of habitability; a 10% rent abatement on the rent attributable to the residential portion of the premises for all of 1979, on a breach of warranty of habitability theory; and punitive damages in the amount of $20,000. After trial the court granted respondents' motion made pursuant to Real Property Law Sec. 234 for reasonable attorney's fees, awarding respondents $5000. The court also granted petitioner's motion to set aside the verdict and for other relief, only to the extent of reducing the award for punitive damages to $5000. Final judgment was entered on March 23, 1984.

On appeal to the Appellate Term that court reversed the judgment. Holding that the doctrine of constructive eviction could not provide a defense to this non-payment proceeding, because tenants had not abandoned possession of the demised premises, the court reversed the jury's award as to the 80% rent abatement predicated on the constructive eviction theory. The court ordered a new trial on the counterclaim for breach of warranty of habitability, concluding it likely that the jury's consideration of the constructive eviction claim impacted on the breach of warranty of habitability claim. The court also struck down the award of punitive damages, concluding that, even if punitive damages could properly be awarded in habitability cases, the facts herein did not support a finding of "high moral culpability" or "criminal indifference to civil obligations," as required by *Walker v. Sheldon*, 10 N.Y.2d 401, 405, 223 N.Y.S.2d 488, 179 N.E.2d 497, so as to warrant punitive damages. We reverse and hold that the tenants were entitled to avail themselves of the doctrine of constructive eviction based on their abandonment of a portion of the premises and that the award for punitive damages was permissible and warranted by these facts.

We agree with the holding and reasoning of *East Haven Associates v. Gurian*, 64 Misc.2d 276,313 N.Y.S.2d 276, that a tenant may assert as a defense to the nonpayment of rent the doctrine of constructive eviction, even if he or she has abandoned only a portion of the demised premises due to the landlord's acts in making that portion of the premises unusable by the tenant. The rule of *Edgerton v. Page*, 20 N.Y. 281, the first decision to establish the requirement of abandonment of premises as a condition to asserting the defense of constructive eviction, is not undermined by our acknowledgement of a defense for partial constructive eviction. *Edgerton v. Page, supra*, emphasized that the tenant's obligation to pay rent continues as long as "the tenant remains in possession of the entire premises demised...." *Id.* at 285 [emphasis original]. It is not contrary to this rule nor against any established precedent to hold that when the tenant is constructively evicted from a portion of the premises by the landlord's actions, he should not be obligated to pay the full amount of the rent. *East Haven Associates v. Gurian, supra*, 64 Misc.2d at 279-280,313 N.Y.S.2d 276. Indeed "compelling considerations of social policy and fairness" dictate such a result. *Id.* at 277, 313 N.Y.S.2d 276. None of the cases cited by the landlord reaches or warrants a contrary conclusion. *See Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 83, 308 N.Y.S.2d 649, 256 N.E.2d 707; T*wo Rector Street Corp. v. Bein*, 226 A.D. 73, 76, 234 N.Y.S. 409; *300 West 56th Street Corp. v. Kelly*, 153 N.Y.S.2d 978.

As for petitioner's argument on appeal that the tenants never abandoned any portion of the premises and, in fact, continued to use the entire loft even up until the day of trial, we note that this assertion is unaccompanied by any citation to the record. This was no mere inadvertent error, for there is absolutely nothing in the record to support such a claim. The evidence at trial fully supported a finding that respondents were compelled to abandon the music studio portion of the loft due to "the landlord's wrongful acts [which] substantially and materially deprive[d] the tenant[s] of the beneficial use and enjoyment" of that portion of the loft. *See Barash v. Pennsylvania Terminal Real Estate Corp., supra*, 26 N.Y.2d at 83, 308 N.Y.S.2d 649, 256 N.E.2d 707.

Petitioner does, however, correctly point out that as the constructive eviction claim was asserted as a defense to the nonpayment of rent and respondents did not request an abatement for any months other than those in which they did not pay rent, the jury's award of an 80% rent abatement as to the months July, August, September and half of October of 1981 must be stricken.

The award for punitive damages, as reduced by the Civil Court to $5000, should be reinstated as well. Although no exception to the court's charge permitting the jury to award punitive damages was made, we discuss the issue of the propriety of submitting this issue to the jury in light of petitioner's argument that the award subjects it to a liability for which there is no support in the law and in light of Appellate Term's inconclusive comment on whether or not punitive damages could, as a matter of law, be awarded in habitability cases.

Although generally in breach of contract claims the damages to be awarded are compensatory, in certain instances punitive damages may be awarded when to do so would "deter morally culpable conduct." *See Halpin v. Prudential Ins. Co.*, 48 N.Y.2d 906, 907, 425 N.Y.S.2d 48, 401 N.E.2d 171; *Williamson, Picket, Gross v. Hirschfeld*, 92 A.D.2d 289, 295, 460 N.Y.S.2d 36 (punitive damages for conduct involving bad faith). The determining factor is "not the form of the action ..., but the moral culpability of the defendant," and whether the conduct implies a "criminal indifference to civil obligations." *Walker v. Sheldon, supra*, 10 N.Y.2d at 404-405, 223 N.Y.S.2d 488, 179 N.E.2d 497.

With respect to this State's strict housing code standards and statutes, made enforceable through civil and criminal sanctions and other statutory remedies, it is within the public interest to deter conduct which undermines those standards when that conduct rises to the level of high moral culpability or indifference to a landlord's civil obligations. Therefore, it has been recognized that punitive damages may be awarded in breach of warranty of habitability cases where the landlord's actions or inactions were intentional and malicious. *See e.g., Pleasant East Associates v. Cabrera*, 125 Misc.2d 877, 883-884, 480 N.Y.S.2d 693; *Century Apts. Inc. v. Yalkowsky*, 106 Misc.2d 762, 766, 435 N.Y.S.2d 627; *Davis v. Williams*, 92 Misc.2d 1051, 1054-1055, 402 N.Y.S.2d 92; *Kipsborough Realty Corp. v. Goldbetter*, 81 Misc.2d 1054, 1058-1060, 367 N.Y.S.2d 916.

Accordingly, the issue of punitive damages was properly submitted to the jury, and we are satisfied that this record supports the jury's finding of morally culpable conduct in light of the dangerous and offensive manner in which the landlord permitted the construction work to be performed, the landlord's indifference to the health and safety of others, and its disregard for the rights of others, so as to imply even a criminal indifference to civil obligations. See Walker v. Sheldon, supra, 10 N.Y.2d at 405, 223 N.Y.S.2d 488, 179 N.E.2d 497. One particularly egregious example of the landlord's wanton disregard for the safety of others was the way in which the stair demolition was performed: steps were removed and no warning sign even posted. The landlord's indifference and lack of response to the tenants' repeated complaints of dust, sand and water leak problems demonstrated a complete indifference to their health and safety and a lack of concern for the damage these conditions could cause to the tenants' valuable personal property. Such indifference must be viewed as rising to the level of high moral culpability. Accordingly, the award of punitive damages is sustained.

We likewise reject petitioner's argument that respondents cannot rely on their lease in order to recover attorney's fees pursuant to the provisions of Real Property Law Sec. 234. This statute has the effect, inter alia, of implying into a lease for residential property which contains a provision permitting the landlord to recover attorney's fees in a summary proceeding brought pursuant to the lease a similarly binding covenant by the landlord to pay the tenant's reasonable attorney's fees incurred in the successful defense of a summary proceeding commenced by the landlord arising out of the lease. We find totally without merit petitioner's interpretation of the decision of another Civil Court judge, holding that the landlord could not take advantage of the waiver of jury trial lease provision, as meaning that respondents cannot now rely on the lease at all in seeking an award of attorney's fees. This is an action under the lease and this lease has not been voided. Furthermore, residential occupants of lofts are afforded the same protections available to other residential tenants under the Real Property Law (seeMultiple Dwelling Law Sec. 286). Thus, the award for attorney's fees was proper.

Except to eliminate any rent abatement for July through mid-October of 1981, the Civil Court judgment should be reinstated.

Overstreet v. Rhodes,

212 Ga. 521 (1956)

Wm. G. Grant, Robert W. Spears, for plaintiff in error.

T. Charles Allen, Fisher, Phillips & Allen, contra.

Candler, Justice.

(After stating the foregoing facts.) As shown by our statement of the case, the defendant admitted a prima facie case in the plaintiff's favor, and affirmatively pleaded constructive eviction from the rented building resulting from the landlord's failure to keep it in a proper state of repair as it was his duty to do under the rent contract. A rented building becomes untenantable and the tenant is constructively evicted therefrom and thereafter relieved of his obligation to pay rent, when the landlord whose duty it is to keep it in a proper state of repair allows it to deteriorate to such an extent that it is an unfit place for the tenant to carry on the business for which it was rented, and when it cannot be restored to a fit condition by ordinary repairs which can be made without unreasonable interruption of the tenant's business. *Wolff* v. *Turner*, 6 *Ga. App.* 366 (65 S. E. 41); *Weinstein* v. *Schacter Brothers*, 32 *Ga. App.* 742 (124 S. E. 803); *Millen Hotel Co.* v. *Gray*, 67 *Ga. App.* 38 (19 S. E. 2d 428). See also *Lewis & Co.* v. *Chisolm*, 68 *Ga.* 40. To establish its affirmative defense of constructive eviction from the rented premises, it was therefore necessary for the defendant in this case to prove (1) that the landlord in consequence of his failure to keep the rented building repaired allowed it to deteriorate to such an extent that it had become an unfit place for the defendant to carry on the business for which it was rented, and (2) that it could not be restored to a fit condition by ordinary repairs which could be made without unreasonable interruption of the tenant's business. Whether or not the defendant had carried the burden and proved these essentials of his affirmative plea, was a question raised in the trial court both by the general grounds of the plaintiff's motion for new trial and by his motion for judgment notwithstanding the verdict, and the Court of Appeals erred in holding that the evidence question as to whether or not the rented premises could be restored to a tenantable condition without unreasonable interruption to the tenant's business was one which it could not consider, since it had been raised for the first time in the brief of the plaintiff in error.

Judgment reversed. All the Justices concur.

Javins v. First National Realty Corporation,

428 F.2d 1071 (1970)

Mr. Edmund E. Fleming, Boston, Mass., for appellants.

Mr. Herman Miller, Washington, D. C., for appellee.

Mrs. Caryl S. Terry, Washington, D. C., filed a brief on behalf of Washington Planning and Housing Association as amicus curiae urging reversal.

Mrs. Margaret F. Ewing, Mrs. Florence Wagman Roisman and Mrs. Patricia M. Wald, Washington, D. C., filed a brief on behalf of Neighborhood Legal Services Program as *amicus curiae* urging reversal.

Messrs. Myron Moskovitz and Peter Honigsberg filed a brief on behalf of National Housing Law Project as *amicus curiae* urging reversal.

Before Wright, McGowan and Robb, Circuit Judges.

J. Skelly Wright, Circuit Judge:

These cases present the question whether housing code[1] violations which arise during the term of a lease have any effect upon the tenant's obligation to pay rent. The Landlord and Tenant Branch of the District of Columbia Court of General Sessions ruled proof of such violations inadmissible when proffered as a defense to an eviction action for nonpayment of rent. The District of Columbia Court of Appeals upheld this ruling. Saunders v. First National Realty Corp., 245 A.2d 836 (1968).

Because of the importance of the question presented, we granted appeallants' petitions for leave to appeal. We now reverse and hold that a warranty of habitability, measured by the standards set out in the Housing Regulations for the District of Columbia, is implied by operation of law into leases of urban dwelling units covered by those Regulations and that breach of this warranty gives rise to the usual remedies for breach of contract.

I

The facts revealed by the record are simple. By separate written leases,[2] each of the appellants rented an apartment in a three-building apartment complex in Northwest Washington known as Clifton Terrace. The landlord, First National Realty Corporation, filed separate actions in the Landlord and Tenant Branch of the Court of General Sessions on April 8, 1966, seeking possession on the ground that each of the appellants had defaulted in the payment of rent due for the month of April. The tenants, appellants here, admitted that they had not paid the landlord any rent for April. However, they alleged numerous violations of the Housing Regulations as "an equitable defense or [a] claim by way of recoupment or set-off in an amount equal to the rent claim," as provided in the rules of the Court of General Sessions.[3] They offered to prove

> "[t]hat there are approximately 1500 violations of the Housing Regulations of the District of Columbia in the building at Clifton Terrace, where Defendant resides some affecting the premises of this Defendant directly, others indirectly, and all tending to establish a course of conduct of violation of the Housing Regulations to the damage of Defendants * * *."

Settled Statement of Proceedings and Evidence, p. 2 (1966). Appellants conceded at trial, however, that this offer of proof reached only violations which had arisen since the term of the lease had commenced. The Court of General Sessions refused appellants' offer of proof[4] and entered judgment for the landlord. The District of Columbia Court of Appeals affirmed, rejecting the argument made by appellants that the landlord was under a contractual duty to maintain the premises in compliance with the Housing Regulations. Saunders v. First National Realty Corp., *supra*, 245 A.2d at 838.[5]

II

Since, in traditional analysis, a lease was the conveyance of an interest in land, courts have usually utilized the special rules governing real property transactions to resolve controversies involving leases. However, as the Supreme Court has noted in another context, "the body of private property law * * *, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical."[6] Courts have a duty to reappraise old doctrines in the light of the facts and values of contemporary life – particularly old common law doctrines which the courts themselves created and developed.[7] As we have said before, "[T]he continued vitality of the common law * * * depends upon its ability to reflect contemporary community values and ethics."[8]

The assumption of landlord-tenant law, derived from feudal property law, that a lease primarily conveyed to the tenant an interest in land may have been reasonable in a rural, agrarian society; it may continue to be reasonable in some leases involving farming or commercial land. In these cases, the value of the lease to the tenant is the land itself. But in the case of the modern apartment dweller, the value of the lease is that it gives him a place to

live. The city dweller who seeks to lease an apartment on the third floor of a tenement has little interest in the land 30 or 40 feet below, or even in the bare right to possession within the four walls of his apartment. When American city dwellers, both rich and poor, seek "shelter" today, they seek a well known package of goods and services[9] – a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.

Professor Powell summarizes the present state of the law:

> "* * * The complexities of city life, and the proliferated problems of modern society in general, have created new problems for lessors and lessees and these have been commonly handled by specific clauses inserted in leases. This growth in the number and detail of specific lease covenants has reintroduced into the law of estates for years a predominantly contractual ingredient. In practice, the law today concerning estates for years consists chiefly of rules determining the construction and effect of lease covenants. * * *"[10]

Ironically, however, the rules governing the construction and interpretation of "predominantly contractual" obligations in leases have too often remained rooted in old property law.

Some courts have realized that certain of the old rules of property law governing leases are inappropriate for today's transactions. In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases.[11] Proceeding piecemeal has, however, led to confusion where "decisions are frequently conflicting, not because of a healthy disagreement on social policy, but because of the lingering impact of rules whose policies are long since dead."[12]

In our judgment the trend toward treating leases as contracts is wise and well considered. Our holding in this case reflects a belief that leases of urban dwelling units should be interpreted and construed like any other contract.[13]

III

Modern contract law has recognized that the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality.[14] In interpreting most contracts, courts have sought to protect the legitimate expectations of the buyer and have steadily widened the seller's responsibility for the quality of goods and services through implied warranties of fitness and merchantability.[15] Thus without any special agreement a merchant will be held to warrant that his goods are fit for the ordinary purposes for which such goods are used and that they are at least of reasonably average quality. Moreover, if the supplier has been notified that goods are required for a specific purpose, he will be held to warrant that any goods sold are fit for that purpose. These implied warranties have become widely accepted and well established features of the common law, supported by the overwhelming body of case law.[16] Today most states as well as the District of Columbia[17] have codified and enacted these warranties into statute, as to the sale of goods, in the Uniform Commercial Code.

Implied warranties of quality have not been limited to cases involving sales. The consumer renting a chattel, paying for services, or buying a combination of goods and services must rely upon the skill and honesty of the supplier to at least the same extent as a purchaser of goods. Courts have not hesitated to find implied warranties of

fitness and merchantability in such situations.[18] In most areas product liability law has moved far beyond "mere" implied warranties running between two parties in privity with each other.[19]

The rigid doctrines of real property law have tended to inhibit the application of implied warranties to transactions involving real estate.[20] Now, however, courts have begun to hold sellers and developers of real property responsible for the quality of their product.[21] For example, builders of new homes have recently been held liable to purchasers for improper construction on the ground that the builders had breached an implied warranty of fitness.[22] In other cases courts have held builders of new homes liable for breach of an implied warranty that all local building regulations had been complied with.[23] And following the developments in other areas, very recent decisions[24] and commentary[25] suggest the possible extension of liability to parties other than the immediate seller for improper construction of residential real estate.

Despite this trend in the sale of real estate, many courts have been unwilling to imply warranties of quality, specifically a warranty of habitability, into leases of apartments. Recent decisions have offered no convincing explanation for their refusal[26] ; rather they have relied without discussion upon the old common law rule that the lessor is not obligated to repair unless he covenants to do so in the written lease contract.[27] However, the Supreme Courts of at least two states, in recent and well reasoned opinions, have held landlords to implied warranties of quality in housing leases. Lemle v. Breeden, S.Ct.Hawaii, 462 P. 2d 470 (1969); Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268 (1969). *See also* Pines v. Perssion, 14 Wis.2d 590, 111 N.W.2d 409 (1961). In our judgment, the old no-repair rule cannot coexist with the obligations imposed on the landlord by a typical modern housing code, and must be abandoned[28] in favor of an implied warranty of habitability.[29] In the District of Columbia, the standards of this warranty are set out in the Housing Regulations.

IV

A. In our judgment the common law itself must recognize the landlord's obligation to keep his premises in a habitable condition. This conclusion is compelled by three separate considerations. First, we believe that the old rule was based on certain factual assumptions which are no longer true; on its own terms, it can no longer be justified. Second, we believe that the consumer protection cases discussed above require that the old rule be abandoned in order to bring residential landlord-tenant law into harmony with the principles on which those cases rest. Third, we think that the nature of today's urban housing market also dictates abandonment of the old rule.

The common law rule absolving the lessor of all obligation to repair originated in the early Middle Ages.[30] Such a rule was perhaps well suited to an agrarian economy; the land was more important[31] than whatever small living structure was included in the leasehold, and the tenant farmer was fully capable of making repairs himself.[32] These historical facts were the basis on which the common law constructed its rule; they also provided the necessary prerequisites for its application.[33]

Court decisions in the late 1800's began to recognize that the factual assumptions of the common law were no longer accurate in some cases. For example, the common law, since it assumed that the land was the most important part of the leasehold, required a tenant to pay rent even if any building on the land was destroyed.[34] Faced with such a rule and the ludicrous results it produced, in 1863 the New York Court of Appeals declined to hold that an upper story tenant was obliged to continue paying rent after his apartment building burned down.[35] The court simply pointed out that the urban tenant had no interest in the land, only in the attached building.

Another line of cases created an exception to the no-repair rule for short term leases of furnished dwellings.[36] The Massachusetts Supreme Judicial Court, a court not known for its willingness to depart from the common law, supported this exception, pointing out:

> "* * * [A] different rule should apply to one who hires a furnished room, or a furnished house, for a few days, or a few weeks or months. Its fitness for immediate use of a particular kind, as indicated by its appointments, is a far more important element entering into the contract than when there is a mere lease of real estate. One who lets for a short term a house provided with all furnishings and appointments for immediate residence may be supposed to contract in reference to a well-understood purpose of the hirer to use it as a habitation. * * * It would be unreasonable to hold, under such circumstances, that the landlord does not impliedly agree that what he is letting is a house suitable for occupation in its condition at the time. * * *"[37]

These as well as other similar cases[38] demonstrate that some courts began some time ago to question the common law's assumptions that the land was the most important feature of a leasehold and that the tenant could feasibly make any necessary repairs himself. Where those assumptions no longer reflect contemporary housing patterns, the courts have created exceptions to the general rule that landlords have no duty to keep their premises in repair.

It is overdue for courts to admit that these assumptions are no longer true with regard to all urban housing. Today's urban[39] tenants, the vast majority of whom live in multiple dwelling houses, are interested, not in the land, but solely in "a house suitable for occupation." Furthermore, today's city dweller usually has a single, specialized skill unrelated to maintenance work; he is unable to make repairs like the "jack-of-all-trades" farmer who was the common law's model of the lessee.[40] Further, unlike his agrarian predecessor who often remained on one piece of land for his entire life, urban tenants today are more mobile than ever before. A tenant's tenure in a specific apartment will often not be sufficient to justify efforts at repairs. In addition, the increasing complexity of today's dwellings renders them much more difficult to repair than the structures of earlier times. In a multiple dwelling repair may require access to equipment and areas in the control of the landlord. Low and middle income tenants, even if they were interested in making repairs, would be unable to obtain any financing for major repairs since they have no long-term interest in the property.

Our approach to the common law of landlord and tenant ought to be aided by principles derived from the consumer protection cases referred to above.[41] In a lease contract, a tenant seeks to purchase from his landlord shelter for a specified period of time. The landlord sells housing as a commercial businessman and has much greater opportunity, incentive and capacity to inspect and maintain the condition of his building. Moreover, the tenant must rely upon the skill and *bona fides* of his landlord at least as much as a car buyer must rely upon the car manufacturer. In dealing with major problems, such as heating, plumbing, electrical or structural defects, the tenant's position corresponds precisely with "the ordinary consumer who cannot be expected to have the knowledge or capacity or even the opportunity to make adequate inspection of mechanical instrumentalities, like automobiles, and to decide for himself whether they are reasonably fit for the designed purpose." Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 375, 161 A.2d 69, 78 (1960).[42]

Since a lease contract specifies a particular period of time during which the tenant has a right to use his apartment for shelter, he may legitimately expect that the apartment will be fit for habitation for the time period for which it is rented. We point out that in the present cases there is no allegation that appellants' apartments were in poor condition or in violation of the housing code at the commencement of the leases.[43] Since the lessees continue

to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term. It is precisely such expectations that the law now recognizes as deserving of formal, legal protection.

Even beyond the rationale of traditional products liability law, the relationship of landlord and tenant suggests further compelling reasons for the law's protection of the tenants' legitimate expectations of quality. The inequality in bargaining power between landlord and tenant has been well documented.[44] Tenants have very little leverage to enforce demands for better housing. Various impediments to competition in the rental housing market, such as racial and class discrimination[45] and standardized form leases,[46] mean that landlords place tenants in a take it or leave it situation. The increasingly severe shortage[47] of adequate housing further increases the landlord's bargaining power and escalates the need for maintaining and improving the existing stock. Finally, the findings by various studies of the social impact of bad housing has led to the realization that poor housing is detrimental to the whole society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum.[48]

Thus we are led by our inspection of the relevant legal principles and precedents to the conclusion that the old common law rule imposing an obligation upon the lessee to repair during the lease term was really never intended to apply to residential urban leaseholds. Contract principles established in other areas of the law provide a more rational framework for the apportionment of landlord-tenant responsibilities; they strongly suggest that a warranty of habitability be implied into all contracts[49] for urban dwellings.

B. We believe, in any event, that the District's housing code requires that a warranty of habitability be implied in the leases of all housing that it covers. The housing code – formally designated the Housing Regulations of the District of Columbia – was established and authorized by the Commissioners of the District of Columbia on August 11, 1955.[50] Since that time, the code has been updated by numerous orders of the Commissioners. The 75 pages of the Regulations provide a comprehensive regulatory scheme setting forth in some detail: (a) the standards which housing in the District of Columbia must meet;[51] (b) which party, the lessor or the lessee, must meet each standard; and (c) a system of inspections, notifications and criminal penalties. The Regulations themselves are silent on the question of private remedies.

Two previous decisions of this court, however, have held that the Housing Regulations create legal rights and duties enforceable in tort by private parties. In Whetzel v. Jess Fisher Management Co., 108 U.S.App.D.C. 385, 282 F.2d 943 (1960), we followed the leading case of Altz v. Lieberson, 233 N.Y. 16, 134 N.E. 703 (1922), in holding (1) that the housing code altered the common law rule and imposed a duty to repair upon the landlord, and (2) that a right of action accrued to a tenant injured by the landlord's breach of this duty. As Judge Cardozo wrote in *Lieberson:*

> "* * * We may be sure that the framers of this statute, when regulating tenement life, had uppermost in thought the care of those who are unable to care for themselves. The Legislature must have known that unless repairs in the rooms of the poor were made by the landlord, they would not be made by any one. The duty imposed became commensurate with the need. The right to seek redress is not limited to the city or its officers. The right extends to all whom there was a purpose to protect. * * *"

134 N.E. at 704. Recently, in Kanelos v. Kettler, 132 U.S.App.D.C. 133, 135, 406 F.2d 951, 953 (1968), we reaffirmed our position in *Whetzel*, holding that "the Housing Regulations did impose maintenance obligations upon appellee [landlord] which he was not free to ignore."[52]

The District of Columbia Court of Appeals gave further effect to the Housing Regulations in Brown v. Southall Realty Co., 237 A.2d 834 (1968). There the landlord knew at the time the lease was signed that housing code viola-

tions existed which rendered the apartment "unsafe and unsanitary." Viewing the lease as a contract, the District of Columbia Court of Appeals held that the premises were let in violation of Sections 2304[53] and 2501[54] of the Regulations and that the lease, therefore, was void as an illegal contract. In the light of *Brown*, it is clear not only that the housing code creates privately enforceable duties as held in *Whetzel*, but that the basic validity of every housing contract depends upon substantial compliance with the housing code at the beginning of the lease term. The *Brown* court relied particularly upon Section 2501 of the Regulations which provides:

> "Every premises accommodating one or more habitations shall be maintained and kept in repair so as to provide decent living accommodations for the occupants. This part of this Code contemplates more than mere basic repairs and maintenance to keep out the elements; its purpose is to include repairs and maintenance designed to make a premises or neighborhood healthy and safe."

By its terms, this section applies to maintenance and repair during the lease term. Under the *Brown* holding, serious failure to comply with this section before the lease term begins renders the contract void. We think it untenable to find that this section has no effect on the contract after it has been signed. To the contrary, by signing the lease the landlord has undertaken a continuing obligation to the tenant to maintain the premises in accordance with all applicable law.

This principle of implied warranty is well established. Courts often imply relevant law into contracts to provide a remedy for any damage caused by one party's illegal conduct.[55] In a case closely analogous to the present ones, the Illinois Supreme Court held that a builder who constructed a house in violation of the Chicago building code had breached his contract with the buyer:

> "* * * [T]he law existing at the time and place of the making of the contract is deemed a part of the contract, as though expressly referred to or incorporated in it. * * *
>
> "The rationale for this rule is that the parties to the contract would have expressed that which the law implies 'had they not supposed that it was unnecessary to speak of it because the law provided for it.' * * * Consequently, the courts, in construing the existing law as part of the express contract, are not reading into the contract provisions different from those expressed and intended by the parties, as defendants contend, but are merely construing the contract in accordance with the intent of the parties."[56]

We follow the Illinois court in holding that the housing code must be read into housing contracts – a holding also required by the purposes and the structure of the code itself.[57] The duties imposed by the Housing Regulations may not be waived or shifted by agreement if the Regulations specifically place the duty upon the lessor.[58] Criminal penalties are provided if these duties are ignored. This regulatory structure was established by the Commissioners because, in their judgment, the grave conditions in the housing market required serious action. Yet official enforcement of the housing code has been far from uniformly effective.[59] Innumerable studies have documented the desperate condition of rental housing in the District of Columbia and in the nation. In view of these circumstances, we think the conclusion reached by the Supreme Court of Wisconsin as to the effect of a housing code on the old common law rule cannot be avoided:

> "* * * [T]he legislature has made a policy judgment – that it is socially (and politically) desirable to impose these duties on a property owner – which has rendered the old common law rule obsolete. To follow the

> old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. * * *"[60]

We therefore hold that the Housing Regulations imply a warranty of habitability, measured by the standards which they set out, into leases of all housing that they cover.

V

In the present cases, the landlord sued for possession for nonpayment of rent. Under contract principles,[61] however, the tenant's obligation to pay rent is dependent upon the landlord's performance of his obligations, including his warranty to maintain the premises in habitable condition. In order to determine whether any rent is owed to the landlord, the tenants must be given an opportunity to prove the housing code violations alleged as breach of the landlord's warranty.[62]

At trial, the finder of fact must make two findings: (1) whether the alleged violations[63] existed during the period for which past due rent is claimed, and (2) what portion, if any or all, of the tenant's obligation to pay rent was suspended by the landlord's breach. If no part of the tenant's rental obligation is found to have been suspended, then a judgment for possession may issue forthwith. On the other hand, if the jury determines that the entire rental obligation has been extinguished by the landlord's total breach, then the action for possession on the ground of nonpayment must fail.[64]

The jury may find that part of the tenant's rental obligation has been suspended but that part of the unpaid back rent is indeed owed to the landlord.[65] In these circumstances, no judgment for possession should issue if the tenant agrees to pay the partial rent found to be due.[66] If the tenant refuses to pay the partial amount, a judgment for possession may then be entered.

The judgment of the District of Columbia Court of Appeals is reversed and the cases are remanded for further proceedings consistent with this opinion.[67]

So ordered.

Circuit Judge Robb concurs in the result and in Parts IV-B and V of the opinion.

---

1. Housing Regulations of the District of Columbia (1956).↩

1. A clause in the lease provided that the tenant waived the statutory 30-day notice to quit. 45 D.C.Code § 908 (1967) expressly permits waiver of this notice. Appellants' answer put in issue the validity of the waivers. In view of our disposition, we have no occasion to pass upon this aspect of the case.↩

1. Rule 4(c) of the Landlord and Tenant Branch of the Court of General Sessions provides:"In suits in this branch for recovery of possession of property in which the basis of recovery of possession is nonpayment of rent, tenants may set up an equitable defense or claim by way of recoupment or set-off in an amount equal to the rent claim. No counterclaim may be filed unless plaintiff asks for money judgment for rent. The exclusion of prosecution of any claims in this branch shall be without prejudice to the prosecution of any claims in other branches of the court."Appellants have sought only to defeat the landlord's action; they have not as yet claimed any money damages for the landlord's alleged breach of contract. Under Rule 4(c) *supra*, they may not counterclaim for money damages if the landlord seeks only possession and no money judgment, as it has done here. For the considerations to be applied in determining whether this rule conforms "as nearly as may be practicable" to the Federal Rules of Civil Procedure as required by 13 D.C.Code § 101 (1967), *see* McKelton v. Bruno, 138 U.S.App. D.C. –, 428 F.2d 718 (decided February 17, 1970).

↩

1. According to established procedure, this case was submitted to both the District of Columbia Court of Appeals and this court on the basis of a sparse "Settled Statement of Proceedings and Evidence," as approved by both parties and the trial judge. Unfortunately, the court's ruling on the offer of proof was made from the bench, and the basis of the ruling is not reflected in the "Settled Statement." We have recently noted the inadequacy of such records for review by an appellate court. Lee v. Habib, 137 U.S.App.D.C. 403, 424 F.2d 891 (1970).↩

1. In the District of Columbia Court of Appeals, appellee urged that these cases were moot on the basis of events occurring since the landlord initiated this litigation. The D.C. Court of Appeals held that the cases were not moot. Saunders v. First National Realty Co., 245 A.2d 836, 837 (1968). Appellee has not argued mootness here, and in any event we follow the ruling of the D.C. Court of Appeals on this point.↩

1. Jones v. United States, 362 U.S. 257, 266, 80 S.Ct. 725, 733, 4 L.Ed.2d 697 (1960).↩

1. *See* Spencer v. General Hospital of the District of Columbia, 138 U.S.App.D.C. 48, 53, 425 F.2d 479, 484 (1969) (*en banc*); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 90, 207 A.2d 314, 325 (1965). *Cf.* 11 S. Williston, Contracts § 1393A at 461 (3d ed. W. Jaeger 1968) ("Most of the leading jurisdictions have not hesitated to undo a judicially committed blunder * * * by employing the same means – judicial decisions") and cases cited therein at n. 20.↩

1. Whetzel v. Jess Fisher Management Co., 108 U.S.App.D.C. 385, 388, 282 F.2d 943, 946 (1960).↩

1. *See, e. g.*, National Commission on Urban Problems, Building the American City 9 (1968). The extensive standards set out in the Housing Regulations provide a good guide to community expectations.↩

1. 2 R. Powell, Real Property ¶ 221 [1] at 179 (1967).↩

1. *E. g.*, Medico-Dental Building Co. v. Horton & Converse, 21 Cal.2d 411, 418, 132 P.2d 457, 462 (1942). *See also* 1 American Law of Property § 3.11 at 202-205 (A. Casner ed. 1952); Note, The California Lease – Contract or Conveyance?, 4 Stan.L.Rev. 244 (1952); Friedman, The Nature of a Lease in New York, 33 Cornell L.Q. 165 (1947).↩

1. Kessler, The Protection of the Consumer Under Modern Sales Law, 74 Yale L.J. 262, 263 (1964).↩

1. This approach does not deny the possible importance of the fact that land is involved in a transaction. The interpretation and construction of contracts between private parties has always required courts to be sensitive and responsive to myriad different factors. We believe contract doctrines allow courts to be properly sensitive to all relevant factors in interpreting lease obligations.We also intend no alteration of statutory or case law definitions of the term "real property" for purposes of statutes or decisions on recordation, descent, conveyancing, creditors' rights, etc. We contemplate only that contract law is to determine the rights and obligations of the parties to the lease agreement, as between themselves. The civil law has always viewed the lease as a contract, and in our judgment that perspective has proved superior to that of the common law. *See* 2 M. Planiol, Treatise on the Civil Law § 1663 *et seq.* (1959); 11 La.Stat.Ann., Civil Code, Art. 2669 (1952).↩

1. *See generally* 8 S. Williston, Contracts §§ 983-989 (3d ed. W. Jaeger 1964); W. Prosser, Torts § 95 (3d ed. 1964).↩

1. *See* Jaeger, Warranties of Merchantability and Fitness for Use, 16 Rutgers L. Rev. 493 (1962); Uniform Commercial Code §§ 2-314, 2-315 (1968).↩

1. *Ibid.*↩

1. 28 D.C.Code Subtitle I (1967).↩

1. Farnsworth, Implied Warranties of Quality in Non-Sales Cases, 57 Colum. L.Rev. 653 (1957). *See* Cintrone v. Hertz Truck Leasing & Rental Service, 45 N.J. 434, 212 A.2d 769 (1965); 2 F. Harper & F. James, Torts § 28.19 at 1577 n. 5 and n. 6 (1956).↩

1. *See, e. g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); Goldberg v. Kollsman Instrument Corp., 12 N.Y.2d 432, 240 N.Y.S.2d 592, 191 N.E.2d 81 (1963). *See generally* Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099 (1960); Jaeger, Product Liability: The Constructive Warranty, 39 Notre Dame Lawyer 501 (1964).↩

1. *See* Fegeas v. Sherill, 218 Md. 472, 147 A.2d 223 (1958); 7 S. Williston, Contracts § 926 at 800-801, § 926A (3d ed. W. Jaeger 1963).↩

1. *See generally* Bearman, Caveat Emptor in Sale of Realty – Recent Assaults Upon the Rule, 14 Vand.L.Rev. 541 (1961); Dunham, Vendor's Obligation as to Fitness of Land for a Particular Purpose, 37 Minn.L.Rev. 108 (1953).↩

1. *See* Waggoner v. Midwestern Development, Inc., S.D., 154 N.W.2d 803 (1967); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1969); Schipper v. Levitt & Sons, Inc., *supra* Note 7; Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Loraso v. Custom Built Homes, Inc., La.App., 144 So.2d 459 (1962). Other cases still continue the older limitation on the vendor's liability to homes sold before construction is complete. *See, e. g.*, Hoye v. Century Builders, 52 Wash.2d 830, 329 P.2d 474 (1958).↩

1. *See* Schiro v. W. E. Gould & Co., 18 Ill.2d 538, 165 N.E.2d 286 (1960); Annot., 110 A.L.R. 1048 (1937).↩

1. Connor v. Great Western Savings and Loan Ass'n, 69 Cal.2d 850, 73 Cal.Rptr. 369, 447 P.2d 609 (1968) (in bank) (Traynor, Ch. J.). Chief Justice Traynor's excellent opinion utilizes tort doctrines to extend liability beyond the immediate seller.↩

1. Comment, Liability of the Institutional Lender for Structural Defects in New Housing, 35 U.Chi.L.Rev. 739 (1968).↩

1. *E. g.*, Kearse v. Spaulding, 406 Pa. 140, 176 A.2d 450 (1962); Susskind v. 1136 Tenants Corp., 43 Misc.2d 588, 251 N.Y.S.2d 321 (1964); Rubinger v. Del Monte, N.Y.S.Ct., App.T., 217 N.Y.S.2d 792 (1961).↩

1. The cases which recite this old rule are legion. A representative sampling is cited in 32 Am.Jur. Landlord and Tenant § 655 n. 14 (1941).↩

1. As far as tort liability is concerned, we have previously held that the old common law rule has been changed by passage of the housing code and that the landlord has a duty to maintain reasonably safe premises. *See* Note 52 *infra.*↩

1. Although the present cases involve written leases, we think there is no particular significance in this fact. The landlord's warranty is implied in oral and written leases for all types of tenancies.↩

1. The rule was "settled" by 1485. 3 W. Holdsworth, A History of English Law 122-123 (6th ed. 1934). The common law rule discussed in text originated in the even older rule prohibiting the tenant from committing waste. The writ of waste expanded as the tenant's right to possession grew stronger. Eventually, in order to protect the landowner's reversionary interest, the tenant became obligated to make repairs and liable to eviction and damages if he failed to do so. *Ibid.*↩

1. The land was so central to the original common law conception of a leasehold that rent was viewed as "issuing" from the land: "[T]he governing idea is that the land is bound to pay the rent * *. We may almost go to the length of saying that the land pays it through [the tenant's] hand." 2 F. Pollock & F. Maitland, The History of English Law 131 (2d ed. 1923).↩

1. Many later judicial opinions have added another justification of the old common law rule. They have invoked the timeworn cry of *caveat emptor* and argued that a lessee has the opportunity to inspect the premises. On the basis of his inspection, the tenant must then take the premises "as is," according to this reasoning. As an historical matter, the opportunity to inspect was not thought important when the rule was first devised. *See* Note 30 *supra.* To the extent the no-repair rule rests on *caveat emptor, see* page 1079, *infra.*↩

1. Even the old common law courts responded with a different rule for a landlord-tenant relationship which did not conform to the model of the usual agrarian lease. Much more substantial obligations were placed upon the keepers of inns (the only multiple dwelling houses known to the common law). Their guests were interested solely in shelter and could not be expected to make their own repairs. "The modern apartment dweller more closely resembles the guest in an inn than he resembles an agrarian tenant, but the law has not generally recognized the similarity." J. Levi, P. Hablutzel, L. Rosenberg & J. White, Model Residential Landlord-Tenant Code 6-7 (Tent. Draft 1969).↩

1. Paradine v. Jane, Aleyn 26, 82 Eng. Rep. 897 (K.B. 1947); 1 American Law of Property, *supra* Note 11, § 3.103.↩

1. Graves v. Berdan, 26 N.Y. 498 (1863).↩

1. 1 American Law of Property, *supra* Note 11, § 3.45 at 267-268, and cases cited therein.↩

1. Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892).↩

1. The cases developing the doctrines of "quiet enjoyment" and "constructive eviction" are the most important. *See* 2 R. Powell, *supra* Note 10, ¶ 225 [3]. *See also* Gladden v. Walker & Dunlop, 83 U.S.App.D.C. 224, 168 F.2d 321 (1948) (landlord has duty to maintain portions of apartment "under his control" including plumbing, heating and electrical systems); J. D. Young Corp. v. McClintic, Tex.Civ.App., 26 S.W.2d 460 (1930) (implied covenant of fitness in lease of building under construction); Steefel x. Rothschild, 179 N.Y. 273, 72 N.E. 112 (1904) (duty to disclose latent defects).↩

1. In 1968 more than two thirds of America's people lived in the 228 largest metropolitan areas. Only 5.2% lived on farms. The World Almanac 1970 at 251 (L. Long ed.). More than 98% of all housing starts in 1968 were non-farm. *Id.* at 313.↩

1. *See* J. Levi *et al., supra* Note 33, at 6.↩

1. *See* Part III, *supra.*↩

1. Nor should the average tenant be thought capable of "inspecting" plaster, floorboards, roofing, kitchen appliances, etc. To the extent, however, that some defects *are* obvious, the law must take note of the present housing shortage. Tenants may have no real alternative but to accept such housing with the expectation that the landlord will make necessary repairs. Where this is so, *caveat emptor* must of necessity be rejected.↩

1. In Brown v. Southall Realty Co., 237 A.2d 834 (1968), the District of Columbia Court of Appeals held that unsafe and unsanitary conditions existing at the beginning of the tenancy and known to the landlord rendered any lease of those premises illegal and void.↩

1. *See* Edwards v. Habib, 130 U.S.App. D.C. 126, 140, 397 F.2d 687, 701 (1968); 2 R. Powell, *supra* Note 10, ¶ 221 [1] at 183; President's Committee on Urban Housing, A Decent Home 96 (1968).↩

1. President's Committee, *supra* Note 44, at 96; National Commission, *supra* Note 9, at 18-19; G. Sternlieb, The Tenement Landlord 71 (1966).↩

1. R. Powell, *supra* Note 10, ¶ 221 [1] at 183 n. 13.↩

1. *See generally* President's Committee, *supra* Note 44.↩

1. A. Schorr, Slums and Insecurity (1963); J. Levi, *et al., supra* Note 33, at 7-8.↩

1. We need not consider the provisions of the written lease governing repairs since this implied warranty of the landlord could not be excluded. *See* Henningsen v. Bloomfield Motors, Inc., *supra* Note 19; Kay v. Cain, 81 U.S.App.D.C. 24, 25, 154 F.2d 305, 306 (1946). *See also* Note 58, *infra.*↩

1. 2 D.C.Register 47 (1955).↩

1. These include standards for nursing homes and other similar institutions. The full scheme of the Regulations is set out in Whetzel v. Fisher Management Co., *supra* Note 8.↩

1. *Kanelos* and *Whetzel* have effectively overruled, on the basis of the enactment of the housing code, Bowles v. Mahoney, 91 U.S.App.D.C. 155, 202 F.2d 320 (1952) (two to one decision, Judge Bazelon dissenting).↩

1. "No person shall rent or offer to rent any habitation, or the furnishings thereof, unless such habitation and its furnishings are in a clean, safe and sanitary condition, in repair, and free from rodents or vermin."↩

1. *See infra.*↩

1. *See* cases cited in Annot., 110 A.L.R. 1048 (1937).↩

1. Schiro v. W. E. Gould & Co., *supra* Note 23, 18 Ill.2d at 544, 165 N.E.2d at 290. As a general proposition, it is undoubtedly true that parties to a contract intend that applicable law will be complied with by both sides. We recognize, however, that reading statutory provisions into private contracts may have little factual support in the intentions of the particular parties now before us. But, for reasons of public policy, warranties are often implied into contracts by operation of law in order to meet generally prevailing standards of honesty and fair dealing. When the public policy has been enacted into law like the housing code, that policy will usually have deep roots in the expectations and intentions of most people. *See* Costigan, Implied-in-Fact Contracts and Mutual Assent, 33 Harv. L.Rev. 376, 383-385 (1920).↩

1. "The housing and sanitary codes, especially in light of Congress' explicit direction for their enactment, indicate a strong and pervasive congressional concern to secure for the city's slum dwellers decent, or at least safe and sanitary, places to live." Edwards v. Habib, *supra* Note 44, 130 U.S.App.D.C. at 139, 397 F.2d at 700.↩

1. Any private agreement to shift the duties would be illegal and unenforceable. The precedents dealing with industrial safety statutes are directly in point:"* * * [T]he only question remaining is whether the courts will enforce or recognize as against a servant an agreement express or implied on his part to waive the performance of a statutory duty of the master imposed for the protection of the servant, and in the interest of the public, and enforceable by criminal prosecution. We do not think they will. To do so would be to nullify the object of the statute. * * *"Narramore v. Cleveland, C., C. & St. L. Ry. Co., 6 Cir., 96 F. 298, 302 (1899). *See* W. Prosser, Torts § 67 at 468-469 (3d ed. 1964) and cases cited therein.

↩

1. *See* Gribetz & Grad, Housing Code Enforcement: Sanctions and Remedies, 66 Colum.L.Rev. 1254 (1966); Note, Enforcement of Municipal Housing Codes, 78 Harv.L.Rev. 801 (1965).↩

1. Pines v. Perssion, 14 Wis.2d 590, 596, 111 N.W.2d 409, 412-413 (1961). *Accord*, Buckner v. Azulai, 251 Cal.App.2d Supp. 1013, 59 Cal.Rptr. 806 (1967).↩

1. In extending all contract remedies for breach to the parties to a lease, we include an action for specific performance of the landlord's implied warranty of habitability.↩

1. To be relevant, of course, the violations must affect the tenant's apartment or common areas which the tenant uses. Moreover, the contract principle that no one may benefit from his own wrong will allow the landlord to defend by proving the damage was caused by the tenant's wrongful action. However, violations resulting from inadequate repairs or materials which disintegrate under normal use would not be assignable to the tenant. Also we agree with the District of Columbia Court of Appeals that the tenant's private rights do not depend on official inspection or official finding of violation by the city government. Diamond Housing Corp. v. Robinson, 257 A.2d 492, 494 (1969).↩

1. The jury should be instructed that one or two minor violations standing alone which do not affect habitability are *de minimis* and would not entitle the tenant to a reduction in rent.↩

1. As soon as the landlord made the necessary repairs rent would again become due. Our holding, of course, affects only eviction for nonpayment of rent. The landlord is free to seek eviction at the termination of the lease or on any other legal ground.↩

1. In George Y. Worthington & Son Management Corp. v. Levy, 204 A.2d 334, 336 (1964), the District of Columbia Court of Appeals approved a similar procedure:"In actions for possession of real property by reason of default in rent, where no money judgment for the back rent is sought, it is nevertheless proper practice for the trial court to specifically find the amount of rent in arrears. * * *"↩

1. *Compare* Molyneaux v. Town House, Inc., D.C.C.A., 195 A.2d 744 (1963). A jury finding that the landlord had failed to live up to all of his obligations would operate as a conclusive finding that the tenant was entitled to equitable relief under *Molyneaux*.↩

1. Appellants in the present cases offered to pay rent into the registry of the court during the present action. We think this is an excellent protective procedure. If the tenant defends against an action for possession on the basis of breach of the landlord's warranty of habitability, the trial court may require the tenant to make future rent payments into the registry of the court as they become due; such a procedure would be appropriate only while the tenant remains in possession. The escrowed money will, however, represent rent for the period between the time the landlord files suit and the time the case comes to trial. In the normal course of litigation, the only factual question at trial would be the condition of the apartment during the time the landlord alleged rent was due and not paid.As a general rule, the escrowed money should be apportioned between the landlord and the tenant after trial on the basis of the finding of rent actually due for the period at issue in the suit. To insure fair apportionment, however, we think either party should be permitted to amend its complaint or answer at any time before trial, to allege a change in the condition of the apartment. In this event, the finder of fact should make a separate finding as to the condition of the apartment at the time at which the amendment was filed. This new finding will have no effect upon the original action; it will only affect the distribution of the escrowed rent paid after the filing of the amendment.↩

Thompson v. Crownover et al.,

259 Ga. 126 (1989)

Carr, Tabb & Pope, David H. Pope, for appellant.

Richard Eason, Jr., John C. Sumner, Rex T. Reeves, Morse & Ontal, Jack O. Morse, for appellees.

Dennis A. Goldstein, Kay Y. Young, amici curiae.

Smith, Justice

We granted a writ of certiorari in *Thompson v. Crownover*, 186 Ga. App. 633 (368 SE2d 170) (1988), and we reverse.

The appellant, Mrs. Thompson, was seriously burned when flames from what was left of a deteriorating gas heater ignited her clothing. She filed an action against the appellees, James L. Crownover and Crownover Electrical and Mechanical, Inc., the owners of the house in which the incident occurred.

The trial court granted the appellees' motion for summary judgment after finding that the defective condition of the heater was patent and that the appellant had equal or superior knowledge of the defect. The Court of Appeals (three judges concurred in the opinion, two concurred in the judgment only, and four dissented) generally affirmed the trial court's grant of summary judgment for the appellees.

Facts

Mrs. Howard, the appellant's mother, leased three rooms from Mr. Crownover as a dwelling place where she lived with her two daughters and six grandchildren. Two gas heaters served as the source of heat for the rooms. At the

time Mrs. Howard leased the rooms, the bedroom heater lacked the protective radiants that served as protection from the gas flames.

During the tenancy, Mrs. Howard told Mr. Crownover that the heater was dangerous and asked him to repair it. Mr. Crownover did not repair the heater, but he did authorize Mrs. Howard to repair it. He told her that she could buy the necessary protective radiants and deduct the cost from her rent. The protective radiants she purchased were not the proper size, and her attempt to repair the heater was unsuccessful. Subsequently, the top and back of the heater fell off, leaving open gas flames rising from a frame on the floor.

Mr. Crownover had actual and constructive notice of the dangerous situation on several occasions from Mrs. Howard and others. The last such notice was received by Mr. Crownover approximately one month prior to the incident. Mr. Crownover received a notice from the College Park housing inspector informing him, among other things, that the heating facilities in the property he leased were in poor condition and that the property was "unsafe for human occupancy and constitute[d a] hazard to [the] health and safety of [the] occupants."

On the day the appellant was burned, she was alone at home. Mrs. Howard was out looking for a new place to live because the property had been declared "unsafe." Not long after the appellant was taken to the hospital, the fire inspector told Mr. Crownover that the heaters would have to be replaced. Before that day had ended, Mr. Crownover had both heaters replaced.

The appellant received burns over 36 percent of her body, requiring her to remain in Grady Hospital from January 1984 until April 1984. Thereafter she had to wear a special garment for a year and had to go to the out-patient clinic at Grady on a weekly basis.

Landlord's Duty

1. Under traditional property law, a lessor grants and a lessee acquires an estate in the land. Thus, according to the common law, the lessor generally has no obligation to keep the tenant's estate in repair nor is he responsible for persons injured on or off the tenant's estate. However, in states that follow the common law there has been

> [d]iscontent with the appearance of unfairness in the landlord's general immunity from tort liability, and with the artificiality and increasing complexity of the various exceptions to this seemingly archaic rule of nonliability, [finally] the New Hampshire Supreme Court in *Sargent v. Ross* [113 N.H. 388 (308 A2d 528) (1973)] turned the rule on its head in 1973 and imposed on the lessor a general tort duty of reasonable care. The holding has been followed by [ten courts], and rejected by [two courts], and it is still too early to know how broadly this restructuring of landlord tort law may extend.

W. L. Prosser & W. P. Keeton, Prosser & Keeton on Torts, p. 446 (5th ed. 1984).

Georgia's statutory landlord and tenant law is unique. More than 120 years ago our General Assembly rejected the common law when it enacted Section 2261 of the 1865 Code which provided:

> When the owner of lands grants to another simply the right to possess and enjoy the use of such lands … and the tenant accepts the grant, the relation of landlord and tenant exists between them. In such case no estate passes out of the landlord, and the tenant has only a usufruct …

Ga. L. 1865, § 2261 (now OCGA § 44-7-1 (a)).

The Georgia landlord does not grant, nor does the Georgia tenant acquire an estate. "[In a landlord and tenant relationship] the tenant has no estate, but a mere right of use, very similar to the right of a hirer of personalty." Ga. L. 1865, § 2256 (now OCGA § 44-6-101). Thus it was only natural for the General Assembly to require the landlord,

the owner of the estate, to keep his estate in repair and retain liability for all substantial improvements upon his estate. "The landlord must keep the premises in repair, and is liable for all substantial improvements placed upon them by his consent." Ga. L. 1865, § 2266 (now OCGA § 44-7-13).

With this understanding of the Georgia landlord's relationship to the property and to the tenant, it was no surprise when the General Assembly in 1895 enacted another statute that imposed a duty of reasonable care on landlords. "[The landlord] is responsible to others for damages arising from defective construction, or for damages from failure to keep the premises in repair." Ga. L. 1895, § 3118 (now OCGA § 44-7-14).

Although our courts have looked to the common law in deciding landlord and tenant cases, it is clear that the General Assembly rejected the common law long ago, "and the judiciary, up until now, has simply failed to give effect to this policy in its decisions." *Country Club Apts. v. Scott*, 246 Ga. 443, 444 (271 SE2d 841) (1980).

2. The General Assembly has consistently expressed the public policy of this state as one in favor of imposing upon the landlord liability for damages to others from defective construction and failure to keep his premises in repair. The expressed public policy in favor of landlord liability is matched by an equally strong and important public policy in favor of preventing unsafe residential housing.

The General Assembly has found that people with low incomes are forced to live in unsafe housing and that such living conditions constitute a menace to the health and safety of all the residents of Georgia. The General Assembly has also found a direct correlation between unsafe residential housing and excessive financial burdens placed on municipalities, counties, and the state as a whole.[1]

3. With these important policies expressed and firmly in place, the General Assembly enacted a statute in 1976, OCGA § 44-7-2, which forbids landlords from avoiding: their duty of repair, OCGA § 44-7-2 (b) (1); and their liability for failure to repair, OCGA § 44-7-2 (b) (2). It also forbids landlords from avoiding their duties created by housing codes, OCGA § 44-7-2 (b) (3).

The public policy of this state supports the position advanced by the Restatement of Law 2d, Property, § 17.6, which follows:

> A landlord [should be] subject to liability for physical harm caused to the tenant and others upon the leased property with the consent of the tenant or his subtenants by a dangerous condition existing before or arising after the tenant has taken possession, if he has failed to exercise reasonable care to repair the condition and the existence of the condition is in violation of:
>
> (1) an implied warranty of habitability; or
>
> (2) a duty created by statute or administrative regulation.

The General Assembly's mandate is clear. The landlord, the owner of the estate, cannot avoid duties created by housing codes. One of the ways in which the public policy of this state can be upheld is by subjecting the landlord to tort liability for a violation of the duties created by the housing codes and other legislation. Accord Restatement of Law 2d, Property, § 17.6 Reporter's note 3.

> >

Disposition of This Case

4. Prior to the time of the incident, the City of College Park adopted "The Southern Housing Code." Thus a jury must decide whether the appellees have failed to exercise reasonable care to repair the heater and whether the condition of the heater constituted a violation of the housing code.

5. The Court of Appeals found that the appellant had assumed the risk. However,

> [i]ssues of negligence, including the related issues of assumption of the risk, lack of ordinary care for one's own safety, lack of ordinary care in avoiding the consequences of another's negligence and comparative negligence, are ordinarily not susceptible of *summary* adjudication whether for or against the plaintiff or the defendant, but must be resolved by a trial in the ordinary manner.

Wakefield v. A. R. Winter Co., 121 Ga. App. 259 (174 SE2d 178) (1970).

6. The Court of Appeals held that the use of the bedroom heater was not one of "necessity" as the heater in the living room provided "a less dangerous" alternative. *Thompson v. Crownover*, supra, 186 Ga. App. 633, 636. However, the evidence regarding the condition of the living room heater was conflicting.[2] It is the jury's function to draw an inference from the evidence when more than one inference can be drawn. Also, the appellees cannot be insulated from liability simply because one portion of the premises might be "less dangerous" than the other. At any rate, it is a question for a jury to resolve.

7. A trial court's grant of summary judgment will not be sustained if there is any genuine issue of material fact. There remain genuine issues of material fact for a jury's resolution.

Judgment reversed. All the Justices concur, except Hunt, J., who concurs specially, and Marshall, C. J., Clarke, P. J., and Weltner, J., who dissent.

Hunt, Justice, concurring specially.

I write separately because the majority's emphasis on the landlord's conduct and the extent of the tenant's injuries tends to obscure the central issue. The central issue is not the extent of the landlord's negligence, which negligence is presupposed in a consideration of assumption of the risk as applied to Mrs. Thompson. Rather, the central issue is whether her admitted knowledge of the heater's condition acts, under the doctrine of assumption of the risk, as a bar to any recovery. But for the "rule of necessity"[3] I think it would.

Having said that, let me point out that certiorari was granted in this case to consider whether the "patent defect" rule bars recovery to the plaintiff in this case. Having implicitly decided that it does not, we should not then move into the fact-finding arena to determine whether the "rule of necessity" applies here – that is, whether, as a matter of fact, the plaintiff had a reasonable alternative to using the hazardous heater. In so doing, we are second-guessing both the trial court's and the Court of Appeals' determinations on that question.[4] This is not our function on certiorari and I would not reach this issue.

---

1. "It is found and declared that there exist in municipalities and counties of this state slum areas ... [which] consume an excessive proportion of its revenues because of the extra services required for police, fire, accident, hospitalization, and other forms of public protection, services, and facilities." OCGA § 36-61-3 (a).[T]here exist in the state insanitary [sic] and unsafe dwelling accommodations; that persons of low income are forced to reside in such accommodations ... [which] constitute a menace to the health, safety, morals, and welfare of the residents of the state and ... these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health and safety, fire and accident protection, and other public services and facilities ...OCGA § 8-3-2.

↩

1. Mrs. Howard's affidavit stated that the Gas Light Company inspector left a note stating that the "gas space *heaters*" were dangerous. When the property was declared "unfit," the notice of the housing violations stated that the "heating *facilities*" were in poor condition. Appellee James Crownover stated in a deposition that he replaced *both heaters* in the apartment after the fire inspector told him that the heaters had to be replaced.↩

1. Explored by Judge Benham in his dissent joined by Judges Deen, McMurray and Pope.↩
1. And, in so doing, we come no closer to reconciling the issue than did the Court of Appeals. What then does our involvement contribute to the general body of state law? See Supreme Court Rules 29 and 30 (1) regarding the criteria for the grant of certiorari.↩

3.4. Problems

PROBLEMS

1. Which, if any, of the below are critical to making a warranty of habitability claim after *Javins*?

(a) showing that one's residential lease is written in the form of a contract rather than a transfer of real property
(b) showing a violation of the local Housing Code
(c) showing bad faith on the part of the landlord
(d) showing a substantial interference with the right of possession

1. In your own words, why should it affect a landlord's duty to mitigate damages when a tenant breaks a lease whether a lease agreement is a transfer of an interest in land?
1. Explain how it might be possible to show a breach of the warranty of habitability where there is no breach of the covenant of quiet enjoyment.
1. True or false: One can maintain a constructive eviction claim while occupying the leased property.

Answers

1. Which, if any, of the below are critical to making a warranty of habitability claim after *Javins*?

(a) showing that one's residential lease is written in the form of a contract rather than a transfer of real property

No, this is not necessary. One of the major points of Javins is that residential leases are not transfers of real property, but are to be treated like ordinary contracts. One need not show that one's lease is a contract.

(b) showing a violation of the local Housing Code

Yes. Though some courts find violations based on conditions that fall below judicially specified community standards, the Javins court found the warranty to be based on compliance with the housing code.

(c) showing bad faith on the part of the landlord

No, not required.

(d) showing a substantial interference with the right of possession

> No, this is, roughly, the standard for showing a constructive eviction, i.e., a breach of the covenant to provide quiet enjoyment, not for showing a breach of the warranty of habitability.

2. In your own words, why should it affect a landlord's duty to mitigate damages when a tenant breaks a lease whether a lease agreement is a transfer of an interest in land?

> If the lease is a transfer of an interest in land, then a landlord could neither enter a tenant's apartment nor re-let it. The property would not 'belong' to the landlord, or at least is not his to possess, until the end of the leasehold at which point the property would revert to him. If, however, the lease is a contract, then the tenant's non-payment is a material breach, which excuses the landlord from his obligation to provide the tenant with possession of the premises. Thus, if it is a contract, the landlord can cover some of his losses, but if it is a conveyance of real property, he cannot.

3. Explain how it might be possible to show a breach of the warranty of habitability where there is no breach of the covenant of quiet enjoyment.

> A breach of the covenant of quiet enjoyment requires constructive eviction from at least a portion of the leased property. A breach of the warranty of habitability, like a broken window or pest infestation, can exist without constituting an eviction. That said, these claims are often brought together. And the Restatement and traditional standards for (more than insignificant, substantial) constructive eviction are less then perfectly clear. But if you observed that the standards were not the same, and observed that a landlord could violate one without violating the other, that's fine.

4. True or false: One can maintain a constructive eviction claim while occupying the leased property.

> True. This is just *Minjak*.

4. Shared Ownership

Christian Turner

An Introduction to Co-Ownership

Having now learned how people split ownership temporally, serially serving as owners, we will study the means by which people can own the same thing at the same time. Instead of "O to *A* and then to *B*," let's consider "O to *A and B*."

It isn't difficult to imagine the kinds of issues that will arise if we recognize two or more people as co-owners of Blackacre. What if they don't get along, can't agree on how to use the property, can't agree on maintenance or remodeling or whether to sell or lease? What if one co-owner acts without the consent of the others? What happens when a co-owner dies? The law must have ways to answer such questions.

As with temporally divided ownership, concurrent co-ownership can come in one of several, fixed types. Knowing the type of co-ownership will answer many questions concerning the rights and obligations of the co-owners (often called cotenants). These forms are: the *tenancy in common*, the *joint tenancy*, and the *tenancy by the entirety*.[1] Your first job when evaluating a situation involving co-owners is to determine whether the co-owners are tenants in common, joint tenants, or tenants by the entirety.

The major differences between the forms of co-ownership are in (1) how they are created, (2) how the interests in the property are distributed, (3) the effect of the death of a cotenant, (4) the alienability of interests, and (5) the availability of partition. Despite these differences, the forms of co-ownership share approaches to dividing income and expenses among cotenants.

Basic Co-Ownership Principles

Except for certain key differences between the forms of co-ownership, the rights and obligations of co-owners can be summarized succinctly:

- *Undivided interests.* Each cotenant has an equal right to use and occupy the whole property. Though the cotenants may, by informal agreement or force of habit, have their own rooms or private areas, they may not bar each other from any part of the property. Cotenants have this right even if they have small *fractional shares*. I may have only a one-quarter interest in Blackacre to your three-quarters interest. If Blackacre were sold, we'd take the proceeds according to those shares. But, despite your greater share, we have *equal* rights to possess and use all of Blackacre.

- *Ouster.* A cotenant is ousted when forcibly ejected or barred from the property. Courts will find constructive ouster if something about the property itself or something about the relationship between the cotenants makes co-occupancy impossible.
- *No duty to pay rent.* Cotenants are not obligated to pay rent to each other, even if one or more of them are not in possession. Thus, if your cotenant has exclusive possession of Blackacre, and you live elsewhere, you have no right to any amount of rent from your cotenant. One important exception: an *ousted* cotenant is owed rent, usually calculated by taking the fair market rental value and giving to the ousted cotenant his or her share (according to his or her fractional interest).
- *Rent from third parties.* Cotenants are however entitled to share in rents received from third parties. If cotenant *A* leases the property to *X*, then cotenant *B* is entitled to a portion of the rent (less expenses) according to *B*'s fractional share.
- *Expenses.* Cotenants have a duty to pay their share of basic expenses, such as mortgage payments, insurance premiums, and taxes. Many courts include among such expenses amounts needed for basic maintenance. Other courts treat even basic maintenance like all courts treat major improvements: no duty to share costs absent an agreement among the cotenants.
- *Expense borne by in-possession cotenants.* Cotenants in exclusive possession must pay all the expenses up to the value of the cotenants' occupation. Thus, in the example above where you live elsewhere while your cotenant enjoys living at Blackacre, while you don't get rent, you do get the benefit of not having to pay at least some of the expenses. If there are only two of you, each with a one-half interest, then you only become liable for basic expenses that exceed half of the fair rental value of Blackacre. You would bear half of the expenses that exceed such amount.
- *Accounting.* An accounting is a cause of action to force a cotenant to pay for rents and basic maintenance.
- *Partitition.* An action for partitition is the means through which to seek judicial division of the property. Partition can be either in kind, meaning that the property is physically divided with the divided pieces distributed to the cotenants as sole owners, or by sale, after which the cotenants receive the proceeds according to their fractional shares. Though there is a stated preference for in kind partitition, it is often impractical and sales are common.

The Tenancy in Common

This is now the default form of co-ownership across the United States. Thus, a grant in the form "O to *A* and *B*" will result in a transfer of the property to *A* and *B* as tenants in common. The fractional shares granted need not be equal, and there can be more than two co-owners. Consider: "O to*A*, *B*, and *C* as tenants in common, with a 1/4 undivided interest in *A*, a 1/4 undivided interest in *B*, and a 1/2 undivided interest in *C*." Each of the cotenant is free to use the whole property, with *C*'s larger interest relevant only to any rent that is collected, expenses to be paid, efforts to partition, or proceeds from a sale. E.g., while *A* is free to wander on and enjoy the whole property, *C* would get half of the property in an in kind partition, half of the proceeds in a sale, and half of the bill for basic expenses.

The cotenants may sell or lease their interests, granting what they have: a fractional, undivided interest as a tenant in common. The recipient steps into the shoes of the cotenant, able to occupy the whole, but subject to the right of the other cotenants to do the same.

The Joint Tenancy

The basic difference between a joint tenancy and a tenancy in common is the effect given to the death of a cotenant. Joint tenants have a *right of survivorship*. Upon death, a joint tenant's share is divided equally among the surviving joint tenants. In the case of two joint tenants, the one who outlives the other gets the whole property. It has been called the ultimate gamble.

What if the ultimate gamble ends in a "tie"? What if all cotenants die at exactly the same time? To this morbid possibility, the oddly titled Uniform Simultaneous Death Act provides an answer: they split the property.

These days, the intention to create a joint tenancy with right of survivorship must be clear in the grant. Not only that, but grants creating joint tenancies must be attended by *the four unities*:

1. Time. The interests of the joint tenants must be created at the same time.
1. Title. The interests must be created in the same instrument.
1. Interest. The interests must be identical. *The tenants must have the same fractional shares.*
1. Possession. The joint tenants must have an equal right to possess the whole. (Note that this is no different than the rule for tenants in common.)

Only if all four of these "unities" are met will a joint tenancy with right of survivorship be created. If the intent is lacking or if any of these unities is not met, a tenancy in common results.

A joint tenant can easily *sever* the joint tenancy, transforming his or her interest into a tenancy in common. A conveyance is universally held to sever the joint tenancy. (As we will see, sometimes lesser actions than sales will also sever.) So if *A* and *B* are joint tenants, and *A* conveys his interest to *X*, then the joint tenancy is severed. *X* and *B* are now tenants in common. When either dies, the decedent's interest goes according to his or her will, not automatically to the surviving joint tenant.

Suppose that *A*, *B*, and *C* are joint tenants. Since they are joint tenants, we know that each has a 1/3 undivided interest. The death of any of them will result in an equal distribution of the decedent's interest to the survivors, who will remain joint tenants, now each with a 1/2 undivided interest. The last survivor will take everything.[2] If *C* sells her interest to *X*, the joint tenancy with respect to *C* is severed and *X* will take as a tenant in common with *A* and *B*. *X* has no right of survivorship and, similarly, will get nothing upon the deaths of *A* or *B*. When *X* dies, his interest goes according to his will. But the joint tenancy remains intact between *A* and *B*. So if *A* dies before *B*, *B* will obtain *A*'s share, remaining a tenant in common with *X*, but now possessing a 2/3 undivided interest.

The Tenancy by the Entirety

You can think of the tenancy by the entirety as a more restrictive joint tenancy that only applies to married couples. It only exists in about half the states. But where it does, it is sometimes the default form of co-ownership for property conveyed to married couples. (Recall that the usual default for transfers to more than one party is the tenancy in common.)

Spouses owning a piece of property in a tenancy by the entirety are essentially joint tenants, but they may not as easily sever the right of survivorship. Typically, conversion to a tenancy in common occurs only as a result of divorce proceedings. Further, most states require both spouses to consent to sale or encumbrance of such property. As a result it is difficult for creditors to reach the property to satisfy the debts of either spouse.[3]

Here is a chart summarizing the major differences between the forms of co-ownership:

	Tenancy in common	**Joint tenancy**	**Tenancy by the entirety**
How created	Default: O to *A* and *B* (as tenants in common).	Four unities in order to create	Sometimes default for married couples, where it exists.
Distribution of interests	Co-Os may have differing shares	All interests identical	Interests identical
Right of survivorship?	No	Yes	Yes
Alienable?	Yes	Alienation severs yielding tenancy in common.	Only sold or burdened if both spouses agree.
Partition?	Yes	Yes	Only in divorce

Marital Property

Marriage presents another complication for property ownership questions. While the three forms above exhaust the ways in which groups of individuals can choose to own particular pieces of property together, the marriage relationship carries with it sharing obligations that apply to any property owned by either spouse. In this sense, marriage is like a business enterprise in which multiple interests can be acquired and shared under the same rules. These sharing obligations are not uniform and may depend on when and under what circumstances the property was acquired.

In a well-functioning marriage, each spouse is made happy by the success and joy of the other. There is an expectation and willingness to share the fruits of each other's hard work. Unwinding a marriage, on divorce, can be difficult, well for many reasons, but at least because the spouses typically no longer view their contributions to each other as generating their own reward. Each is likely to believe their sacrifices went uncompensated.

There are two primary divisions among states in dealing with marital property: *separate property* states and *community property* states.

Separate property

In a separate property state, the property of each spouse, whether acquired before or during the marriage is considered to be, well, the separate property of each spouse. That does not mean, however, that the spouses have no property-based obligations between them. These are the major features of separate property states:

- Creditors of one spouse cannot seek satisfaction from the separate property of the other spouse.
- Spouses do have a (rarely litigated outside of divorce) duty to support and maintain one another.
- On divorce property is *equitably distributed*, a serious caveat to the notion that the property of either spouse is truly separate. What equitable means varies widely among states. What property is divided also varies, with some looking to all property on division and others looking only to what they define as "marital property."
- Alimony, if ordered at all, is usually temporary (less than two years). The states overwhelmingly prefer clean breaks and financial independence.

- On death, while separate property is separate and can be freely devised, most separate property states have forced share statutes requiring a certain portion, from a third to a half of the decedent's separate property, to be devised to the surviving spouse.

Community Property

There are relatively few community property states, but they include large segments of the population.[4] What's more, separate property states honor the community property status of property brought into them. Thus, it is worth knowing something about community property rules no matter where one practices.

Generally, community property is deemed to include all property acquired during the marriage, except property that is inherited or received as a gift. In some states, income derived from separate property (such as property acquired before marriage) is separate. Contracts to change the status of property are upheld in most states. Here are some general, though not universal rules:

- Spouses have fiduciary duties to each other with respect to community property, but they may unilaterally convey and encumber property. There are exceptions: both spouses must consent to the conveyance of a business and to the conveyance or mortgaging of real property.
- The states differ widely on whether creditors of individual spouses can reach community property.
- On divorce, some states mechanically give to each spouse his or her own separate property and half of the community property, but most equitably divide like separate property states.
- On death, a spouse can will away all of his or her separate property and half of the community property. There is generally no forced share beyond this.

---

1. At common law, there was recognized a fourth form of concurrent ownership, the *tenancy in partnership*. It was used for joint ownership of business assets by business partners. Today, business ownership is almost entirely governed by state statutes, such as the Uniform Partnership Act and others defining and regulating partnerships and corporations.↩

1. Students are typically tempted to assume that the last survivor will have a fee simple absolute. But we don't know that. The joint tenants may only have been sharing a life estate or a fee simple determinable. The joint tenancy refers to how their interest, whatever it may be, is shared. Every present and future interest we learned about earlier can be held solely or with others. If with others, then it can be held in a tenancy in common or joint tenancy. In a joint tenancy, the last survivor becomes the sole owner of whatever interest was jointly owned.↩

1. I will spare you the historical background of the tenancy by the entirety. It is based on the legal fiction that husband and wife are one person, and that person, originally, was the husband. The Married Women's Property Acts of the nineteenth century permitted married women to control their own property, but they did not uniformly alter the interpretation of the tenancy by the entirety as vesting full control in the husband. The *Sawada v. Endo* case explores the ways courts have attempted to transition to a gender-neutral interpretation of this form of co-ownership.↩

1. Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, Wisconsin↩

4.1. Tenancies in Common

Olivas v. Olivas,

108 N.M. 814 (1989)

Nancy Ann Meuchel, Sapello, for respondent-appellant.

Eugenio S. Mathis, Las Vegas, for petitioner-appellee.

Hartz, Judge.

Respondent Sam Olivas (husband) appeals the property division in a divorce action. Petitioner Carolina Olivas (wife) and husband were divorced by a partial decree entered December 18, 1984. The district court did not enter its final order dividing property until August 31, 1987. The issues in this appeal arise, for the most part, as a consequence of the unusually lengthy delay between the divorce decree and the property division.

... .

1. CONSTRUCTIVE OUSTER

Husband and wife separated in June 1983, about two months before wife filed her petition for dissolution of marriage. The district court found that husband "chose to move out of the family home, and he then maintained another home where he also had his office for his business." Husband contends that the district court erred in failing to find that he had been constructively ousted from the family home. He requested findings and conclusions that the constructive ouster by his wife entitled him to half of the reasonable rental value of the home from the time of the initial separation.

Husband and wife held the family home as community property during the marriage and as tenants in common after dissolution. *See Phillips v. Wellborn*, 89 N.M. 340, 552 P.2d 471 (1976); *Hickson v. Herrmann*, 77 N.M. 683, 427 P.2d 36 (1967). Although wife was the exclusive occupant of the house after the separation, ordinarily a cotenant incurs no obligation to fellow cotenants by being the exclusive occupant of the premises.

> "[I]t is a well-settled principle of the common law that the mere occupation by a tenant of the entire estate does not render him liable to his co-tenant for the use and occupation of any part of the common property. The reason is easily found. The right of each to occupy the premises is one of the incidents of a tenancy in common. Neither tenant can lawfully exclude the other. The occupation of one, so long as he does not exclude the other, is but the exercise of a legal right. If, for any reason, one does not choose to assert the right of common enjoyment, the other is not obliged to stay out; and if the sole occupation of one could render him liable therefor to the other, his legal right to the occupation would be dependent upon the caprice or indolence of his co-tenant, and this the law would not tolerate."

Williams v. Sinclair Refining Co., 39 N.M. 388, 392, 47 P.2d 910, 912 (1935) (quoting *Hamby v. Wall*, 48 Ark. 135, 137, 2 S.W. 705, 706 (1887)).

The result is otherwise, however, when the occupant has ousted the other cotenants. *See Chance v. Kitchell*, 99 N.M. 443, 659 P.2d 895 (1983). Although the term "ouster" suggests an affirmative physical act, even a reprehensible act, the obligation of the occupying cotenant to pay rent may arise in the absence of "actual" ouster when the realities of the situation, without there being any fault by either cotenant, prevent the cotenants from sharing occupancy. 4 G. Thompson, *Real Property* Section 1805, at 189 (J. Grimes Repl. 1979), states:

> [B]efore a tenant in common can be liable to his cotenants for rent for the use and occupation of the common property, his occupancy must be such as amounts to a denial of the right of his cotenants to occupy the premises jointly with him, or *the character of the property must be such as to make such joint occupancy impossible or impracticable.* [Emphasis added.]

We believe that it was this latter type of situation – an "ouster" in effect, without any physical act and perhaps without any fault – to which the New Mexico Supreme Court was referring when it recognized the doctrine of "constructive ouster" in the marital context in *Hertz v. Hertz*, 99 N.M. 320, 657 P.2d 1169 (1983). The court wrote:

> [I]f one of the parties in a divorce case remains in possession of the community residence between the date of the divorce and the date of the final judgment dividing the community assets, then there *may* be a form of constructive ouster, exclusion, or an equivalent act which is created as to the right of common enjoyment by the divorced spouse not in possession. *See* § 42-4-8, N.M.S.A. 1978. This exclusion may render the divorced spouse in possession of the community residence liable to the divorced spouse not in possession for the use and occupation of the residence between the date of the divorce and the date of the final judgment. *See* § 42-4-9, N.M.S.A. 1978. To hold otherwise would mean that both divorced spouses should have continued to live with each other during the eighteen month interim or that both should have abandoned the property. [Emphasis added.]

Id. at 330, 657 P.2d at 1179.

Applying the notion of constructive ouster in the marital context is simply another way of saying that when the emotions of a divorce make it impossible for spouses to continue to share the marital residence pending a property division, the spouse who – often through mutual agreement – therefore departs the residence may be entitled to rent from the remaining spouse. Although one can say that the departing spouse has been constructively "ousted," the term should not suggest physical misconduct, or any fault whatsoever, on the part of the remaining spouse.

Common law precedents support the proposition that the remaining spouse should pay rent to the cotenant when both cannot be expected to live together on the property. For example, when it is impractical for all cotenants to occupy the premises jointly, it is unnecessary that those claiming rent from the cotenant in possession first demand the right to move in and occupy the premises. *See Oechsner v. Courcier*, 155 S.W.2d 963 (Tex.Civ.App. 1941) (applying that principle when five heirs, with separate families totalling twenty-two members, were cotenants of a five-room cottage being occupied by one of the families); Annotation, *Accountability of Cotenants for Rents and Profits or Use and Occupation*, 51 A.L.R.2d 388, § 15 (1957). The impracticality of joint occupancy by the cotenants may result from the relations between the cotenants becoming "so strained and bitter that they could not continue to reside together in peace and concord." *Maxwell v. Eckert*, 109 A. 730, 731 (N.J. Eq. 1920). *See Finley v. Keene*, 136 N.J. Eq. 347, 42 A.2d 208 (1945); *In re Marriage of Maxfield*, 47 Wash. App. 699, 737 P.2d 671 (1987). If, however, hostility flows only from the cotenant out of possession, ordinarily there would be no constructive ouster. *See O'Connell v. O'Connell*, 93 N.J. Eq. 603, 117 A. 634 (1922) (wife left home and refused to return despite solicitation by husband). In that circumstance the departing spouse has "abandoned" his or her interest in possession, rather than being excluded. *See* 4 G. Thompson, *supra*, § 1805, at 192 (possessing cotenant not liable for his use and occupancy when other cotenant has abandoned property). *Cf. Elsner v. Elsner*, 425 S.W.2d 254 (Mo. Ct. App. 1967) (wife not required to pay rent to absent husband; husband apparently voluntarily abandoned home).

One jurisdiction has gone so far as to create a rebuttable presumption of ouster of the spouse who moves out of the former marital residence upon divorce. *See Stylianopoulos v. Stylianopoulos*, 17 Mass. App. 64, 455 N.E.2d 477 (1983). *Cf. In re Marriage of Watts*, 171 Cal. App.3d 366, 217 Cal. Rptr. 301 (1985) (court may order husband to re-

imburse community for exclusive use of residence after separation); *Palmer v. Protrka*, 257 Or. 23, 476 P.2d 185, 190 (1970) (En Banc) (when marital difficulties make co-occupancy impossible, requiring occupant to pay one-half of rental value seems closest to parties' intentions when they took title); *but cf. Kahnovsky v. Kahnovsky*, 67 R.I. 208, 21 A.2d 569 (1941) (finding no ouster although "separation was the result of marital difference"); *Barrow v. Barrow*, 527 So.2d 1373 (Fla. 1988) (ex-spouses who own residence as co-tenants *after* final property distribution are treated just as any other co-tenants). We note that a comparable result has been achieved in New Mexico's Second Judicial District Court through unpublished Interim Guidelines adopted in December 1984, which provide that, in the absence of a contrary order or agreement of the parties, the parties will share the costs of maintaining the households for both parties during the pendency of the divorce proceeding.

Husband had the burden of proving constructive ouster in this case. Therefore, we must sustain the district court's ruling against husband unless the evidence at trial was such as to *compel* the district court to find ouster. Although the evidence of hostility between the spouses may have sustained a finding by the district court of constructive ouster, there was substantial evidence to support the inference that husband's purpose in leaving the community residence was to live with a girl friend and his departure was the reason wife filed for divorce; he was not pushed out but pulled. Even if husband was entitled to a presumption of ouster (an issue we need not reach), that presumption would not *require* a finding in his favor once wife presented evidence that husband's motive for departure was to live with another woman. *See* SCRA 1986, 11-301 (presumption shifts burden of production but not burden of proof). Also, the delay of several years before husband demanded any rent from wife supports an inference of abandonment of his interest in occupancy. In short, the evidence was conflicting and did not compel a finding of constructive ouster.

We recognize the ambiguity in the district court's finding that defendant "chose to move out." Such language could be consistent with husband's departure being the result of marital friction, in which case there generally would be constructive ouster. On the other hand, the language could also be construed as referring to husband's abandoning the home to live with another woman. We choose the second construction of the finding, because "[i]n the case of uncertain, doubtful or ambiguous findings, an appellate court is bound to indulge every presumption to sustain the judgment." *Ledbetter v. Webb*, 103 N.M. 597, 602, 711 P.2d 874, 879 (1985). Moreover, it appeared from oral argument before this court that the issue of constructive ouster was framed in the district court in essentially the same manner as treated in this opinion. Therefore, we are comfortable in assuming that the district court applied the proper rule of law and in construing the district court's finding compatibly with its rejection of husband's proposed conclusion of law that there was a constructive ouster.

… .

Donnelly, Judge (specially concurring).

I concur in the result reached by the majority on each of the issues raised by appellant on appeal; I disagree, however, with the discussion concerning appellant's claim of constructive ouster.

Appellant asserts that the trial court improperly rejected his requested finding of fact that he was constructively ousted or evicted from the family home and that he should be compensated for a portion of the reasonable monthly rental value of the residence from the time of the parties separation to the entry of the final judgment disposing of the community debts and assets. The trial court adopted a finding determining that appellant "chose to move out of the family home, and he then maintained another home where he also had his office for his business." Appellant contends that the court's finding is not supported by substantial evidence. Although the record contains conflicting testimony on this issue the trial court's finding is supported by substantial evidence.

An "ouster" is a wrongful dispossession or exclusion of a party from real property and involves proof of intent of one party to exclude another. *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir.1974); *Mastbaum v. Mastbaum*, 126 N.J. Eq. 366, 9 A.2d 51 (1939). A party seeking to establish the fact of ouster must prove that he has unequivocally

been deprived of the right to the common and equal possession and enjoyment of the property. *See Young v. Young*, 37 Md. App. 211, 376 A.2d 1151 (1977). Generally, ouster may not be presumed solely from the fact that one party is in possession of the property. *Barrow v. Barrow*, 527 So.2d 1373 (Fla. 1988). Similarly, a cotenant in possession of property is not liable to another cotenant for a portion of the fair rental value of the occupied property, except where he has agreed to pay, deprived the other of possession, or has used the property so as to constructively exclude the other cotenant from its use or enjoyment. *See Chance v. Kitchell*, 99 N.M. 443, 659 P.2d 895 (1983); *Keeler v. McNeir*, 184 Okl. 244, 86 P.2d 1004 (1939); *Roberts v. Roberts*, 584 P.2d 378 (Utah 1978); *In re Marriage of Maxfield*, 47 Wash. App. 699, 737 P.2d 671 (1987). "Exclusive use," which means no more than one cotenant using the entire property, requires either an act of exclusion or a use of such nature that it necessarily prevents another cotenant from exercising his rights in the property. *Young v. Young*. Generally there can be no holding adversely or ouster by one cotenant unless the fact of such exclusive holding is communicated or made known to the other. *Barrow v. Barrow*.

Where the parties have separated and one spouse retains exclusive possession of the community residence pending entry of the final decree of divorce, such occupancy, if tantamount to an ouster or constructive eviction, may render the spouse who retains possession of the property liable to the other for a portion of the reasonable rental value. *Hertz v. Hertz*, 99 N.M. 320, 657 P.2d 1169 (1983). If the evidence, however, supports a finding that one party elected to move out of the community residence, absent conduct and an intent on the part of the remaining party to exclude the other from the property, denial of a claim of ouster or constructive eviction is proper.

The term "constructive eviction" most commonly arises in the context of a landlord and tenant relationship. *See Santrizos v. Public Drug Co.*, 143 Minn. 222, 173 N.W. 563 (1919). For the acts of one party to constitute a constructive eviction of another, there must be an injurious interference with one party's possession, substantial deprivation of the party's beneficial use of the premises, and such impairment of the party's right to reasonable use of the premises that he is compelled to vacate the property. *See Ben Har Holding Corp. v. Fox*, 147 Misc. 300, 263 N.Y.S. 695 (1933). Where one party is forced to leave the home because of violent conduct of the other, such fact may give rise to a finding of ouster. *See Young v. Young*. In situations where the property is not adaptable to double occupancy, occupancy of the property by one party where rancor or hostility exists to the degree that one or the other must vacate the property may give rise to a basis for finding a constructive ouster. *Newman v. Chase*, 70 N.J. 254, 359 A.2d 474 (1976). *See Cummings v. Anderson*, 94 Wash.2d 135, 614 P.2d 1283 (1980); *see also* Annotation, *Accountability of Cotenants for Rents and Profits or Use and Occupation*, 51 A.L.R.2d 388, at § 15 (1957).

No presumption of constructive ouster or eviction arises from the mere fact that one spouse has left the marital residence and the other remains in possession. Proof of occupancy of realty by one party, without more, does not render a tenant liable to a cotenant for use of the property because each has a right to occupy the premises. *In re Estate of Lopez*, 106 N.M. 157, 740 P.2d 707 (Ct.App. 1987). *See also* NMSA 1978, § 40-3-3 (Repl. 1986); *Oliver v. Oliver*,710 S.W.2d 942 (Mo. App. 1986). Each case must be decided under the facts of that particular case.

The finding of the trial court determining that appellant was not ousted from the community residence is supported by substantial evidence; thus denial of appellant's requested finding of fact seeking an award of the rental value of the community residence during the separation was proper. *See Holloway v. New Mexico Office Furniture*, 99 N.M. 525, 660 P.2d 615 (Ct.App. 1983).

Brewer v. Washingtn RSA No. 8 Limited Partnership,

184 P.3d 860 (Ida. 2008)

Clark & Feeney, Lewiston, for appellants. Paul Thomas Clark argued.

Creason, Moore, Dokken, PLLC, Lewiston, for respondents. Mark Moorer argued.

Burdick, Justice

Brothers William and Robert Brewer (the Brewers) are tenants in common with their aunt, Madlynn Kinzer, and other family members of property located on Moscow Mountain, Latah County. The Brewers each own a collective, undivided one-sixth interest in the property, and Kinzer owns an undivided, one-third interest in the property. The other family members own the remaining interests.

Since the late 1980s, before the Brewers acquired their interest, Kinzer has acted as manager of the property. Various companies, including Inland Cellular, entered into leases with Kinzer to operate microwave communication towers on the property. Inland Cellular's lease is for the use of a specific fifty feet square portion of the property and an easement to access that parcel. The Brewers never authorized Kinzer to enter into any of the leases, and prior to signing the leases, Kinzer never spoke with her nephews regarding the leases. Kinzer sent the Brewers their share of the proceeds from many of the leases; however, Kinzer retained all of the proceeds from the lease with Inland Cellular as her fee for managing the property. Although the Brewers requested copies of the leases from Kinzer, she did not send them.

Subsequently, the Brewers brought this action against Kinzer, the other tenants in common and the various lease holders for breach of contract, breach of fiduciary duty, constructive fraud, accounting, rescission of leases, and unjust enrichment. The district court granted Inland Cellular's motion for summary judgment as to the Brewers' claim for unjust enrichment. It also determined that the Brewers were not entitled to rescind the Inland Cellular lease, as partition was their exclusive remedy. The Brewers appealed.

… .

The Brewers assert that as a matter of law, in order to make a binding lease all tenants must act, and an unauthorized lease is without force and is invalid; co-tenants may void unauthorized leases and may regard the lessee as a trespasser. Therefore, they argue, it was error for the district court to determine partition was their sole remedy.

We hold the district court erred when it determined that partition was the sole remedy. When deciding the various motions for summary judgment, the district court noted that the Brewers had not ratified the lease with Inland Cellular, as they had done with other lessees. Nonetheless, it determined the Brewers were not entitled to rescission of that lease, as partition of the tenancy in common was their exclusive remedy. Since the Brewers had not sought partition of the property, the court granted summary judgment to Inland Cellular.

Although a co-tenant has the right to lease their individual interest in the common property, a co-tenant has no power to lease the entire estate or a specific portion of the entire estate without the consent of the other tenants. 20 Am.Jur.2d *Cotenancy & Joint Ownership* § 100 (2005). An ousted co-tenant has three available remedies under Idaho law. Such a contract may be voidable by the non-leasing tenants in common. *See id.* Excluded tenants in common may also seek the fair rental value of common property. *See Cox v. Cox*, 138 Idaho 881, 886, 71 P.3d 1028, 1033 (2003). Finally, co-tenants ousted by the lease of the common property (or some portion thereof) to another party by one co-tenant may seek partition of the property. *See* I.C. § 6-501 *et seq.; Morga v. Friedlander*, 140 Ariz. 206, 680 P.2d 1267, 1270 (1984); *Jackson v. Low Cost Auto Parts*, 25 Ariz.App. 515, 544 P.2d 1116, 1117-18 (1976); *Quinlan Invest. Co. v. Meehan Cos.*, 171 Mich.App. 635, 430 N.W.2d 805, 808 (1988); *Bangen v. Bartelson*, 553 N.W.2d 754, 759 (N.D.1996); *Carr v. Deking*, 52 Wash.App. 880, 765 P.2d 40, 43 (1988); *see also* 20 Am.Jur.2d *Cotenancy & Joint Ownership* § 101 (2005). Each of these remedies is equitable in nature, and the district court must examine all the interests involved before determining which remedy is appropriate for the situation.

Here, the Inland Cellular lease was for a specific portion of the land to the exclusion of other co-tenants. Although the lease is binding between Kinzer, Inland Cellular and the co-tenants who ratified the lease, the Brewers may seek rescission of the lease as a potential remedy. However, because the district court determined that partition was the exclusive remedy, it failed to balance the equities to determine if rescission was the appropriate rem-

edy. As such, we vacate the district court's decision and remand the case for the district court to consider whether rescission is the appropriate remedy in this instance.

J. Jones, J., specially concurring.

I concur in the Court's opinion but think it appropriate to mention an issue not particularly addressed by the parties – the timeliness of the Brewers' action.

The Brewers acquired their interest in the real property at issue pursuant to a probate decree dated July 6, 1992. The Inland Cellular lease was entered into on January 27, 1995, with a five-year term and a five-year renewal option. The lease appears to have been twice renewed, because counsel notified the Court in oral argument that the lease was then in effect. The Brewers began raising questions about the various property leases after the summer of 2000. This lawsuit was filed on June 15, 2001, during the first renewal period of this lease. It does appear that the Brewers tried, without much success, to find out what was going on with the property prior to filing their suit. However, it would seem that they could have exercised substantially more diligence in their efforts. After all, Kinzer began entering into leases for the property in 1978 and continued without apparent question until the fall of 2000. After the Brewers acquired their interest in the property in 1992 and throughout the remainder of the 1990's, inquiry would have shown that Kinzer had leased the property for a number of communication facilities. A visit to the property would likely have disclosed the existence of several communication facilities. There is no indication that Inland Cellular's predecessor in interest attempted to conceal the construction of its facility on the property. Things that come to mind at this point are concepts such as laches or the weighing of equities.

While Inland Cellular's predecessor should have obtained the approval of all tenants in common when it negotiated the lease for the property, the inordinate passage of time, combined with the construction and operation of the facility on the property, will make this a difficult situation to unwind. This is not an issue that can be determined on this appeal, but it is one that will hopefully be fully aired on remand.

4.2. Joint Tenancies

Riddle v. Harmon,

102 Cal.App.3d 524 (Cal. App. 1980).

Jack C. Hamson, Ukiah, for plaintiff and respondent.

Farella, Braun & Martel by Jon F. Hartung, Richard J. Hicks, San Francisco, for defendant and appellant.

Pochee, Associate Justice.

We must decide whether Frances Riddle, now deceased, unilaterally terminated a joint tenancy by conveying her interest from herself as joint tenant to herself as tenant in common. The trial court determined, via summary judgment quieting title to her widower, that she did not. The facts follow.

Mr. and Mrs. Riddle purchased a parcel of real estate, taking title as joint tenants. Several months before her death, Mrs. Riddle retained an attorney to plan her estate. After reviewing pertinent documents, he advised her that the property was held in joint tenancy and that, upon her death, the property would pass to her husband. Distressed upon learning this, she requested that the joint tenancy be terminated so that she could dispose of her interest by will. As a result, the attorney prepared a grant deed whereby Mrs. Riddle granted to herself an undivided one-half interest in the subject property. The document also provided that "The purpose of this Grant Deed is to terminate those joint tenancies formerly existing between the Grantor, FRANCES P. RIDDLE, and JACK C. RIDDLE, her husband. …" He also prepared a will disposing of Mrs. Riddle's interest in the property. Both the grant deed and will were executed on December 8, 1975. Mrs. Riddle died 20 days later.

The court below refused to sanction her plan to sever the joint tenancy and quieted title to the property in her husband. The executrix of the will of Frances Riddle appeals from that judgment.

The basic concept of a joint tenancy is that it is one estate which is taken jointly. Under the common law, four unities were essential to the creation and existence of an estate in joint tenancy: interest, time, title and possession. (*Tenhet v. Boswell* (1976) 18 Cal.3d 150, 155, 133 Cal.Rptr. 10, 554 P.2d 330.)If one of the unities was destroyed, a tenancy in common remained.(Id.) Severance of the joint tenancy extinguishes the principal feature of that estate, the Jus accrescendi or right of survivorship. This "right" is a mere expectancy that arises "only upon success in the ultimate gamble survival and then only if the unity of the estate has not theretofore been destroyed by voluntary conveyance ..., by partition proceedings ..., by involuntary alienation under an execution ..., or by any other action which operates to sever the joint tenancy." (*Id.*, at pp. 155-156, 133 Cal.Rptr. at p. 14, 554 P.2d at p. 334, citations omitted.)

An indisputable right of each joint tenant is the power to convey his or her separate estate by way of gift or otherwise without the knowledge or consent of the other joint tenant and to thereby terminate the joint tenancy. (*Delanoy v. Delanoy* (1932) 216 Cal. 23, 26, 13 P.2d 513; *Estate of Harris* (1937) 9 Cal.2d 649, 658, 72 P.2d 873; *Wilk v. Vencill* (1947) 30 Cal.2d 104, 108-109, 180 P.2d 351.)If a joint tenant conveys to a stranger and that person reconveys to the same tenant, then no revival of the joint tenancy occurs because the unities are destroyed. (*Hammond v. McArthur* (1947) 30 Cal.2d 512, 183 P.2d 1; Comments, Severance of Joint Tenancy in California (1957) 8 Hastings L.J. 290, 291.)The former joint tenants become tenants in common.

At common law, one could not create a joint tenancy in himself and another by a direct conveyance. It was necessary for joint tenants to acquire their interests at the same time (unity of time) and by the same conveyancing instrument (unity of title). So, in order to create a valid joint tenancy where one of the proposed joint tenants already owned an interest in the property, it was first necessary to convey the property to a disinterested third person, a "strawman," who then conveyed the title to the ultimate grantees as joint tenants. This remains the prevailing practice in some jurisdictions. Other states, including California, have disregarded this application of the unities requirement "as one of the obsolete 'subtle and arbitrary distinctions and niceties of the feudal common law,' (and allow the creation of a valid joint tenancy without the use of a strawman)." (4 A. Powell on Real Property (1979) p. 616, p. 670, citation omitted.)

By amendment to its Civil Code,[1] California became a pioneer in allowing the Creation of a joint tenancy by direct transfer. Under authority of Civil Code section 683, a joint tenancy conveyance may be made from a "sole owner to himself and others," or from joint owners to themselves and others as specified in the code. (See Bowman, Real Estate Law in California (4th ed. 1975) p. 105.) The purpose of the amendment was to "avoid the necessity of making a conveyance through a dummy" in the statutorily enumerated situations. (Appendix to Journal of the Senate, California, Reg.Sess. 1955, Vol. 2, Third Progress Report to the Legislature, March 1955, p. 54.) Accordingly, in California, it is no longer necessary to use a strawman to Create A joint tenancy. (*Donovan v. Donovan* (1963) 223 Cal.App.2d 691, 697, 36 Cal.Rptr. 225.)This court is now asked to reexamine whether a strawman is required to terminate a joint tenancy.

Twelve years ago, in *Clark v. Carter* (1968) 265 Cal.App.2d 291, 295, 70 Cal.Rptr. 923, the Court of Appeal considered the same question and found the strawman to be indispensable. As in the instant case, the joint tenants in Clark were husband and wife. The day before Mrs. Clark died, she executed two documents without her husband's knowledge or consent: (1) a quitclaim deed conveying her undivided half interest in certain real property from herself as joint tenant to herself as tenant in common, and (2) an assignment of her undivided half interest in a deed of trust from herself as joint tenant to herself as tenant in common. These documents were held insufficient to sever the joint tenancy.

After summarizing joint tenancy principles, the court reasoned that "(U)nder California law, a transfer of property presupposes participation by at least two parties, namely, a grantor and a grantee. Both are essential to the efficacy of a deed, and they cannot be the same person. A transfer of property requires that title be conveyed by one living person to another. (Civ.Code, s 1039.) ... (P) Foreign authority also exists to the effect that a person cannot convey to himself alone, and if he does so, he still holds under the original title. (P) Similarly, it was the common law rule that in every property conveyance there be a grantor, a grantee, and a thing granted. Moreover, the grantor could not make himself the grantee by conveying an estate to himself."(*Clark, supra*, at pp. 295-296, 70 Cal.Rptr. at pp. 926, 927, citations omitted.)

That "two-to-transfer" notion stems from the English common law feoffment ceremony with livery of seisin. (Swenson and Degnon, Severance of Joint Tenancies (1954) 33 Minn.L.Rev. 466, 467.)If the ceremony took place upon the land being conveyed, the grantor (feoffor) would hand a symbol of the land, such as a lump of earth or a twig, to the grantee (feoffee). (Burby, Real Property (3d ed. 1966) p. 281.) In order to complete the investiture of seisin it was necessary that the feoffor completely relinquish possession of the land to the feoffee. (Moynihan, Preliminary Survey of the Law of Real Property (1940) p. 86.) It is apparent from the requirement of livery of seisin that one could not enfeoff oneself that is, one could not be both grantor and grantee in a single transaction. Handing oneself a dirt clod is ungainly. Just as livery of seisin has become obsolete,[2] so should ancient vestiges of that ceremony give way to modern conveyancing realities.

"We are given to justifying our tolerance for anachronistic precedents by rationalizing that they have engendered so much reliance as to preclude their liquidation. Sometimes, however, we assume reliance when in fact it has been dissipated by the patent weakness of the precedent. Those who plead reliance do not necessarily practice it."(Traynor, No Magic Words Could Do It Justice (1961) 49 Cal.L.Rev. 615, 622-623.)Thus, undaunted by the Clark case, resourceful attorneys have worked out an inventory of methods to evade the rule that one cannot be both grantor and grantee simultaneously.

The most familiar technique for unilateral termination is use of an intermediary "strawman" blessed in the case of *Burke v. Stevens* (1968) 264 Cal.App.2d 30, 70 Cal.Rptr. 87. There, Mrs. Burke carried out a secret plan to terminate a joint tenancy that existed between her husband and herself in certain real property. The steps to accomplish this objective involved: (1) a letter written from Mrs. Burke to her attorney directing him to prepare a power of attorney naming him as her attorney in fact for the purpose of terminating the joint tenancy; (2) her execution and delivery of the power of attorney; (3) her attorney's execution and delivery of a quitclaim deed conveying Mrs. Burke's interest in the property to a third party, who was an office associate of the attorney in fact; (4) the third party's execution and delivery of a quitclaim deed reconveying that interest to Mrs. Burke on the following day. The Burke court sanctioned this method of terminating the joint tenancy, noting at one point: "While the actions of the wife, from the standpoint of a theoretically perfect marriage, are subject to ethical criticism, and her stealthy approach to the solution of the problems facing her is not to be acclaimed, the question before this court is not what should have been done ideally in a perfect marriage, but whether the decedent and her attorneys acted in a legally permissible manner."(*Burke, supra*, at p. 34, 70 Cal.Rptr. at p. 91.)

Another creative method of terminating a joint tenancy appears in *Reiss v. Reiss* (1941) 45 Cal.App.2d 740, 114 P.2d 718. There a trust was used. For the purpose of destroying the incident of survivorship, Mrs. Reiss transferred bare legal title to her son, as trustee of a trust for her use and benefit. The son promised to reconvey the property to his mother or to whomever she selected at any time upon her demand. (*Id.*, at p. 746, 114 P.2d 718.)The court upheld this arrangement, stating, "(w)e are of the opinion that the clearly expressed desire of Rosa Reiss to terminate the joint tenancy arrangement was effectively accomplished by the transfer of the legal title to her son for her

expressed specific purpose of having the control and the right of disposition of her half of the property."(*Id.*, at p. 747, 114 P.2d at p. 722.)

In view of the rituals that are available to unilaterally terminate a joint tenancy, there is little virtue in steadfastly adhering to cumbersome feudal law requirements. "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."(Justice Oliver Wendell Holmes, Collected Legal Papers (1920) p. 187.) Common sense as well as legal efficiency dictate that a joint tenant should be able to accomplish directly what he or she could otherwise achieve indirectly by use of elaborate legal fictions.

Moreover, this will not be the first time that a court has allowed a joint tenant to unilaterally sever a joint tenancy without the use of an intermediary. In *Hendrickson v. Minneapolis Federal Sav. & L. Assn.* (Minn.1968) 281 Minn. 462, 161 N.W.2d 688, decided one month after Clark, the Minnesota Supreme Court held that a tenancy in common resulted from one joint tenant's execution of a "(D)eclaration of election to sever survivorship of joint tenancy."No fictional transfer by conveyance and reconveyance through a strawman was required.[3]

Our decision does not create new powers for a joint tenant. A universal right of each joint tenant is the power to effect a severance and destroy the right of survivorship by conveyance of his or her joint tenancy interest to another "person." (Swenson and Degnon, op. cit. supra, at p. 469.)"If an indestructible right of survivorship is desired that is, one which may not be destroyed by one tenant that may be accomplished by creating a joint life estate with a contingent remainder in fee to the survivor; a tenancy in common in simple fee with an executory interest in the survivor; or a fee simple to take effect in possession in the future."(Swenson and Degnon, supra, at p. 469, fn. omitted.)

We discard the archaic rule that one cannot enfeoff oneself which, if applied would defeat the clear intention of the grantor. There is no question but that the decedent here could have accomplished her objective termination of the joint tenancy by one of a variety of circuitous processes. We reject the rationale of the Clark case because it rests on a common law notion whose reason for existence vanished about the time that grant deeds and title companies replaced colorful dirt clod ceremonies as the way to transfer title to real property. One joint tenant may unilaterally sever the joint tenancy without the use of an intermediary device.

The judgment is reversed.

Caldecott, P.J., and Rattigan, J., concur.

Mosk, J., and Manuel, J., are of the opinion that the petition should be granted.

---

1. Civil Code section 683, as amended in 1955, provides in relevant part that:

> "A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or by transfer from a sole owner to himself and others, or from tenants in common or joint tenants to themselves or some of them, or to themselves or any of them and others, or from a husband and wife, when holding title as community property or otherwise to themselves or to themselves and others or to one of them and to another or others, when expressly declared in the transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants."

↩

1. It was not until 1845 that a statute was enacted in England making it possible for a freehold estate to be conveyed by grant deed. In America, livery of seisin was done away with long before legislative reforms were

effected in the mother country. (*Moynihan, op. cit, supra*, at p. 87.) Maitland tells us that the physical acts involved in a feoffment grew out of a "mental incapacity, an inability to conceive that mere rights can be transferred."(The Mystery of Seisin, 2 Law Quarterly Review 489 (1886).)↩

1. In its reasoning the Hendrickson court recognized a policy disfavoring survivorship in Minnesota, noting that in modern times survivorship came to be regarded " 'as an "odious thing" that too often deprived a man's heirs of their rightful inheritance (footnote omitted).' "(*Hendrickson, supra*, at p. 670.)Construing the grant deed as effecting a termination of the joint tenancy will result in the concurrent estate becoming a tenancy in common. This outcome is consistent with California's statutorily decreed preference for recognizing tenancies in common. (See Civ.Code, ss 683, 686; *Tenhet v. Boswell, supra*, 18 Cal.3d 150, 157, 133 Cal.Rptr. 10, 554 P.2d 330.)Contrary to the modern preference, at common law there was a presumption in favor of joint tenancy. This presumption was based on a desire to avoid the splitting of the feudal services due to the lord of the fee. (Moynihan, Preliminary Survey of the Law of Real Property (1940) p. 130.) Land was kept in larger tracts and thus facilitated the rendering of services to the lord. Tenancy in common, on the other hand, resulted in constant subdivision. (Swenson and Degnon, Severance of Joint Tenancies (1954) 38 Minn.L.R. 466, 503.)Another possible reason that joint tenancy was favored is that it is easier to rely on the loyalty of one man than two. (*Id.*) As the age of feudalism ended, the reasons for the presumption in favor of joint tenancies also ended.(*Id.*)↩

Tehnet v. Boswell,

554 P.2d 330 (Cal. 1976).

Stringham & Rogers and William J. Kadi, Tulare, for plaintiff and appellant.

James G. McCain, Corcoran, for defendant and respondent.

Mosk, Justice.

A joint tenant leases his interest in the joint tenancy property to a third person for a term of years, and dies during that term. We conclude that the lease does not sever the joint tenancy, but expires upon the death of the lessor joint tenant.

Raymond Johnson and plaintiff Hazel Tenhet owned a parcel of property as joint tenants.[1] Assertedly without plaintiff's knowledge or consent, Johnson leased the property to defendant Boswell for a period of 10 years at a rental of $150 per year with a provision granting the lessee an 'option to purchase.'[2] Johnson died some three months after execution of the lease, and plaintiff sought to establish her sole right to possession of the property as the surviving joint tenant. After an unsuccessful demand upon defendant to vacate the premises, plaintiff brought this action to have the lease declared invalid. The trial court sustained demurrers to the complaint, and plaintiff appealed from the ensuing judgment of dismissal.

I

Before addressing the primary issue, we must determine whether the appeal should be dismissed because of the 'one final judgment' rule. The problem arises from the trial court's failure to dispose of all five causes of action set forth in the third amended complaint. The court granted a motion to strike the fourth and fifth causes and sustained demurrers to the second and third causes without leave to amend. But the court made no express ruling on the first cause of action, which sought declaratory relief and damages.

Generally, an appeal may be taken only from the final judgment in an entire action. (*Gombos v. Ashe* (1958) 158 Cal.App.2d 517, 520-523, 322 P.2d 933; 6 Witkin, Cal.Rpocedure (2d ed. 1971) Appeal, s 36, p. 4050.) A party

may not normally appeal from a judgment on one of his causes of action if determination of any remaining cause is still pending. (*U.S. Financial v. Sullivan* (1974) 37 Cal.App.3d 5, 11, 112 Cal.Rptr. 18; *Gombos v. Ashe, supra*, 158 Cal.App.2d at pp. 520-523, 322 P.2d 933.)

However, the rule has been modified in cases in which the trial court's failure to dispose of all causes of action results from inadvertence or mistake rather than an intention to retain the remaining causes of action for trial. The leading case of *Gombos v. Ashe* is a prime example. There, plaintiffs injured in an automobile accident filed a complaint setting forth two causes of action seeking compensatory damages and a third praying for punitive damages. The trial court sustained a demurrer on the punitive damage issue, and the case went to trial on the compensatory damage causes. Plaintiffs won a jury verdict, but the judgment failed to dispose of the punitive damage issue. On plaintiffs' appeal from the ruling on that issue, the court, speaking through Justice Peters, observed that the order sustaining the demurrer was not a final judgment and thus not appealable. The normal procedure, noted the court, would be to dismiss the appeal with instructions to the trial court to amend its judgment by disposing of the punitive damage issue. However, the court continued, 'That would then require the parties to rebrief the question as to whether the (punitive damage) cause of action stated a cause of action-the very point that is fully briefed in the briefs now on file. This seems to be an unnecessarily dilatory and circuitous method of reaching a proper result. It should not be adopted unless it is the only proper method of reaching a fair result.'(*Id.* at p. 524, 322 P.2d at p. 937.)

As an alternative, the *Gombos* appellate court itself amended the judgment on the compensatory damage verdict to include a paragraph dismissing the punitive damage cause of action. (*Ibid.*) The judgment on the jury verdict thus became final, and the court could properly hear the appeal. This method of preserving appeals has been routinely followed in subsequent cases. (*See, e.g., Oakes v. Suelynn Corp.* (1972) 24 Cal.App.3d 271, 281, 100 Cal.Rptr. 838 (where the trial court, in a damage action, properly struck a conversion count but inadvertently failed to dismiss that count in rendering judgment on a jury verdict on a separate count, judgment was amended to include such dismissal); *Tsarnas v. Bailey* (1960) 179 Cal.App.2d 332, 337, 3 Cal.Rptr. 629 (where the intention of the trial court was clear from its judgment on a complaint, judgment was amended to include disposition of a cross-complaint in the same action).)

The instant case also calls for application of the *Gombos* procedure. The trial court, apparently believing that a cause of action seeking declaratory relief could not be disposed of by judgment on the pleadings (but see 3 Witkin, Cal.Procedure (2d ed. 1971) Pleading, s 731, pp. 2351-2352), made no express ruling on the first cause of action. However, the court left no doubt that it considered plaintiff's position insupportable. It sustained demurrers on the other causes of action based on identical facts, and stated, 'The Court agrees with ... defendant to the effect that a co-tenant may make a valid lease to the extent of his own interest even though the lease is to commence on the death of the lessor.'In these circumstances little would be gained by ordering the court to rule on the first cause of action, for the outcome is preordained. Not only is the position of the court clear, but both sides have briefed the primary issues, and both urge us to decide the case. We shall therefore amend the judgment by ruling in favor of defendant on the first cause of action seeking declaratory relief and damages. We now turn to the merits of the judgment as thus amended.

II

An understanding of the nature of a joint interest in this state is fundamental to a determination of the question whether the present lease severed the joint tenancy. Civil Code section 683 provides in part: 'A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy... .' This statute, requiring an express declaration for the creation of joint interests, does not abrogate the common law rule that four unities are essential to an estate in joint tenancy: unity of interest, unity of time, unity of title, and unity of possession. (*See Hammond v. McArthur* (1947) 30

Cal.2d 512, 514, 183 P.2d 1; *McDonald v. Morley* (1940) 15 Cal.2d 409, 412, 101 P.2d 690; 2 Blackstone, Commentaries -182.)

The requirement of four unities reflects the basic concept that there is but one estate which is taken jointly; if an essential unity is destroyed the joint tenancy is severed and a tenancy in common results. (*Swartzbaugh v. Sampson* (1936) 11 Cal.App.2d 451, 454, 54 P.2d 73; 2 Am.Law of Prop. (1952) s 6.2, p. 9.) Accordingly, one of two joint tenants may unilaterally terminate the joint tenancy by conveying his interest to a third person. (*Delanoy v. Delanoy* (1932) 216 Cal. 23, 26, 13 P.2d 513; Green v. Skinner (1921) 185 Cal. 435, 438, 197 P. 60.)Severance of the joint tenancy, of course, extinguishes the principal feature of that estate-the Jus accrescendi or right of survivorship.[3] Thus, a joint tenant's right of survivorship is an expectancy that is not irrevocably fixed upon the creation of the estate (*Gwinn v. Commissioner of Internal Revenue* (1932) 287 U.S. 224, 228, 53 S.Ct. 157, 77 L.Ed. 270 (interpreting California law)); it arises only upon success in the ultimate gamble-survival-and then only if the unity of the estate has not theretofore been destroyed by voluntary conveyance (*Delanoy v. Delanoy, supra*), by partition proceedings (Code Civ.Proc., s 752; *Teutenberg v. Schiller* (1955) 138 Cal.App.2d 18, 22, 291 P.2d 53; cf. *Lazzarevich v. Lazzarevich* (1952) 39 Cal.2d 48, 50, 244 P.2d 1), by involuntary alienation under an execution (*Young v. Hessler* (1945) 72 Cal.App.2d 67, 69, 164 P.2d 65; *Zeigler v. Bonnell* (1942) 52 Cal.App.2d 217, 219, 126 P.2d 118), or by any other action which operates to sever the joint tenancy.

Our initial inquiry is whether the partial alienation of Johnson's interest in the property effected a severance of the joint tenancy under these principles. It could be argued that a lease destroys the unities of interest and possession because the leasing joint tenant transfers to the lessee his present possessory interest and retains a mere reversion. (*See Alexander v. Boyer* (1969) 253 Md. 511, 253 A.2d 359, 365.) Moreover, the possibility that the term of the lease may continue beyond the lifetime of the lessor is inconsistent with a complete right of survivorship.

On the other hand, if the lease entered into here by Johnson and defendant is valid only during Johnson's life, then the conveyance is more a variety of life estate Pur autre vie than a term of years. Such a result is inconsistent with Johnson's freedom to alienate his interest during his lifetime.

We are mindful that the issue here presented is 'an ancient controversy, going back to Coke and Littleton.'(2 Am.Law of Prop. (1952) s 6.2, p. 10.) Yet the problem is like a comet in our law: though its existence in theory has been frequently recognized, its observed passages are few.[4] Some authorities support the view that a lease by a joint tenant to a third person effects a complete and final severance of the joint tenancy. (*Alexander v. Boyer* (Md.1969) supra, 253 Md. 511, 253 A.2d 359, 365; 2 Am.Law of Prop. (1952) s 6.2, p. 10; Freeman on Cotenancy and Partition (2d ed. 1886) s 30; Comment (1937) 25 Cal.L.Rev. 203, 208; Swenson & Degnan, Severance of Joint Tenancies (1954) 38 Minn.L.Rev. 466, 474.) Such a view is generally based upon what is thought to be the English common law rule. (*See Napier v. Williams* (1911) 1 Ch. 361; *Cowper v. Fletcher* (1865) 6 B. & S. 464, 472; *Doe ex dem. Marsack v. Read* (1810) 12 East 57; *Gould v. Kemp* (1834) 39 Eng.Rep. 959, 962; *Clerk v. Clerk* (1694) 23 Eng.Rep. 809; Littleton's Tenures, s 289; *Swartzbaugh v. Sampson* (1936) supra, 11 Cal.App.2d 451, 454, 54 P.2d 73; Annot. (1959) 64 A.L.R.2d 918, 932; cf. Palmer v. Rich (1897) 1 Ch. 134, 142-143; but see 27 Halsbury's Laws of England (2d ed. 1937) s 1144, p. 662, fn. (l); Co.Litt. a.)

Others adopt a position that there is a temporary severance during the term of the lease. If the lessor dies while the lease is in force, under this view the existence of the lease at the moment when the right of survivorship would otherwise take effect operates as a severance, extinguishing the joint tenancy. If, however, the term of the lease expires before the lessor, it is reasoned that the joint tenancy is undisturbed because the joint tenants resume their original relation. (See, e.g., 2 Reeves on Real Property (1909) s 680, p. 965; Comment (1937) 25 Cal.L.Rev. 203, 208-209; cf. 1 Platt on Leases (1847) pp. 130-131.) The single conclusion that can be drawn from centuries of academic speculation on the question is that its resolution is unclear.<</p>

As we shall explain, it is our opinion that a lease is not so inherently inconsistent with joint tenancy as to create a severance, either temporary or permanent. (*See Hammond v. McArthur* (1947) supra, 30 Cal.2d 512, 516, 183 P.2d 1 (dictum); *Swartzbaugh v. Sampson* (1936) supra, 11 Cal.App.2d 451, 454, 54 P.2d 73; 15 Cal.Jur.3d, Cotenancy and Joint Ownership, s 16, p. 736; 20 Am.Jur.2d, Cotenancy and Joint Ownership, s 17, p. 111; 1 Ogden's Revised Cal. Real Property Law (1974) s 720; 1 Platt on Leases (1847) pp. 130-131; 27 Halsbury's Laws of England (2d ed. 1937) s 1144, p. 662, fn. (l); Co.Litt. a.)

Under Civil Code sections 683 and 686 a joint tenancy must be expressly declared in the creating instrument, or a tenancy in common results. This is a statutory departure from the common law preference in favor of joint tenancy. (*Abbey v. Lord* (1959) 168 Cal.App.2d 499, 503, 336 P.2d 226; *Reiss v. Reiss* (1941) 45 Cal.App.2d 740, 747, 114 P.2d 718; *Swartzbaugh v. Sampson* (1936) supra, 11 Cal.App.2d 451, 454, 54 P.2d 73; *see Frisbie v. Marques* (1870) 39 Cal. 451, 453-454.)[5] Inasmuch as the estate arises only upon express intent, and in many cases such intent will be the intent of the joint tenants themselves, we decline to find a severance in circumstances which do not clearly and unambiguously establish that either of the joint tenants desired to terminate the estate. (See Comment (1973) 61 Cal.L.Rev. 231, 248; Note (1948) 36 Cal.L.Rev. 133, 135.)

If plaintiff and Johnson did not choose to continue the joint tenancy, they might have converted it into a tenancy in common by written mutual agreement. (*See, e.g., Smith v. Morton* (1972) 29 Cal.App.3d 616, 621, 106 Cal.Rptr. 52; 15 Cal.Jur.3d, Cotenancy and Joint Ownership, s 15, p. 733; 20 Am.Jur.2d, Cotenancy and Joint Ownership, s 19, p. 112.) They might also have jointly conveyed the property to a third person and divided the proceeds. Even if they could not agree to act in concert, either plaintiff or Johnson might have severed the joint tenancy, with or without the consent of the other, by an act which was clearly indicative of an intent to terminate, such as a conveyance of her or his entire interest. Either might also have brought an action to partition the property, which, upon judgment, would have effected a severance. Because a joint tenancy may be created only by express intent, and because there are alternative and unambiguous means of altering the nature of that estate, we hold that the lease here in issue did not operate to sever the joint tenancy.

III

Having concluded that the joint tenancy was not severed by the lease and that sole ownership of the property therefore vested in plaintiff upon her joint tenant's death by operation of her right of survivorship, we turn next to the issue whether she takes the property unencumbered by the lease.

In arguing that plaintiff takes subject to the lease, defendant relies on *Swartzbaugh v. Sampson* (1936) supra, 11 Cal.App.2d 451, 54 P.2d 73.In that case, one of two joint tenants entered into lease agreements over the objection of his joint tenant wife, who sought to cancel the leases. The court held in favor of the lessor joint tenant, concluding that the leases were valid.

But the suit to cancel the lease in *Swartzbaugh* was brought during the lifetime of both joint tenants, not as in the present case after the death of the lessor. Significantly, the court concluded that 'a lease to all of the joint property by one joint tenant is not a nullity but is a valid and supportable contract In so far as the interest of the lessor in the joint property is concerned.'(Italics added; Id. at p. 458, 54 P.2d at p. 77.)During the lifetime of the lessor joint tenant, as the Swartzbaugh court perceived, her interest in the joint property was an undivided interest in fee simple that encompassed the right to lease the property.

By the very nature of joint tenancy, however, the interest of the nonsurviving joint tenant extinguishes upon his death. And as the lease is valid only 'in so far as the interest of the lessor in the joint property is concerned,' it follows that the lease of the joint tenancy property also expires when the lessor dies.

This conclusion is borne out by decisions in this state involving liens on and mortgages of joint tenancy property. In *Zeigler v. Bonnell* (1942) supra, 52 Cal.App.2d 217, 126 P.2d 118, the Court of Appeal ruled that a surviving

joint tenant takes an estate free from a judgment lien on the interest of a deceased cotenant judgment debtor. The court reasoned that 'The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property.... . The judgment lien of (the creditor) could attach only to the interest of his debtor .... That interest terminated upon (the debtor's) death.' (Id. at pp. 219-220, 126 P.2d at p. 119.)After his death 'the deceased joint tenant had no interest in the property, and his judgment creditor has no greater rights.'(*Id.* at p. 220, 126 P.2d at p. 120.)

A similar analysis was followed in *People v. Nogarr* (1958) 164 Cal.App.2d 591, 330 P.2d 858, which held that upon the death of a joint tenant who had executed a mortgage on the tenancy property, the surviving joint tenant took the property free of the mortgage. The court reasoned (at p. 594, 330 P.2d at p. 861) that 'as the mortgage lien attached only to such interest as (the deceased joint tenant) had in the real property(,) when his interest ceased to exist the lien of the mortgage expired with it.'(*Accord, Hamel v. Gootkin* (1962) 202 Cal.App.2d 27, 20 Cal.Rptr. 372 (applying the Nogarr holding to a trust deed).)

As these decisions demonstrate, a joint tenant may, during his lifetime, grant certain rights in the joint property without severing the tenancy. But when such a joint tenant dies his interest dies with him, and any encumbrances placed by him on the property become unenforceable against the surviving joint tenant. For the reasons stated a lease falls within this rule.

Any other result would defeat the justifiable expectations of the surviving joint tenant. Thus if A agrees to create a joint tenancy with B, A can reasonably anticipate that when B dies A will take an unencumbered interest in fee simple. During his lifetime, of course, B may sever the tenancy or lease his interest to a third party. But to allow B to lease for a term continuing After his death would indirectly defeat the very purposes of the joint tenancy. For example, for personal reasons B might execute a 99-year lease on valuable property for a consideration of one dollar a year. A would then take a fee simple on B's death, but would find his right to use the property-and its market value-substantially impaired. This circumstance would effectively nullify the benefits of the right of survivorship, the basic attribute of the joint tenancy.

On the other hand, we are not insensitive to the potential injury that may be sustained by a person in good faith who leases from one joint tenant. In some circumstances a lessee might be unaware that his lessor is not a fee simple owner but merely a joint tenant, and could find himself unexpectedly evicted when the lessor dies prior to expiration of the lease. This result would be avoided by a prudent lessee who conducts a title search prior to leasing, but we appreciate that such a course would often be economically burdensome to the lessee of a residential dwelling or a modest parcel of property. Nevertheless, it must also be recognized that every lessee may one day face the unhappy revelation that his lessor's estate in the leased property is less than a fee simple. For example, a lessee who innocently rents from the holder of a life estate is subject to risks comparable to those imposed upon a lessee of joint tenancy properly.

More significantly, we cannot allow extraneous factors to erode the functioning of joint tenancy. The estate of joint tenancy is firmly embedded in centuries of real property law and in the California statute books. Its crucial element is the right of survivorship, a right that would be more illusory than real if a joint tenant were permitted to lease for a term continuing after his death. Accordingly, we hold that under the facts alleged in the complaint the lease herein is no longer valid.

It is ordered that the judgment dated June 18, 1973, be and it is hereby amended to read as follows:

> It is ordered, adjudged and decreed that Defendant, W. W. Boswell, Jr., have judgment against Plaintiff of dismissal of said First, Second and Third Causes of Action of said Third Amended Complaint and the Plaintiff, with respect to said defendant, take nothing by said First, Second and Third Causes of Action of said Third Amended Complaint.

As amended, the judgment is reversed.

Wright,, C.J., and McComb, Tobriner, Clark and Richardson, JJ., concur.

---

1. An 'Affidavit-Death of Joint Tenant,' executed by plaintiff and appended as an exhibit to plaintiff's third amended complaint, indicates that the property was acquired by a joint tenancy deed 'executed by Jettie N. Johnson to Raymond Johnson and Hazel Johnson (now known as Hazel Tenhet) as joint tenants.'Plaintiff avers by the same document that the value of the property, which allegedly includes a dwelling house and lot, did not exceed $3,500 at the time of the death of the lessor in 1971.↩

1. The lease did not disclose that the lessor possessed only a joint interest in the property. To the contrary, the 'option to purchase' granted to the lessee, which might more accurately be described as a right of first refusal, implied that the lessor possessed a fee simple. It provided in part: 'Lessee is given a first exclusive right, privilege and option to purchase the house and lot covered by this lease... . ( ) If so purchased, Lessor will convey title by grant deed on the usual form subject only to easements or rights of way of record and liens or encumbrances specifically agreed to by and between Lessor and Lessee. ( ) Lessor shall furnish Lessee with a policy of title insurance at Lessor's cost... .'↩

1. The rule is, *Nihil de re accrescit ei, qui nihil in re quando jus accrescerit habet.* (2 Co.Litt.) Literally, no part of the estate accrues to him who has nothing in the estate when the right accrues. In modern parlance, what you have is what you get.↩

1. For discussions of the question, see, e.g., Comment (1973) 61 Cal.L.Rev. 231; Comment (1937) 25 Cal.L.Rev. 203, 206-209; Swenson & Degnan, Severance of Joint Tenancies (1954) 38 Minn.L.Rev. 466, 472-474; Comment (1957) 8 Hastings L.J. 290, 293; Comment (1948) 21 So.Cal.L.Rev. 295, 297; 2 Tiffany, The Law of Real Property (3d ed. 1939) section 425, page 210.↩

1. Because the feudal system was opposed to a division of tenures, estates in joint tenancy were favored at common law. Like the laws of primogeniture, joint tenancy was founded 'on the principle of the aggregation of landed estates in the hands of a few, and opposed to their division among many persons.'(*Siberell v. Siberell* (1932) 214 Cal. 767, 771, 7 P.2d 1003, 1004 quoting *DeWitt v. San Francisco* (1852) 2 Cal. 289, 297.)Despite the obsolescence of its original purpose, the estate of joint tenancy remains a popular form of property ownership in California (see Griffith, Community Property in Joint Tenancy Form (1961) 14 Stan.L.Rev. 87, 88-89) on the ground that it avoids the delay and administrative expenses of probate.↩

4.3. Tenancies by the Entirety

Sawada v. Endo,

57 Haw. 608 (1977)

Andrew S. Hartnett, Honolulu, for plaintiffs-appellants.

George M. Takane, Eichi Oki, Honolulu, for defendants-appellees.

Before Richardson, C. J., and Kobayashi, Ogata, Menor and Kidwell, JJ.

Menor, Justice

This is a civil action brought by the plaintiffs-appellants, Masako Sawada and Helen Sawada, in aid of execution of money judgments in their favor, seeking to set aside a conveyance of real property from judgment debtor Kokichi Endo to Samuel H. Endo and Toru Endo, defendants-appellees herein, on the ground that the conveyance as to the Sawadas was fraudulent.

On November 30, 1968, the Sawadas were injured when struck by a motor vehicle operated by Kokichi Endo. On June 17, 1969, Helen Sawada filed her complaint for damages against Kokichi Endo. Masako Sawada Fied her suit against him on August 13, 1969. The complaint and summons in each case was served on Kokichi Endo on October 29, 1969.

On the date of the accident, Kokichi Endo was the owner, as a tenant by the entirety with his wife, Ume Endo, of a parcel of real property situate at Wahiawa, Oahu, Hawaii. By deed, dated July 26, 1969, Kokichi Endo and his wife conveyed the property to their sons, Samuel H. Endo and Toru Endo. This document was recorded in the Bureau of Conveyances on December 17, 1969. No consideration was paid by the grantees for the conveyance. Both were aware at the time of the conveyance that their father had been involved in an accident, and that he carried no liability insurance. Kokichi Endo and Ume Endo, while reserving no life interests therein, continued to reside on the premises.

On January 19, 1971, after a consolidated trial on the merits, judgment was entered in favor of Helen Sawada and against Kokichi Endo in the sum of $8,846.46. At the same time, Masako Sawada was awarded judgment on her complaint in the amount of $16,199.28. Ume Endo, wife of Kokichi Endo, on January 29, 1971. She was survived by her husband, Kokichi. Subsequently, after being frustrated in their attempts to obtain satisfaction of judgment from the personal property of Kokichi Endo, the Sawadas brought suit to set aside the conveyance which is the subject matter of this controversy. The trial court refused to set aside the conveyance, and the Sawadas appeal.

I

The determinative question in this case is, whether the interest of one spouse in real property, held in tenancy by the entireties, is subject to levy and execution by his or her individual creditors. This issue is one of first impression in this jurisdiction.

A brief review of the present state of the tenancy by the entirety might be helpful. Dean Phipps, writing in 1951,[1] pointed out that only nineteen states and the District of Columbia continued to recognize it as a valid and subsisting institution in the field of property law. Phipps divided these jurisdictions into four groups. He made no mention of Alaska and Hawaii, both of which were then territories of the United States.

In the Group I states (Massachusetts, Michigan, and North Carolina) the estate is essentially the common law tenancy by the entireties, unaffected by the Married Women's Property Acts. As at common law, the possession and profits of the estate are subject to the husband's exclusive dominion and control. In all three states, as at common law, the husband may convey the entire estate subject only to the possibility that the wife may become entitled to the whole estate upon surviving him. As at common law, the obverse as to the wife does not hold true. Only in Massachusetts, however, is the estate in its entirety subject to levy by the husband's creditors. In both Michigan and North Carolina, the use and income from the estate is not subject to levy during the marriage for the separate debts of either spouse.

In the Group II states (Alaska, Arkansas, New Jersey, New York, and Oregon) the interest of the debtor spouse in the estate may be sold or levide upon for his or her separate debts, subject to the other spouse's contingent right of survivorship. Alaska, which has been added to this group, has provided by statute that the interest of a debtor spouse in any type of estate, except a homestead as defined and held in tenancy by the entirety, shall be subject to his or her separate debts.

In the Group III jurisdictions (Delaware, District of Columbia, Florida, Indiana, Maryland, Missouri, Pennsylvania, Rhode Island, Vermont, Virginia, and Wyoming) an attempted conveyance by either spouse is wholly void, and the estate may not be subjected to the separate debts of one spouse only.

In Group IV, the two states of Kentucky and Tennessee hold that the contingent right of survivorship appertaining to either spouse is separately alienable by him and attachable by his creditiors during the marriage. The use and profits, however, may neither be alienated nor attached during coverture.

It appears, therefore, that Hawaii is the only jurisdiction still to be heard from on the question. Today we join that group of states and the District of Columbia which hold that under the Married Women's Property Acts the interest of a husband or a wife in an estate by the entireties is not subject to the claims of his or her individual creditors during the joint lives of the spouses. In so doing, we are placing our stamp of approval upon what is apparently the prevailing view of the lower courts of this jurisdiction.

Hawaii has long recognized and continues to recoginized the tenancy in common, the joint tenancy, and the tenancy by the entirety, as separate and distinct estates. See *Paahana v. Bila*, 3 Haw. 725 (1876). That the Married Women's Property Act of 1888 was not intended to abolish the tenancy by the entirety was made clear by the language of Act 19 of the Session Laws of Hawaii, 1903 (now HRS s 509-1). See also HRS s 509-2. The tenancy by the entirety is predicated upon the legal unity of husband and wife, and the estate is held by them in single ownership. They do not take by moieties, but both and each are seized of the whole estate. *Lang v. Commissioner of Internal Revenue*, 289 U.S. 109 (1933).

A joint tenant has a specific, albeit undivided, interest in the property, and if he survives his cotenant he becomes the owner of a larger interest than he had prior to the death of the other joint tenant. But tenants by the entirety are each deemed to be seized of the entirety from the time of the creation of the estate. At common law, this taking of the 'Whole estate' did not have the real significance that it does today, insofar as the rights of the wife in the property were concerned. For all practical purposes, the wife had no right during coverture to the use and enjoyment and exercise of ownership in the marital estate. All she possessed was her contingent right of survivorship.

The effect of the Married Women's Property Acts was to abrogate the husband's common law dominance over the marital estate and to place the wife on a level of equality with him as regards the exercise of ownership over the whole estate. The tenancy was and still is predicated upon the legal unity of husband and wife, but the Acts converted it into a unity of equals and not of unequals as at common law.Otto F. Stifel's Union Brewing Co. v. Saxy, supra;Lang v. Commissioner of Internal Revenue, supra. No longer could the husband convey, lease, mortgage or otherwise encumber the property without her consent. The Acts confirmed her right to the use and enjoyment of the whole estate, and all the privileges that ownership of property confers, including the right to convey the property in its entirety, jointly with her husband, during the marriage relation. They also had the effect of insulating the wife's interest in the estate from the separate debts of her husband.

Neither husband nor wife has a separate divisible interest in the property held by the entirety that can be conveyed or reached by execution. A joint tenancy may be destroyed by voluntary alienation, or by levy and execution, or by compulsory partition, but a tenancy by the entirety may not. The indivisibility of the estate, except by joint action of the spouses, is an indispensable feature of the tenancy by the entirety.

In *Jordan v. Reynolds*, the Maryland court held that no lien could attach against entirety property for the separate debts of the husband, for that would be in derogation of the entirety of title in the spouses and would be tantamount to a conversion of the tenancy into a joint tenancy or tenancy in common. In holding that the spouses could jointly convey the property, free of any judgment liens against the husband, the court said:

> To hold the judgment to be a lien at all against this property, and the right of execution suspended during the life of the wife, and to be enforced on thee death of the wife, would, we think, likewise encumber her estate, and be in contravention of the constitutional provision heretofore mentioned, protecting the wife's property from the husband's debts.
>
> It is clear, we think if the judgment here is declared a lien, but suspended during the life of the wife, and not enforceable until her death, if the husband should survive the wife, it will defeat the sale here made by the husband and wife to the purchaser, and thereby make the wife's property liable for the debts of her husband.

105 Md. at 295, 296, 66 A. at 39.

In *Hurd v. Hughes*, the Delaware court, recognizing the peculiar nature of an estate by the entirety, in that the husband and wife are the owners, not merely of equal interests but of the whole estate, stated:

> The estate (by the entireties) can be acquired or held only by a man and woman while married. Each spouse owns the whole while both live; neither can sell any interest except with the other's consent, and by their joint act; anc at the death of either the other continues to own the whole, and does not acquire any new interest from the other. There can be no partition between them. From this is deduced the indivisibility and unseverability of the estate into two interests, and hence that the creditors of either spouse cannot during their joint lives reach by execution any interest which the debtor had in land so held… . One may have doubts as to whether the holding of land by entireties is advisable or in harmony with the spirit of the legislation in favor of married women; but when such an estate is created due effect must be given to its peculiar characteristics.

12 Del.Ch. at 190, 109 A. at 419.

In *Frost v. Frost*, the Missouri court said:

> Under the facts of the case at bar it is not necessary for us to decide whether or not under our married women's statutes the husband has been shorn of the exclusive right to the possession and control of the property held as an estate in entirety; it is sufficient to say, as we do say, that the title in such an estate is as it was at common law; neither husband nor wife has an interest in the property, to the exclusion of the other. Each owns the whole while both live and at the death of either the other continues to own the whole, freed from the claim of any one claiming under or through the deceased.

200 Mo. at 483, 98 S.W. at 528, 529.

We are not persuaded by the argument that it would be unfair to the creditors of either spouse to hold that the estate by the entirety may not, without the consent of both spouses, be levied upon for the separate debts of either spouse. No unfairness to the creditor in involved here. We agree with the court in *Hurd v. Hughes*:

> But creditors are not entitled to special consideration. If the debt arose prior to the creation of the estate, the property was not a basis of credit, and if the debt arose subsequently the creditor presumably had notice of the characteristics of the estate which limited his right to reach the property.

12 Del.Ch. at 193, 109 A. at 420.

We might also add that there is obviously nothing to prevent the creditor from insisting upon the subjection of property held in tenancy by the entirety as a condition precedent to the extension of credit. Further, the creation

of a tenancy by the entirety may not be used as a device to defraud existing creditors. In re *Estate of Wall*, 440 F.2d 215 (1971).

Were we to view the matter strictly from the standpoint of public policy, we would still be constrained to hold as we have done here today. In *Fairclaw v. Forrest*, the court makes this observation:

> The interest in family solidarity retains some influence upon the institution (of tenancy by the entirety). It is available only to husband and wife. It is a convenient mode of protecting a surviving spouse from inconvenient administration of the decedent's estate and from the other's improvident debts. It is in that protection the estate finds its peculiar and justifiable function.

130 F.2d at 833.

It is a matter of common knowledge that the demand for single-family residential lots has increased rapidly in recent years, and the magnitude of the problem is emphasized by the concentration of the bulk of fee simple land in the hands of a few. The shortage of single-family residential fee simple property is critical and government has seen fit to attempt to alleviate the problem through legislation. When a family can afford to own real property, it becomes their single most important asset. Encumbered as it usually is by a first mortgage, the fact remains that so long as it remains whole during the joint lives of the spouses, it is always available in its entirety for the benefit and use of the entire family. Loans for education and other emergency expenses, for example, may be obtained on the security of the marital estate. This would not be possible where a third party has become a tenant in common or a joint tenant with one of the spouses, or where the ownership of the contingent right of survivorship of one of the spouses in a third party has cast a cloud upon the title of the marital estate, making it virtually impossible to utilize the estate for these purposes.

If we were to select between a public policy favoring the creditors of one of the spouses and one favoring the interests of the family unit, we would not hesitate to choose the latter. But we need not make this choice for, as we pointed out earlier, by the very nature of the estate by the entirety as we view it, and as other courts of our sister jurisdictions have viewed it, '(a) unilaterally indestructible right of survivorship, an inability of one spouse to alienate his interest, and, importantly for this case, a broad immunity from claims of separate creditors remain among its vital incidents.' In re *Estate of Wall*, *supra*, 440 F.2d at 218.

Having determined that an estate by the entirety is not subject to the claims of the creditors of one of the spouses during their joint lives, we now hold that the conveyance of the marital property by Kokichi Endo and Ume Endo, husband and wife, to their sons, Samuel H. Endo and Toru Endo, was not in fraud of Kokichi Endo's judgment creditors.

Affirmed.

Kidwell, Justice, dissenting.

This case has been well briefed, and the arguments against the conclusions reached by the majority have been well presented. It will not materially assist the court in resolving the issues for me to engage in an extensive review of the conflicting views. Appellants' position on the appeal was that tenancy by the entirety as it existed at common law, together with all of the rights which the husband had over the property of his wife by virtue of the common law doctrine of the unity of the person, was recognized by the early decisions; that the Married Women's Act of 1888 (new Ch. 573, HRS) destroyed the fictional unity of husband and wife; that the legislature has recognized the continuing existence of the estate of tenancy by the entirety, but has not defined the nature or the incidents of that estate, HRS s 509-1, 509-2; that at common law the interest of the husband in an estate by the entireties could be taken by his separate creditors on execution against him, subject only to the wife's right of survivorship; and that the Married Women's Act merely eliminated any inequality in the positions of the spouses with respect

to their interests in the property, thus depriving the husband of his former power over the wife's interest, without thereby altering the nature and incidents of the husband's interest.

I find the logic of Appellant's analysis convincing. While the authorities are divided, I consider that the reasoning of the cases cited by Appellant best reconciles the Married Women's Act with the common law. [Citations omitted.]

The majority reaches its conclusion by holding that the effect of the Married Women's Act was to equalize the positions of the spouses by taking from the husband his common law right to transfer his interest, rather than by elevating the wife's right of alienation of her interest to place it on a position of equality with the husband's. I disagree. I believe that a better interpretation of the Married Women's Acts is that offered by the Supreme Court of New Jersey in *King v. Greene*, 30 N.J. 395, 412 (1959):

> It is clear that the Married Women's Act created an equality between the spouses in New Jersey, insofar as tenancies by the entirety are concerned. If, as we have previously concluded, the husband could alienate his right of survivorship at common law, the wife, by virtue of the act, can alienate her right of survivorship. And it follows, that if the wife takes equal rights with the husband in the estate, she must take equal disabilities. Such are the dictates of common equality. Thus, the judgment creditors of either spouse may levy and execute upon their separate rights of survivorship.

One may speculate whether the courts which first chose the path to equality now followed by the majority might have felt an unexpressed aversion to entrusting a wife with as much control over her interest as had previously been granted to the husband with respect to his interest. Whatever may be the historical explanation for these decisions, I feel that the resultant restriction upon the freedom of the spouses to deal independently with their respective interests is both illogical and unnecessarily at odds with present policy trends. Accordingly, I would hold that the separate interest of the husband in entireties property, at least to the extent of his right of survivorship, is alienable by him and subject to attachment by his separate creditors, so that a voluntary conveyance of the husband's interest should be set aside where it is fraudulent as to such creditors, under applicable principles of the law of fraudulent conveyances.

---

1. Phipps, *Tenancy by Entireties*, 25 Temple L.Q. 24 (1951).↩

In re Susan Elaine Watford, Debtor.,

427 B.R. 552 (U.S. Bankr., S.D. Fl. 2010)

Erik P. Kimball, Bankruptcy Judge.

… .

Section 522(b)(3)(B) [of the Bankruptcy Code] provides that a debtor may exempt property "in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law." The Debtor claims that her interest in the Georgia Property is that of a tenant by the entirety, that such interest is exempt from process under Georgia law, and that it is exempt under section 522(b)(3)(B). The Trustee argues that under Georgia law the Debtor's interest in the Georgia Property is that of a tenant in common, a severable interest subject to process, and that it is not exempt under section 522(b)(3)(B).

… . By statute, Georgia law provides that a deed conveying real property to two or more persons is presumed to create a tenancy in common unless the deed expressly states that the grantees take as "joint tenants," "joint tenants and not as tenants in common," "joint tenants with survivorship," or "jointly with survivorship."[1] Georgia case law uniformly provides that an instrument granting an interest in property to two or more individuals creates a tenancy in common unless the instrument expressly states that the grantees take such interest subject to a right of survivorship. *E.g., Williams v. Studstill*, 251 Ga. 466, 306 S.E.2d 633, 634-35 (1983); *Sams v. McDonald*, 117 Ga.App. 336, 160 S.E.2d 594, 598 (1968).

The deed by which the Debtor obtained her interest in the Georgia Property shows the grantees as "William H. Watford & Susan E. Watford." Under Georgia law, this deed created a tenancy in common. Such interest is not exempt under section 522(b)(3)(B).

By its terms, Section 44-6-190(a) of the Official Code of Georgia encompasses all deeds to two or more persons, whether or not married. In spite of this, the Debtor argues that Georgia recognizes the common law form of tenancy by the entirety. For this proposition, the Debtor cites *Sams v. McDonald*, 117 Ga.App. 336, 160 S.E.2d 594 (1968). In *Sams v. McDonald*, the court considered whether a bank account in the names of two unmarried individuals was held with right of survivorship. One account holder had died and the other claimed sole ownership. The account application was in "the joint names of the undersigned as tenants by the entireties." *Sams v. McDonald*, 160 S.E.2d at 597. To define the term "tenants by the entireties" the *Sams* court reviewed case law in Tennessee, Mississippi, Oregon, Pennsylvania, South Carolina, and the District of Columbia, and treatises such as American Jurisprudence and Blackstone's Commentaries. The *Sams* court did not cite a single Georgia case addressing tenancy by the entireties. The court concluded that tenancy by the entireties is a species of joint tenancy reserved for married couples, and that where a tenancy by the entireties is stated, and the parties are not married, a joint tenancy is created unless the evidence supports a contrary intent. *Id.* at 598. Noting that the account application before the court also stated that it was for a "membership of joint holders (with right of survivorship) of a share account," the *Sams* court determined that the account in question was held with right of survivorship. *Id.* The court held that the surviving account holder was the sole owner of the account. *Id.* The *Sams* court addressed the concept of tenants by the entireties only to assist the court in determining the intent of the parties before it. There is nothing in *Sams v. McDonald* to suggest that Georgia then recognized, or now recognizes, tenancy by the entireties.

Other persuasive authority confirms that Georgia does not recognize the common law form of tenancy by the entirety. 1 Ga. Wills & Administration § 2:3 (7th ed.) ("Georgia does not authorize the creation of a tenancy by the entirety. Tenancy by the entirety has been referred to in Georgia case law as 'a species of joint tenancy' and the 'nomenclature for a joint tenancy between husband and wife.'") (citing *Sams v. McDonald*, 160 S.E.2d at 597-98); 1 Ga. Real Estate Law & Procedure § 7-80 (6th ed.) ("Entireties seem never to have been recognized in Georgia. Under our present Code, wherever two or more persons 'from any cause' are entitled to the possession simultaneously, a tenancy in common is created, and this is accepted as true equally of husband and wife as any other two grantees."); 1 Ga. Jur. Property § 5:1 ("Georgia has referred to a tenancy by the entirety as a species of joint tenancy between husband and wife. An estate by the entirety is, at common law, one created by conveyance to a husband and wife jointly, the two holding as a unit title to the whole. However, this type of joint tenancy has largely lost its relevancy now that the husband and wife are no longer one person in the law.").

Because the Debtor holds a severable interest in the Georgia Property as a tenant in common, the Debtor may not exempt her interest in the Georgia Property under section 522(b)(3)(B). The Debtor's interest in the Georgia Property is property of the estate under section 541 and may be administered by the Trustee. The Trustee's objection to the Debtor's claimed exemption with regard to the Georgia Property will be sustained.

1. Section 44-6-190(a) of the Official Code of Georgia provides: "Deeds and other instruments of title, including any instrument in which one person conveys to himself and one or more other persons, any instrument in which two or more persons convey to themselves or to themselves and another or others, and wills, taking effect after January 1, 1977, may create a joint interest with survivorship in two or more persons. Any instrument of title in favor of two or more persons shall be construed to create interests in common without survivorship between or among the owners unless the instrument expressly refers to the takers as 'joint tenants,' 'joint tenants and not as tenants in common,' or 'joint tenants with survivorship' or as taking 'jointly with survivorship.'"↩

4.4. Relationships and Property

4.4.1. Marriage and Divorce

Wright v. Wright,

277 Ga. 133 (2003)

William R. Oliver, Cornelia, for appellant.

Browning & Tanksley, Thomas J. Browning, Marietta, for appellee.

Carley, Justice.

Linda (Wife) and Seaborn (Husband) Wright were married in 1985. It was a second marriage for both, and they had no children. Each brought assets and debts to the marriage, including Husband's house which was mortgaged. In 1991, his mother died and left her estate to him. He used his inheritance to start a family business, in which he and Wife both worked and were salaried employees. In 2000, she filed for divorce. After conducting a hearing, the trial court entered an order granting a divorce and dividing the marital property. We granted Wife's application for discretionary appeal pursuant to this Court's pilot project, pursuant to which we grant all non-frivolous applications seeking discretionary appeal from a final divorce decree.

1. Wife contends that the trial court erred in determining which portions of the property were marital and non-marital assets.

> What items of property can legally constitute a marital or non-marital asset is a question of law for the court. However, whether a particular item of property actually constitutes a marital or non-marital asset may be a question of fact for the trier of fact to determine from the evidence. [Cit.]

Bass v. Bass, 264 Ga. 506, 507, 448 S.E.2d 366 (1994). A review of the record shows that, in making the award, the trial court correctly applied the legal principle that "[o]nly property acquired as a direct result of the labor and investments of the parties during the marriage is subject to equitable division. [Cit.]" *Payson v. Payson*, 274 Ga. 231, 232(1), 552 S.E.2d 839 (2001). Because Husband brought the house to the marriage, only the subsequent increase in the net equity attributable to marital contributions was a marital asset. *Hubby v. Hubby*, 274 Ga. 525, 556 S.E.2d 127 (2001); *Thomas v. Thomas*, 259 Ga. 73, 76, 377 S.E.2d 666 (1989). Husband started the family business after the marriage, but used his own separate funds to do so. *Bailey v. Bailey*, 250 Ga. 15, 295 S.E.2d 304 (1982). Therefore, only the appreciation in the value of the business attributable either to his and Wife's individual efforts or to their joint efforts was subject to an equitable division. >*Bass v. Bass*, supra.

2. Wife's primary contention is that the trial court erroneously failed to award her an appropriate share of that portion of the equity in the house and the appreciation in the business which was a marital asset. According to her, she should receive one-half of the divisible equity and appreciation. However, an equitable division of marital property does not necessarily mean an equal division. *Goldstein v. Goldstein*, 262 Ga. 136(1), 414 S.E.2d 474 (1992). "The purpose behind the doctrine of equitable division of marital property is 'to assure that property accumulated during the marriage be fairly distributed between the parties.' [Cit.]"*Payson v. Payson*, supra at 232(1), 552 S.E.2d 839. Each spouse is entitled to an allocation of the marital property based upon his or her respective equitable interest therein. *Byers v. Caldwell*, 273 Ga. 228, 229, 539 S.E.2d 141 (2000). Thus, an award is not erroneous simply because one party receives a seemingly greater share of the marital property. See *Mitchely v. Mitchely*, 237 Ga. 138, 139, 227 S.E.2d 34 (1976). See also *Clements v. Clements*, 255 Ga. 714, 342 S.E.2d 463 (1986); *Stokes v. Stokes*, 246 Ga. 765, 273 S.E.2d 169 (1980) (trier of fact may award whole or part interest in property to one spouse or require the parties to sell property).

3. The fact finder has broad discretion to distribute marital property to assure that it is fairly divided between the divorcing spouses. *Jones v. Jones*, 264 Ga. 169, 441 S.E.2d 745 (1994). In the exercise of that discretion, the fact finder should consider "all the relevant factors, including each party's contribution to the acquisition and maintenance of the property (which would include monetary contributions and contributions of a spouse as a homemaker), as well as the purpose and intent of the parties regarding the ownership of the property. (Cits.)"

Morrow v. Morrow, 272 Ga. 557, 558, 532 S.E.2d 672 (2000). Here, the record shows that the trial court, sitting as the trier of fact, considered all of the relevant factors and, in the exercise of its broad discretion, awarded each party what it considered to be a fair and equitable portion of the marital property.

> [R]eviewing all the evidence adduced in this case we cannot say that the trial court treated [Wife] inequitably in its decision regarding what constituted a fair division between the parties of the marital property. Therefore, we hold that [she] failed to carry [her] burden of proving error in the trial court's award to [Husband].

Morrow v. Morrow, supra at 559, 532 S.E.2d 672.

Judgment affirmed.

In Re Marriage of King,

700 P.2d 591 (Mont. 1985).

William Law Firm, Richard Ranney, Missoula, for respondent and appellant.

Goldman & Goldman, Joseph M. Goldman, Missoula, for petitioner and respondent.

Milodragovich, Dale & Dye, Karl Boehm, Missoula, for children.

Hunt, Justice.

Jack King appeals an order and an amended order of the Missoula County District Court which divided his and Pamela King's marital property, and established custody and visitation rights, and the support obligations of the parties to their two minor children. Two issues are presented for review: first, whether substantial evidence supports the District Court's award of nearly all the marital estate to the wife; and second, whether the District Court erred in awarding the parties' real property to the wife in lieu of requiring the husband to make child support payments. We affirm the District Court.

Jack and Pamela King married in March 1971, in Mexico. Thereafter, they resided in California, where their two children were born, in 1971 and 1973. In 1977, they moved to Montana. They separated in June 1980, and the District Court dissolved their marriage in June 1981, reserving the issues of division of marital property, custody, visitation rights and child support until a later time. Maintenance was neither sought nor awarded, and custody and visitation rights are not in issue on this appeal.

On February 29, 1984, the District Court entered findings of fact, conclusions of law and its order deciding those reserved issues. All parties filed certain objections to the order, and thereafter, on April 16, 1984, the court entered its amended findings, conclusions and order. That amended order awarded each party the personal property then in their possession, and awarded the family residence to Pamela.

Jack asserts several of the court's findings of fact are unsupported by substantial evidence. We will address them in order. In its finding no. 2, the court noted: "The distribution of the proceeds of the sale of the family home if it is ordered sold makes inadequate provision for the support of the minor children of the parties."

Finding no. 3: "A substantial hardship would be imposed upon the children of the parties if they would be required to vacate the family home if it is ordered sold."

Finding no. 4: "The expenses of sale, including realtors' commissions, attorneys' fees and potential capital gain tax liability would take a disproportionate amount of marital assets needed for child support."

And no. 5: "It would be in the best interests of the minor children of the parties to continue to reside in the family home."

Jack contends the division of property should be separate from and not contingent upon child support. However, a fair reading of s 40-4-202, MCA, shows that the District Court, in a proceeding for dissolution of marriage, may take into account support considerations, and may protect and promote the best interests of the children by setting aside a portion of the jointly and separately held estate of the parties for the support of their children. In reaching such a result, the court shall equitably apportion between the parties, the property or assets belonging to either or both. The court is neither required to divide each asset 50-50, nor to sell all the parties' property and divide the proceeds 50-50. Equitable apportionment is the guideline under any or all of the many factors which apply. To order the sale of the family residence would subject the marital estate to realty fees, would lose a favorable interest rate, and would uproot the children from their home and possibly from their neighborhood. These findings are well supported in the record.

Finding no. 7 provided that if Pamela were awarded the residence, she would be able to devote sufficient monies from her earnings to support the children. Jack contends the finding is not supported by substantial evidence because she probably would be able to support the children without the award of the residence. His contention, even if correct, neither per se invalidates the finding, nor begs the conclusion that she would not be able to support them without the home. Rather, it is reasonable to view the finding in light of the court's order relieving Jack of a financial support obligation. Viewing the record in its entirety, as we must, we cannot say the finding was erroneous.

Jack also attacks finding no. 8, wherein the court noted he had not presented satisfactory means of verifying his present or future income, given the nature of his occupation as a professional gambler. He did testify without objection that he earned approximately $1,000.00 per month in California from gambling winnings, and approximately $500.00 per month therefrom after the parties moved to Montana. Yet, when questioned further about his income, Jack was very evasive, and eventually conceded that there was no way of verifying his income. That makes it difficult to ascertain whether he would be able to make support payments. It is reasonable to conclude the court meant he did not have a regular paycheck as such. It is also reasonable to infer the court meant he had not presented sufficient income evidence to justify a different property division. In light of those considerations, we feel the finding is supported by record evidence.

Jack next contends finding no. 9, that he would not pay any portion of the childrens' attorney fees, was based on the court's "suspicions and distaste for Jack's method of earning a living." The Supreme Court, in reviewing evidence on appeal, is not concerned with the motives of the trial court. Nor may we express our opinion as to the wisdom of its decisions. Rather, we look to determine whether the result comports with the law. The District Court was in the best position to examine the demeanor of the parties, the witnesses and the evidence, and the District Court has broad discretion in arriving at its decisions. We will not substitute our judgment for the District Court absent a clear abuse of that discretion. We fail to see how the court's finding that Jack would not pay the childrens' attorney fees abused its discretion.

Finally, Jack assails finding no. 10: "Awarding the Petitioner the Respondent's share of the equity in the family home is the only reasonable means to insure that the Respondent will contribute to the care and support of the minor children of the parties."

Again, the District Court was in the best position to view the parties, the witnesses and the evidence, and to render a decision based on its view. Our role is not to examine other possible means of ensuring Jack will contribute to the care and support of his and Pamela's children, but to determine whether the means chosen has a lawful basis of support in the record. The income earned from Jack's chosen occupation as a professional gambler, is by its very nature, inadequate to ensure he will always or regularly or even predictably have that income. To accede to such speculation is a gamble that neither party nor the District Court is advised to undertake. We find substantial evidence supports the findings of the District Court.

The second issue Jack presents is whether the District Court erred in awarding the custodial spouse the family residence "in lieu of any child support obligation on the part of the [non-custodial spouse.]" He contends the award was erroneous because the issues of property and support are totally irrelevant to each other. Pamela, on the other hand, claims the award was proper because the issues of property, support, custody and visitation rights are "inextricably interwoven." The record does not support a conclusion favoring either of those extremes. Rather, the District Court considered all the factors, and made a decision based on the extent to which they were interrelated. Custody and visitation rights are not issues raised on appeal. The property division and support findings, however, do call for a discussion.

We held in Perkins v. Perkins (1975), 168 Mont. 78, 540 P.2d 957, that where the husband was financially unable to contribute to the support of the minor children, it was not error to grant the wife a proportionally larger share of the marital property to offset her increased obligation. Similarly, in Bailey v. Bailey (1979), 184 Mont. 418, 603 P.2d 259, the trial court awarded the family residence to the wife, plus other property, for a total award of approximately 67% of the marital estate. After noting the District Court weighed all the applicable factors of s 40-4-202, MCA, we held a division of the marital estate which favors one party over the other may be acceptable if there is reason for it. Here, the District Court stated its reasons-the best interests of the children are served by allowing them to remain in the family home; forced sale of the family home would divert and dissipate assets needed for support; and the only reasonable means to protect and promote the best interests of the children is to award the home to Pamela. That award was made in lieu of a support obligation.

No reasonable purpose would be served by ordering the residence sold. Jack would not reside there in any event, the children would be uprooted, and the marital estate would be lessened because of realty fees attendant to the sale.

The District Court's findings and conclusions are embodied in a ten-page summary attached to its order, delineating all the statutory criteria.

We believe the District Court did a thorough job of dividing the marital assets and resolving the respective support obligations of the parties. We hold there was no abuse of discretion.

Affirmed.

Harrison, Weber, Sheehy, and Gulbrandson, JJ.

Behrens v. Behrens,

143 A.D.2d 617 (N.Y. App. Div. 1988)

… .

The plaintiff is contesting various provisions of the judgment of divorce with emphasis on that section which ordered the sale of the marital residence. In its memorandum decision dated March 10, 1987, the trial court determined that the home had to be sold to pay off debts incurred by the parties and because the upkeep of the home was more than the parties could afford. The plaintiff argues that a sale of the marital residence will force her and the children to leave their present community, with which the family has established strong ties, and relocate to an entirely new area without realizing a substantial decrease in housing expenses. The record reveals that the couple purchased the marital residence in Dix Hills, in 1982 for $153,000. It was stipulated that at the time of trial the house was worth $310,000. The mortgage payment, including real estate taxes, was $1,907 per month. The other expenses, including utilities, telephone, gardening and insurance, brought the total monthly cost up to $2,700. According to the plaintiff the cost of obtaining replacement housing in the Dix Hills area would be between $2,500 and $3,500 per month. The defendant testified that he had investigated the availability of housing in other "nice neighborhoods" on Long Island and found that a three-bedroom house could be rented for between $1,100 and $1,300 per month. While this court has generally favored allowing a custodial parent to remain in the marital residence at least until the youngest child reaches the age of 18 years or is sooner emancipated (*see*, *Cassano v Cassano*, 111 AD2d 208; *Hillmann v Hillmann*, 109 AD2d 777; *Patti v Patti*, 99 AD2d 772), in this case we agree with the finding of the trial court that the home must be sold. The parties are financially incapable of maintaining the marital residence and there is no doubt that replacement housing can be found at a substantial saving on Long Island. The children are young enough to make the necessary social adjustments that a move from Dix Hills will entail (*see*, *Cassano v Cassano*, *supra*; *Patti v Patti*, *supra*). Given the defendant's testimony that the cost of alternative housing would be at least $1,100 to $1,300 per month, we direct that the housing allowance award be increased from $1,000 to $1,500 per month, which award is to be treated as a maintenance payment to the wife for income tax purposes. Furthermore the child support payments will be increased from $100 per week to $150 per week per child.

Even with the increases herein granted it will be necessary for the wife to return to work as soon as possible in order to supplement the family's income. We therefore agree with the trial court's award of maintenance in the amount of $100 per week. The wife expects to resume employment as a school teacher and her hours of work will correspond with the children's school hours; therefore, her return to work in the near future will not significantly interfere with their care (*see*, *Hillmann v Hillmann*, *supra*). Since there may be a short delay until she begins to receive her salary, we are extending the maintenance payments for an additional month until the first Friday of October 1988.

… .

Weinstein, J., concurring

… .

In the instant case, the trial court ordered the sale of the marital residence based upon its belief that the parties could simply not afford to incur the costs of maintaining that particular residence. In the language of the court, "Quite simply, the parties could not afford the luxuries they gave to themselves". Furthermore, the court viewed the residence as the only major salable asset of sufficient value to pay off the marital debts with sufficient funds remaining to allow for a substantial distribution to each party.

Although it appears, at first blush, that the cost of housing outside the Dix Hills area would be substantially below the cost of maintaining the marital residence, the projected savings may be somewhat illusory when certain factors are considered. While the defendant testified that his investigations had revealed that the plaintiff could rent a three-bedroom home in a "nice" area of Long Island for between $1,100 and $1,300 per month, the record is devoid of any indication that this sum includes any of the expenses necessarily associated with the upkeep of a home, i.e., utilities, telephone and insurance. Based on the ages of the three children, alternative housing of at least three bedrooms would be required for the next 10 years. Considering the increases in rent which could be expected during that period, it is reasonable to conclude that it would not be long before the cost of renting would exceed the present mortgage payment on the marital residence. In view of the ages of the children and their strong ties to the community, I believe that the wife should be permitted to retain possession of the marital residence until the youngest child becomes 18 or is sooner emancipated. Notwithstanding the defendant's contention that he is in debt and unable to afford the maintenance of the marital residence, the record reveals that at the time of trial, his position in West Virginia guaranteed him an income of $100,000 per year and, based on his past income, he is readily capable of earning substantially more. There is no reason to doubt that once he settles into a new practice, his earnings will soon reach levels equalling or exceeding those of his New York practice. Consequently, he should be compelled to assume a substantial portion of the cost of maintaining his family in the marital residence.

Although the trial court believed that the sale of the marital residence was required in order to pay off what the court termed "marital debts", the record reveals that the major portion of this marital debt was incurred by the defendant as a means of paying income taxes. The total debt computed by the court was $47,623. In light of the husband's substantial income and in view of the fact that the trial court awarded him $50,000 worth of accounts receivable from the sale of his New York practice, equity dictates that the husband should be responsible for the payment of these debts.

In conclusion, I concur with the majority's modifications of the judgment appealed from. However, consistent with my view that the immediate sale of the marital residence should not have been ordered, I would also further modify the judgment appealed from as set forth above.

Stolow v. Stolow,

149 A.D.2d 683 (1989)

The plaintiff and the defendant, who were married in 1970, have two children, Michael, born January 12, 1976, and Jordana, born February 9, 1979.

In 1976, the couple purchased a large residence located on a three-quarter-acre lot in Pelham Manor, New York, with five bedrooms, seven baths, four fireplaces, a butler's pantry, two sunrooms, a den, a playroom, two maid's quarters, and two living rooms, in addition to the kitchen and dining room. In order to properly maintain the house, the services of a housekeeper, cleaning person and gardener are required in addition to normal repair services such as those provided by plumbers and electricians. The parties stipulated that the fair market value of the marital residence was $960,000 at the time of trial.

The defendant is the chief executive officer in a closely held family philately corporation which sells stamps, both by mail and at public auction. The defendant's salary during the marriage was supplemented by generous perquisites, such as Porsche automobiles, country club dues, garage space, insurance, and vacations which were considered corporate expenses and not charged to the defendant as earnings. He additionally supplemented his income by borrowing from an officer's loan account to which he owed $222,879 in 1985.

The court, in distributing the marital assets, found that the plaintiff's interest in the marital residence was $455,000 (50% of the $960,000 less an outstanding mortgage of $50,000), her 30% interest in the defendant's business, for which she had worked part time, was $364,000, and her interest in the defendant's current residence was $91,500.

Because the defendant did not have sufficient liquid assets to satisfy the plaintiff's equitable award of the marital assets, the court allowed the plaintiff to accept title to the marital residence in lieu of a cash payment. The court directed joint custody of the children, who were to live with the plaintiff. In order to cover the expenses of the house and because the plaintiff's equitable share was not in liquid form, the court awarded the plaintiff $1,000 per week maintenance until the youngest child was 14 years old or entered high school, and $375 per week in child support for each child, to be raised to $500 per week as each child entered high school.

Although it is a well-settled principle of matrimonial law that exclusive possession of a marital residence is generally awarded to a custodial spouse with minor children (*see, e.g.*, *Parris v Parris*, 136 AD2d 685; *Flanagan v Flanagan*, 118 AD2d 681), we find that under the circumstances at bar, the immediate sale of the marital residence is indicated since the expenses involved in maintaining the property are wastefully extravagant. The sale of the marital residence will leave the plaintiff sufficient liquid assets to purchase a fine residence, albeit on a smaller scale, in the same neighborhood, thus obviating the need to continue the high maintenance and child support payments necessitated by the plaintiff's living in what the court had termed a "mini-mansion". While the record demonstrates that the defendant may be able to afford the substantial amounts directed to be paid for maintenance, child support and other expenses, it is unjust to require that he do so while an asset valued at nearly $1,000,000 sits idly by consuming income. In deciding whether to direct the sale of the marital residence, the court must weigh the need for the custodial parent to remain in it against the financial situation of the parties (*see*, *Behrens v Behrens*, 143 AD2d 617; *Blackman v Blackman*, 131 AD2d 801). In this case the financial circumstances of the parties dictate the sale of the marital residence.

… .

Accordingly, we direct the immediate sale of the marital residence and remit the matter to the Supreme Court, Westchester County, for a new determination as to the value of J & H Stolow, Inc., maintenance, child support and the share of the plaintiff's attorneys' fees to be paid by the defendant.

We have reviewed the parties' remaining contentions and find them to be without merit.

4.4.2. Professional Degrees

Simmons v. Simmons,

244 Conn. 158 (1998)

Frank J. Kolb, with whom were David E. Crow and, on the brief, Louis A. Crisci, Jr., for the appellant (defendant).

Barbara J. Radlauer, with whom was Ralph P. Dupont, for the appellee (plaintiff).

Louis I. Parley and S. Deborah Eldrich filed a brief for the Connecticut Chapter of the American Academy of Matrimonial Lawyers as amicus curiae.

Callahan, C.J.

The defendant, Aura R. Simmons, appeals from the judgment of the trial court in an action for dissolution of her marriage to the plaintiff, Duncan R. Simmons. She raises three issues: (1) whether the trial court properly concluded that a medical degree is not property subject to equitable distribution pursuant to General Statutes § 46b-81[1] upon dissolution of the marriage; (2) whether, if it is assumed that the medical degree is not property, the

trial court abused its discretion in its distribution of the remaining marital property and in denying alimony to the defendant; and (3) whether a contract existed between the parties with regard to the medical degree, which affords the defendant a contractual remedy. We affirm the judgment of the trial court on the first issue and reverse its judgment, in part, on the second issue. We decline to address the third issue.

The trial court made the following findings of fact. The plaintiff and the defendant were married on September 23, 1983, in Fayetteville, North Carolina. At the time of their marriage, the plaintiff was twenty-three years of age and was a sergeant in the United States Army. The defendant was forty-three years of age and was working as a bartender. There are no children of the marriage. The defendant, however, had six children of her own prior to her marriage to the plaintiff.

During the course of the marriage, both the plaintiff and the defendant pursued their individual educational goals. The defendant obtained two associates degrees, one as a surgical technician and one in nursing, culminating in her becoming a registered nurse in 1991. The plaintiff received his undergraduate degree in 1990 and entered medical school. He completed medical school in 1994 and entered a surgical residency program at St. Raphael's Hospital in New Haven, causing the family to relocate to Connecticut from North Carolina. The defendant and the plaintiff both paid their own educational expenses and both were employed and jointly supporting the family unit until the plaintiff entered medical school, when he was prohibited from maintaining outside employment. The plaintiff received loans and grants to pay for medical school and to defray some of the household expenses. The defendant worked and supported the family while the plaintiff attended medical school. She provided financial and emotional support as well as her services as a homemaker. She did not, however, make any direct financial contribution toward the cost of the plaintiffs medical school education.

In the third year of his five year surgical residency, the plaintiff filed an action for dissolution of marriage. At trial, the defendant argued that the plaintiffs medical degree was property subject to equitable distribution pursuant to § 46b-81 upon dissolution of the marriage. She presented an expert witness, Steven Shapiro, an economist, who testified regarding the present value of the plaintiff's medical degree. Shapiro testified that the plaintiffs future earning potential, reduced to present value, was approximately $3.4 million as a plastic surgeon and $2.8 million as a general surgeon. He concluded that the average of the two, $3.1 million, represents the appropriate value to be assigned to the plaintiffs medical degree.[2] The defendant claimed that the degree's present value should be equitably distributed between the parties and demanded in excess of $1.5 million as a property settlement. In its memorandum of decision analyzing the state of the law of this and other jurisdictions, the trial court concluded that the plaintiff's medical degree was not property subject to equitable distribution pursuant to § 46b-81. The court then issued an order dissolving the marriage, denying alimony to both parties and ordering distribution of the parties' debts and assets. The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to Practice Book § 4023 and General Statutes § 51-199 (c).

I

The first issue raised by the defendant is whether the plaintiffs medical degree is property subject to equitable distribution pursuant to § 46b-81 upon dissolution of the marriage. This is a question of first impression for Connecticut. It is not, however, a new question nationwide. At least thirty-five states have addressed the issue and substantial ink has been expended by academicians and practitioners on this subject. It has been labeled with a number of appellations, the most common of which is the "working spouse/student spouse syndrome," apparently so called because it represents an unfortunate circumstance that too often arises in family courts. In its most basic form, it is typified by one spouse who works to provide primary support for the family unit while the other spouse obtains an education, meanwhile earning either nothing or substantially less than he or she otherwise might have earned. Typically, it is also characterized by a relatively short marriage[3] and a working spouse who has made sig-

nificant sacrifices, for example, forgoing or delaying educational or childrearing opportunities and the current enjoyment of income that could have been produced by the student spouse. The expectation that the future benefit of increased earning capacity would be the reward shared by both is dashed when the marriage disintegrates and one of the parties files an action for dissolution before the anticipated benefits are realized. The critical problem in these situations is that the couple usually has few, if any, assets to be distributed at the time of the dissolution of the marriage. The degree, with its potential for increased earning power, is, therefore, the only thing of real economic value to the parties. See, e.g., *Haugan v. Haugan*, 117 Wis. 2d 200, 206-207, 343 N.W.2d 796 (1984), and cases cited there; B. Herring, "Divisibility of Advanced Degrees in Equitable Distribution States," 19 J. Marshall L. Rev. 1, 1-2 (1985).

The defendant argues that she fits within this paradigm and is entitled to share in the benefits of the plaintiffs medical degree by way of a distribution pursuant to § 46b-81 conferring on her an equitable portion of the value of the plaintiffs medical degree.[4] In support of this argument, the defendant asserts that § 46b-81 adopts an "'all property,' equitable distribution scheme"; *Krafick v. Krafick*, 234 Conn. 783, 792, 663 A.2d 365 (1995); pursuant to which this court has given an expansive definition of property that necessarily includes an advanced degree obtained during the marriage.[5] The crux of the defendant's argument rests upon selected language from our opinion in *Krafick*. The plaintiff counters that a medical degree cannot be distributed as property because it has no inherent value independent of the holder and does not fit within the statutory definition of property. We conclude that the plaintiff's medical degree is not property subject to distribution pursuant to § 46b-81.

We are supported in this conclusion by what we deem to be the intent of the legislature, the overwhelming weight of authority in other jurisdictions that have addressed this issue; see footnote 7 of this opinion; and sound public policy considerations. We begin our analysis with the relevant statute, § 46b-81. "We approach this question according to well established principles of statutory construction designed to further our fundamental objective of ascertaining and giving effect to the apparent intent of the legislature.... In seeking to discern that intent, we look to the words of the statute itself, to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter...." (Citations omitted; internal quotation marks omitted.) *Krafick v. Krafick*, supra, 234 Conn. 793-94.

In *Krafick*, we were called upon to determine whether the term property in § 46b-81, which is not defined by the statute or clarified by its legislative history, was broad enough to include vested, though unmatured, pension rights. To that end, we concluded that the legislature intended to adopt the commonly accepted legal definition of property as set forth in Black's Law Dictionary (6th Ed. 1990) p. 1095, which "defines 'property' as the term 'commonly used to denote everything which is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal; everything that has an exchangeable value or which goes to make up wealth or estate. It extends to every species of valuable right and interest, and includes real and personal property, easements, franchises, and incorporeal hereditament.'" *Krafick v. Krafick*, supra, 234 Conn. 794. By adopting that definition, we acknowledged that the legislature intended the term to be broad in scope. Id., 793-94. While we do not retreat from the definition of property espoused in *Krafick*, we also recognize that it is not without limits. We conclude that the plaintiffs medical degree falls outside those limits.

Whether the interest of a party to a dissolution is subject to distribution pursuant to § 46b-81,[6] depends on whether that interest is: (1) a presently existing property interest or (2) a mere expectancy. See id., 797. "[Section] 46b-81 applies only to presently existing property interests, not 'mere expectancies.'" Id. Therefore, the former interest is subject to equitable distribution upon dissolution, while the latter is not. The prototypical nonproperty interest is an anticipated inheritance, which we consistently have deemed to be a mere expectancy that is precluded

from equitable distribution under § 46b-81. See *Rubin v. Rubin*, 204 Conn. 224, 236-39, 527 A.2d 1184 (1987); *Krause v. Krause*, 174 Conn. 361, 387 A.2d 548 (1978). In *Krafick*, we stated that unlike a property interest, an "expectancy may never be realized …. The term expectancy describes the interest of a person who merely foresees that he might receive a future beneficence…. *[T]he defining characteristic of an expectancy is that its holder has no enforceable right to his beneficence."* (Citations omitted; emphasis altered; internal quotation marks omitted.) *Krafick v. Krafick*, supra, 234 Conn. 797.

By contrast, a vested pension benefit is property within the meaning of § 46b-81 and, thus, is subject to equitable distribution because it represents a presently existing, enforceable contract right. Id., 795. We reasoned that "vested pension benefits represent an employee's *right* to receive payment in the future, subject ordinarily to his or her living until the age of retirement. The fact that a *contractual right* is contingent upon future events does not degrade that right to an expectancy." (Emphasis altered; internal quotation marks omitted.) Id., 797. Consequently, the defining characteristic of property for purposes of § 46b-81 is the present existence of the right and the ability to enforce that right. Id.

The defendant first argues, by analogy, that a medical degree is substantially similar to pension benefits because both are a means to obtain deferred compensation. In both circumstances, she argues, the marital unit forgoes current income and invests those resources to acquire the benefit of future income. The defendant misconstrues the import of our analysis in *Krafick*.

There, we acknowledged in dicta that a vested pension represents deferred compensation and is often the only substantial asset of the marital unit. Id., 796. Relying on the law of contracts, however, we went on to conclude that *"[a]s contractual rights*, pension benefits are 'a type of *intangible* property,' and, as such, are encompassed in Black's definition of 'property.'" (Emphasis altered.) Id., 795. We repeatedly emphasized the fact that the owner of the pension has a presently existing, enforceable contract right attendant to a vested pension. Id., 795. In conclusion, we stated "that 'property' as used in § 46b-81, includes the right, *contractual in nature*, to receive vested pension benefits in the future." (Emphasis added.) Id., 798. Thus, it is not the pension's character as deferred compensation that makes it property subject to equitable distribution pursuant to § 46b-81, but the presently existing, enforceable contract right to receive the benefits that does so.

The defendant's argument is, therefore, unpersuasive because an advanced degree entails no presently existing, enforceable right to receive any particular income in the future. It represents nothing more than an *opportunity* for the degree holder, through his or her own efforts, in the absence of any contingency that might limit or frustrate those efforts, to earn income in the future. See *Mahoney v. Mahoney*, 91 N.J. 488, 496, 453 A.2d 527 (1982) (concluding that professional degree or license is not analogous to vested pension benefits).

The defendant next relies on our statement in *Krafick* that "[t]he fact that a contractual right is contingent upon future events does not degrade that right to an expectancy." (Internal quotation marks omitted.) *Krafick v. Krafick*, supra, 234 Conn. 797. She argues, again by analogy, that the fact that an advanced degree is also subject to contingencies in the future should not prevent its classification as property. This argument misses the crucial prerequisite that the interest must first qualify as an *existing* right before it qualifies as property subject to distribution pursuant to § 46b-81. The enforceable rights inherent in a vested pension make it distinctly different from the expectation of possible benefits afforded by an advanced degree. Additionally, the right to a vested pension benefit has already accrued prior to the action for dissolution. It is presently existing and enforceable, notwithstanding that it is contingent on certain factors such as survival of the pensioner until maturity.

By contrast, the benefits attendant on a newly acquired professional degree have not vested at the time of dissolution, and any benefits derived will accrue only after the dissolution of the marriage. These benefits may never accrue for any number of reasons because the holder has no enforceable right to earn any particular income in his or her chosen profession. Consequently, we conclude that an advanced degree is properly classified as an

expectancy rather than a presently existing property interest. It is not, therefore, subject to equitable distribution upon dissolution pursuant to § 46b-81.

The great weight of authority supports this conclusion.[7] The oft-cited rationale for concluding that a degree is not property subject to distribution is found in *Graham v. Graham*, 194 Colo. 429, 574 P.2d 75 (1978). There, the Colorado Supreme Court concluded that "[a]n educational degree ... is simply not encompassed even by the broad views of the concept of 'property.' It does not have an exchange value or any objective transferable value on an open market. It is personal to the holder. It terminates on death of the holder and is not inheritable. It cannot be assigned, sold, transferred, conveyed or pledged. An advanced degree is a cumulative product of many years of previous education, combined with diligence and hard work. It may not be acquired by mere expenditure of money. It is simply an intellectual achievement that may potentially assist in future acquisition of property. In our view, it has none of the attributes of property in the usual sense of the term." Id., 432.

We agree that an advanced degree has no inherent value extrinsic to the recipient. Its only value rests in the possibility of the enhanced earning capacity that it might afford sometime in the future. The possibility of future earnings, however, represents a mere expectancy, not a present right. We previously have concluded that "[t]he terms 'estate' and 'property,' as used in the statute [§ 46b-81] *connote presently existing interests.* 'Property' entails *'interests that a person has already acquired* in specific benefits.'" (Emphasis added.) *Rubin v. Rubin*, supra, 204 Conn. 230-31. In *Rubin*, we declined to allow a property division in contemplation of an anticipated inheritance. We concluded that "the relevance of probable future income in determining the fair and equitable division of *existing* property ... does not establish jurisdiction to make allowances from ... property *other than that held at the time.*" (Emphasis added; internal quotation marks omitted.) Id., 231. "Until our legislature amends § 46b-81 to authorize contingent transfers of expected property, we shall not read such an intent into the statute." Id., 232.

In this regard, we find the rationale of the Supreme Court of Pennsylvania persuasive. In *Hodge v. Hodge*, 513 Pa. 264, 520 A.2d 15 (1986), the court denied a professional degree the status of property, concluding that "[i]n instances such as the one now before the Court, the real value being sought is not the diploma but the *future* earned income of the former spouse which will be attained as a result of the advanced degree. The property being sought is actually acquired subsequent to the parties' separation. Thus, the future income sought cannot be 'marital property' because it has not been earned. If it has not been earned, it has not been acquired during the marriage." (Emphasis in original.) Id., 269.

The court in *Hodge* went on to note that "the contribution made by one spouse to another spouse's advanced degree plays only a small part in the overall achievement." Id. In the same vein, the Supreme Court of Appeals of West Virginia, concluded that "[o]n the whole, a degree of any kind results primarily from the efforts of the student who earns it. Financial and emotional support are important, as are homemaker services, but they bear no logical relation to the value of the resulting degree."*Hoak v. Hoak*, 179 W. Va. 509, 513, 370 S.E.2d 473 (1988). The defendant maintains in her reply brief that this assertion "reflects a paleolithic view of marriage" that is inconsistent with the partnership theory of marriage embraced in Connecticut. We disagree.

The defendant reminds us that "the primary aim of property distribution is to recognize that marriage is, among other things, 'a shared enterprise or joint undertaking in the nature of a partnership to which both spouses contribute–directly and indirectly, financially and nonfinancially–*the fruits of which* are distributable at divorce.'" (Emphasis added.) *Krafick v. Krafick*, supra, 234 Conn. 795. She argues that the only way to effectuate this purpose in these circumstances is to conclude that the plaintiffs medical degree is marital property. We disagree.

There are other ways to compensate the defendant for her contribution to the plaintiffs degree without subjecting it to classification as property subject to equitable distribution. See B. Herring, supra, 19 J. Marshall L. Rev. 1 (analyzing variety of solutions adopted by courts). Furthermore, while we have acknowledged that the marital

union is *akin* to a partnership, we have never held that it is an actual economic partnership. The parties to a marriage do not enter into the relationship with a set of ledgers and make yearly adjustments to their capital accounts. "Marriage is not a business arrangement, and this Court would be loathe to promote any more tallying of respective debits and credits than already occurs in the average household." *Hoak v. Hoak*, supra, 179 W. Va. 514; accord *Mahoney v. Mahoney*, supra, 91 N.J. 500. Reducing the relationship, even when it has broken down, to such base terms serves only to degrade and undermine that relationship and the parties.

Of the numerous states that have passed on this question, only one has concluded that an advanced degree is distributable as marital property. The New York Court of Appeals, in *O'Brien v. O'Brien*, 66 N.Y.2d 576, 583-84, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985), concluded that a professional license is "marital property" within the context of the governing New York statute. The New York Appellate Division, relying on the rationale of *O'Brien*, subsequently also concluded, in *McGowan v. McGowan*, 136 Misc. 2d 225, 518 N.Y.S.2d 346 (1987), that a professional degree is marital property. In *O'Brien*, the working wife supported the student husband through medical school only to have the husband file for divorce two months after obtaining a medical license. The court concluded that New York's unique statutory scheme was broader than those of other states that had declined to consider degrees and licenses marital property, and that, unlike other states, *"our statute* recognizes that spouses have an equitable claim to *things of value* arising out of the marital relationship and classifies them as subject to distribution by focusing on the marital status of the parties at the time of acquisition.... [T]hey hardly fall within the traditional property concepts because there is no common-law property interest remotely resembling marital property." (Emphasis added; internal quotation marks omitted.) *O'Brien v. O'Brien*, supra, 583. The court further acknowledged that "the New York Legislature deliberately went beyond traditional concepts when it formulated the Equitable Distribution Law...." (Citation omitted.) Id.

By contrast, we have interpreted our equitable distribution scheme under § 46b-81 as embracing the traditional, albeit broad, legal concept of property as defined in Black's Law Dictionary. *Krafick v. Krafick*, supra, 234 Conn. 794. In *Krafick*, we concluded that this definition represents the "common understanding" of the term. Id. Furthermore, the New York statute *specifically states* that the court must consider the contribution and expenditures of each spouse *to the career of the other spouse* when making a property distribution. *O'Brien v. O'Brien*, supra, 66 N.Y.2d 583. There is no concomitant directive in § 46b-81 (c), which requires only that courts consider various factors including "occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income ... [and] the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." Accordingly, we are not persuaded that we should follow New York's minority approach, which is based exclusively on its unique statute and the statute's illustrative legislative history. We conclude that the plaintiff's medical degree is not property subject to equitable distribution pursuant to § 46b-81 upon dissolution of the parties' marriage.

II

The second issue raised by the defendant is whether, if it is assumed that the plaintiffs degree is not property subject to distribution pursuant to § 46b-81, the trial court abused its discretion by failing to take proper account of the plaintiffs degree in structuring a property settlement and in denying her alimony. The following additional facts are relevant to this issue. When this case was decided by the trial court, the plaintiff was thirty-six years of age with an annual gross income of $45,660 from his residency position. The defendant was fifty-six years of age and employed part time as a registered nurse earning approximately $36,000 annually. She had earned approximately $67,000 in the previous year. The parties owned minimal assets, including their older automobiles,[8] approximately $5800 in cash, some collectibles, including rare books and stamps, and other miscellaneous personalty. After con-

cluding that neither party was solely responsible for the irretrievable breakdown, the trial court ordered the dissolution of the marriage; denied alimony to either party; allowed each party to retain the personal property currently in that party's possession;[9] made the plaintiff solely responsible for a joint debt to the Internal Revenue Service, but otherwise made each party responsible for that party's own debts, which included the plaintiff's medical school loans amounting to approximately $40,000; ordered the plaintiff to pay the defendant $5800, which was the total amount of cash in the joint accounts of the parties at the time of the parties' separation and which the plaintiff unilaterally had withdrawn; and ordered both parties to be responsible for their own attorneys' fees.

"The well settled standard of review in domestic relations cases is that this court will not disturb trial court orders unless the trial court has abused its legal discretion or its findings have no reasonable basis in the facts.... As has often been explained, the foundation for this standard is that the trial court is in a clearly advantageous position to assess the personal factors significant to a domestic relations case, such as demeanor and attitude of the parties at the hearing." (Citations omitted; internal quotation marks omitted.) *McPhee v. McPhee*, 186 Conn. 167, 177, 440 A.2d 274 (1982); see also *Rostain v. Rostain*, 213 Conn. 686, 693, 569 A.2d 1126 (1990). "In determining whether there has been an abuse of discretion, the ultimate issue is whether the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Sands v. Sands*, 188 Conn. 98, 101, 448 A.2d 822 (1982), cert. denied, 459 U.S. 1148, 103 S. Ct. 792, 74 L. Ed. 2d 997 (1983). Accordingly, "it is only in rare instances that the trial court's decision will be disturbed." Id.; accord *Tutalo v. Tutalo*, 187 Conn. 249, 252, 445 A.2d 598 (1982); *McPhee v. McPhee*, supra, 177.

Our statutory scheme, specifically §§ 46b-81 and 46b-82,[10] "set[s] forth the criteria that a trial court must consider when resolving property and alimony disputes in a dissolution of marriage action. The court must consider *all* of these criteria.... It need not, however, make explicit reference to the statutory criteria that it considered in making its decision or make express finding as to each statutory factor. A ritualistic rendition of each and every statutory element would serve no useful purpose.... [T]he trial court is free to weigh the relevant statutory criteria without having to detail what importance it has assigned to the various statutory factors." (Citations omitted; emphasis in original; internal quotation marks omitted.) *Caffe v. Caffe*, 240 Conn. 79, 82-83, 689 A.2d 468 (1997). With this standard in mind, we turn to the defendant's claims.

A

The defendant first argues that the trial court abused its discretion in distributing the property between the parties. She maintains in her brief that "[t]he court awarded the plaintiff-appellee the degree and subsequent training and left the defendant-appellant with $5800." Additionally, she argues that the court failed to take account of the plaintiff's collectibles, which she claims are worth between $70,000 and $80,000. Neither of the defendant's arguments is persuasive. "It is often the case that the appellant, in arguing abuse of discretion, would in reality have this court vary either the weight placed upon specific statutory criteria or the weight placed upon documentary or testimonial evidence.*Fucci v. Fucci*, 179 Conn. 174, 183, 425 A.2d 592 (1979). Such an excursion by this court into the domain of the trier is unacceptable. *Schaffer v. Schaffer*, 187 Conn. 224, 227, 445 A.2d 589 (1982)." *Carpenter v. Carpenter*, 188 Conn. 736, 741-42, 453 A.2d 1151 (1982).

Section 46b-81 (c) directs that, "[i]n fixing the nature and value of the property, if any, to be assigned, the court ... shall consider *the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income.* The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates." (Emphasis added.) The trial court's comprehensive memorandum of decision demonstrates that it evaluated all of the statutory factors in making its decision concerning the property distribution. It acknowledged the need to consider the "vocational skills and employability of the parties" and,"'the

opportunity of each [party] for future acquisition of capital assets and income' and ... 'the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates.'" We conclude that "the trial court made sufficient reference, [if] not in form [then] in substance, to the factors it considered so that an appellate court would have guidance as to whether the trial court's discretion was properly exercised." *Caffe v. Caffe*, supra, 240 Conn. 83.

The memorandum of decision reveals that the trial court did take account of the plaintiffs degree and the potential for enhanced earning capacity when it distributed property pursuant to § 46b-81. There appear to have been only four assets of any significance– $5800 in cash, two automobiles, and some collectibles, which included gifts to the plaintiff from his father. On the liabilities side of the ledger were two significant debts–the plaintiffs $40,000 in education loans and a debt to the Internal Revenue Service. The plaintiff was ordered to assume both of those debts. The plaintiff also was ordered to pay over the full amount of the parties' cash assets to the defendant. Each was allowed to keep his or her own automobile and any other miscellaneous personalty already within his or her possession.

With respect to the collectibles, it appears that a substantial portion of their value was either destroyed or retained by the defendant after the plaintiff had left the marital home and that the defendant returned only a portion of the stamps to the plaintiff. In allowing each party to keep the personalty already within his or her possession, the court accounted for and distributed the collectibles. In light of the defendant's possible misconduct with respect to these collectibles, which the trial court reasonably could have found, we cannot say that such a distribution was inequitable or an abuse of discretion. The purpose of a distribution of property upon dissolution of the marriage is to "giv[e] each spouse what is *equitably* his [or hers]." (Emphasis added.) *McPhee v. McPhee*, supra, 186 Conn. 170. Of the assets that did exist at the time of trial, all that were liquid went to the defendant and all the debt went to the plaintiff. We cannot say that this distribution is inequitable.

The defendant's attempt to obfuscate this issue by claiming that the plaintiff was awarded the value of the degree is unavailing. As resolved under our consideration of the first issue, the court properly made no distribution of the value of the medical degree because it is not property. The degree, however, was taken into account in the distribution of what property the parties currently did possess. Accordingly, we find no abuse of discretion in the trial court's distribution of the property of the parties pursuant to § 46b-81.

B

We do, however, find merit in the defendant's second claim, that the trial court abused its discretion in failing to award her alimony. An award of alimony is governed by § 46b-82,[11] which mandates that the court "shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, *the age, health, station, occupation, amount and sources of income, vocational skills, employ ability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81*...." (Emphasis added.) We continue mindful of the substantial deference that this court affords the decisions of the trial court in a dissolution case. See, e.g., *Caffe v. Caffe*, supra, 240 Conn. 82-83. We consider this case, however, to present one of those rare situations in which we must conclude that there was an abuse of that discretion. See *Sands v. Sands*, supra, 188 Conn. 100; *McPhee v. McPhee*, supra, 186 Conn. 177.

The trial court, in its memorandum of decision, acknowledged the need to consider the plaintiff's medical degree in determining an award of alimony. Further, the court specifically referred to the statutory factors related to the earning capacity of both parties as well as other economic factors in making that determination. It went on, however, to conclude that "consideration of the statutory factors in this case [does] not justify the award of alimony to the defendant." In support of its conclusion, the court analyzed the facts, noting that "[t]he defendant provided no direct financial contributions to the plaintiff's attainment of his medical degree. He paid for his own

education costs and incurred large medical school loans, of which approximately $40,000 remains outstanding. The defendant also did not forgo educational and career opportunities in order to support her husband. Much to her credit, she was able to further her education and attain her career goal of becoming a licensed nurse during the marriage. She is presently employed as a nurse and is able to financially support herself at a standard of living to which she was accustomed during marriage.

"The economic condition in which a divorce decree leaves the parties is a paramount concern for the court in a dissolution proceeding. A severing of the marriage bond in this case will not result in just one party facing a rewarding professional future. Both parties will remain able to support themselves and able to pursue their chosen career[s]." We have three problems with respect to the trial court's analysis.

First, we find no reference to the age of the defendant. This court does not mandate that any one factor should be given greater weight than other factors, nor do we require that the court recite every factor in its memorandum of decision. *Caffe v. Caffe*, supra, 240 Conn. 83. We believe, however, that this particular omission is significant in light of the substantial age disparity between the parties. The defendant was fifty-six years of age at the time of trial, while the plaintiff was thirty-six years of age. Although the defendant may be able to continue to pursue her chosen career, she is significantly limited in the duration of that career because of her age. Moreover, she currently has no significant assets and she is not likely to accumulate any prior to her retirement. Any savings she might have garnered in anticipation of her retirement were necessarily consumed during the years of the plaintiffs medical education because she was the sole support of the family unit. It is not unlikely or unreasonable to believe that the plaintiffs medical degree was the defendant's retirement plan.

We also take exception to the trial court's emphasis of the fact that the defendant did not contribute direct financial aid to the cost of the plaintiffs schooling. The absence of direct financial contribution is of little consequence in an award of alimony in these circumstances. The defendant provided emotional support and homemaker services during the years of the plaintiff's medical education. Moreover, she was the primary financial support of the family unit and forsook earnings by her spouse during his years in medical school in anticipation of the future enhanced earning capacity of the family. Just prior to the time when she reasonably might have anticipated a return on her sacrifice, the breakdown of the marriage effectively prevented her from realizing anything for her efforts.

Finally, we are concerned by the trial court's reference to the defendant's ability to sustain herself at a level to which she had become accustomed during the marriage. While an absence of need may be a customary criterion for determining the propriety of an award of alimony, this is an atypical case. "Need is to be satisfied if it can be, but those cases and the authorities on which [this rule] rest[s] are not to be read as necessarily limiting alimony by the dependent spouse's need." *Rosenberg v. Rosenberg*, 33 Mass. App. 903, 904, 595 N.E.2d 792 (1992). The only reason the defendant was accustomed to a standard of living commensurate with her salary alone is that she had become the sole support of the family unit in order to allow the plaintiff an opportunity to attain his medical degree. In view of the foregoing factors, we conclude that the trial court abused its discretion by not awarding the defendant some alimony, thereby depriving her of any opportunity for future support.

In concluding that the trial court abused its discretion by failing to award the defendant any alimony, we are guided by the analysis of the Wisconsin Supreme Court in *Haugan v. Haugan*, supra, 117 Wis. 2d 215-23. In *Haugan*, the court faced the typical working spouse/ student spouse situation and concluded that it was an abuse of discretion to deny alimony to the working spouse. The court determined that notions of fairness demand that the working wife be compensated for her lost expectation of the enjoyment of her husband's enhanced future earnings in light of her contributions to his education, particularly in view of the fact that there was inadequate property to distribute. Id., 207. The court concluded that it was an abuse of discretion to deny alimony because of a lack of need, that the trial court failed to provide an adequate articulation of its reason for the denial, and that the award

was clearly inadequate under the circumstances. Id., 216. We are persuaded by this rationale and conclude, for the same reasons, that the trial court abused its discretion in denying alimony to the defendant.

In concluding that alimony is a proper means of sharing the future earning of a spouse's advanced degree, we are supported by the conclusions of courts interpreting statutes similar to ours. Particularly, the Massachusetts[12] and Rhode Island[13] statutes use language parallel to that of §§ 46b-81 and 46b-82. The courts of both states have concluded that their respective statutes do not permit equitable distribution of an advanced degree as property, but that alimony is the proper means of compensating the working spouse. *Drapek v. Drapek*, 399 Mass. 240, 246-47, 503 N.E.2d 946 (1987); *Becker v. Perkins-Becker*, 669 A.2d 524, 531-32 (R.I. 1996). In *Drapek*, the Massachusetts Supreme Judicial Court concluded that distribution of a degree as property would be improper in that it would not take into account the possibility of future events because property settlements are not subject to future modification.[14] *Drapek v. Drapek*, supra, 244. The court went on to conclude that in such circumstances, it is more appropriate to employ an award of alimony to account for the enhanced earning capacity engendered by an advanced degree. Id., 245-46. The Rhode Island Supreme Court, in *Becker v. Perkins-Becker*, supra, 531-32, adopted the rationale of *Drapek.*

The conclusions of both the Massachusetts and Rhode Island courts that the unmodifiable nature of a property settlement sometimes makes it an inappropriate method for sharing the wealth generated by the student spouse's increased earning capacity is persuasive. The further conclusions of those courts that alimony is an appropriate vehicle by which to compensate the working spouse when there is inadequate property to distribute is equally compelling. We previously have concluded that "property distributions, unlike alimony awards, *cannot* be modified to alleviate hardships that may result from enforcement of the original dissolution decree in the face of changes in the situation of either party. See *Connolly v. Connolly*, [191 Conn. 468, 477, 464 A.2d 837 (1983)]; H. Clark, [Domestic Relations in the United States (1968)] § 14.8, p. 449, and § 14.9, p. 453." (Emphasis added.) *Rubin v. Rubin*, supra, 204 Conn. 232; see also General Statutes § 46b-86.[15] An alimony award, on the other hand, is an appropriate method to take into account future earning capacity because it can be modified whenever there is a change in the circumstances of the parties that justifies the modification. *Bartlett v. Bartlett*, 220 Conn. 372, 381, 599 A.2d 14 (1991);[16] *Rubin v. Rubin*, supra, 235-36; see General Statutes § 46b-86.

Sound public policy militates in favor of using an alimony award rather than a property settlement in these circumstances. To conclude that the plaintiffs medical degree is property and to distribute it to the defendant as such would, in effect, sentence the plaintiff to a life of involuntary servitude in order to achieve the financial value that has been attributed to his degree. The plaintiff may become disabled, die or fail his medical boards and be precluded from the practice of medicine. He may chose an alternative career either within medicine or in an unrelated field or a career as a medical missionary, earning only a subsistence income. An award of alimony will allow the court to consider these changes if and when they occur.

Because this case represents our first foray into this particular aspect of marriage dissolutions, we take this opportunity to clarify certain questions that may arise in interpreting the scope of this decision. First, we caution that we have not established a blanket rule that alimony must always be awarded to the working spouse.[17] Nor do we conclude that enhanced earning capacity, and the contributions of the parties thereto, are necessarily factors of greater significance than other statutory factors. The trial courts continue to retain their traditional discretion in that regard. We do conclude, however, that a working spouse is normally entitled to some compensation for contributions made during the marriage and for the loss of enhanced future earnings, particularly when there are inadequate assets to distribute. The absence of need or direct financial contribution to a spouse's education are not

sufficient bases upon which to deny alimony when it is the only equitable compensation available to the working spouse.

Additionally, we are mindful that in ordering alimony or a property distribution in cases where there is an advanced degree obtained with the aid of a working spouse, the trial court also must take into account factors relating to the student spouse. The court must recognize the fact that the student spouse has worked and studied hard to obtain the degree and will have to continue to work hard in the future to realize the earning potential attributable to the degree. *Haugan v. Haugan*, supra, 117 Wis. 2d 215. "Granting equity to the supporting spouse should not result in inequity to the student spouse." Id.

Finally, we recognize that a nominal alimony award may often be appropriate when the present circumstances will not support a substantial award. Nominal awards, however, are all that are necessary to afford the court continuing jurisdiction to make appropriate modifications. We have stated that "because some alimony was awarded, [one dollar per year] with no preclusion of modification, if the circumstances warrant, a change in the award can be obtained at some future date." *Ridgeway v. Ridgeway*, 180 Conn. 533, 543, 429 A.2d 801 (1980); see also General Statutes § 46b-86; *Ridolfi v. Ridolfi*, 178 Conn. 377, 379-80, 423 A.2d 85 (1979). Concededly, in this case, no significant alimony appears to have been warranted at the time of trial. This was particularly true because, at the time of dissolution, the defendant's salary was roughly equal to that of the plaintiff and, with further effort, could have been increased significantly. The failure to award any alimony at the time of trial, however, permanently precluded the defendant from seeking alimony at a future date should those circumstances change.[18]

III

The final issue presented for our consideration is the existence of an implied in fact contract between the parties with respect to the plaintiffs medical degree. There are two subparts to this issue articulated by the defendant. First, she asks *this court* to find that a contract did exist between the parties, and, second, she asks us to conclude that the trial court improperly failed to enforce that contract. Because these issues were not properly raised in the trial court, we decline to address them.

The existence of a contract is, at least initially, a question of fact; *Fortier v. Newington Group, Inc.*, 30 Conn. App. 505, 509, 620 A.2d 1321, cert. denied, 225 Conn. 922, 625 A.2d 823 (1993); particularly with respect to the existence of an implied in fact contract as alleged here. *Bolmer v. Kocet*, 6 Conn. App. 595, 609, 507 A.2d 129 (1986). "It is the function of the trial court, not this court, to find facts." *State v. Lefferty*, 189 Conn. 360, 363, 456 A.2d 272 (1983). Since a contractual claim was not properly raised at trial, it is not reviewable by this court. "[T]o review [a] claim, which has been articulated for the first time on appeal and not before the trial court, would result in a trial by ambuscade of the trial judge." (Internal quotation marks omitted.) *State v. Robinson*, 227 Conn. 711, 741, 631 A.2d 288 (1993). "We have repeatedly indicated our disfavor with the failure, whether because of a mistake of law, inattention or design, to object to errors occurring in the course of a trial until it is too late for them to be corrected, and thereafter, if the outcome of the trial proves unsatisfactory, with the assignment of such errors as grounds of appeal." (Internal quotation marks omitted.) *Knock v. Knock*, 224 Conn. 776, 792, 621 A.2d 267 (1993).

The defendant contends that this issue was raised at trial because her attorney cited *Boland v. Catalano*, 202 Conn. 333, 521 A.2d 142 (1987) (unmarried, cohabiting couple may be found to have an implied contractual agreement regarding property distribution), in closing argument.[19] Reference to *Boland* appears to have been made, however, solely for comparative purposes. It was an effort to highlight the inequity of the situation between the paucity of what the defendant would take from the marriage compared to the substantial benefits that the plaintiff would take from the marriage if his medical degree was not to be considered property available for distribution. At no point did the defendant suggest that the rationale of *Boland*, i.e., the existence of an implied contract, was applicable in this case. Furthermore, a claim sounding in contract was neither pleaded nor proved.[20] Such a passing

reference to *Boland*, without any analysis or explanation of its applicability to this case does not constitute sufficient raising of an issue at trial to warrant review by this court. See, e.g., *Sicaras v. Hartford*, 44 Conn. App. 771, 783-84, 692 A.2d 1290, cert. denied, 241 Conn. 916, 696 A.2d 340 (1997).

The judgment is reversed in part and the case is remanded to the trial court for further proceedings consistent with this opinion.

In this opinion the other justices concurred.

---

1. General Statutes § 46b-81 provides in relevant part: "(a) At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect...."(c) In fixing the nature and value of the property, if any, to be assigned, the court, after hearing the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income. The court shall also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates."↩

1. At the time of trial, the plaintiff had not yet decided which surgical specialty he intended to pursue. In point of fact, the plaintiff subsequently was not invited to return to the surgical residency program and, thus, apparently he will be unable to pursue either career.↩

1. Although the short duration of the marriage is not an essential element, it is typical because in longer marriages the parties usually will have completed their education and entered the workforce before the end of the marriage. They are also more likely to have accumulated property in longer marriages.↩

1. Although the present facts are not an exact fit with the more typical model, the relationship here generally falls within the basic framework of the paradigm. Unlike the typical working spouse who has forgone educational opportunities, the defendant here did attain a postsecondary education during the marriage and is currently working in her chosen field. Moreover, there is no allegation that the defendant has forgone childrearing opportunities as is often the case. The parties do, however, lack substantial assets, and the marriage was of only moderate duration.↩

1. At oral argument, the defendant conceded that such a rule would have to apply to any degree, not simply an advanced degree.↩

1. In interpreting § 46b-81, we have concluded that "[t]here are three stages of analysis regarding the equitable distribution of each resource: first, whether the resource is property within § 46b-81 to be equitably distributed (classification); second, what is the appropriate method for determining the value of the property (valuation); and third, what is the most equitable distribution of the property between the parties (distribution)." *Krafick v. Krafick*, supra, 234 Conn. 792-93. The issue presented in the instant case addresses exclusively the first stage, classification.↩

1. Thirty-five states have addressed this issue. Of them, thirty-four have declined to consider an educational degree marital property subject to equitable distribution. See *Jones v. Jones*, 454 So. 2d 1006 (Ala. Civ. App. 1984); *Nelson v. Nelson*, 736 P.2d 1145 (Alaska 1987); *Wisner v. Wisner*, 129 Ariz. 333, 631 P.2d 115 (1981); *In re Marriage of Sullivan*, 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984); *Graham v. Graham*, 194 Colo. 429,

574 P.2d 75 (1978); *Hughes v. Hughes*, 438 So. 2d 146 (Fla. App. 1983); *Lowery v. Lowery*, 262 Ga. 20, 413 S.E.2d 731 (1992); *In re Marriage of Weinstein*, 128 Ill. App. 3d 234, 470 N.E.2d 551 (1984); *Roberts v. Roberts*. 670 N.E.2d 72 (Ind. App. 1996); *In re Marriage of Plasencia*, 541 N.W.2d 923 (Iowa App. 1995); *Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982); *Sweeney v. Sweeney*, 534 A.2d 1290 (Me. 1987); *Archer v. Archer*, 303 Md. 347, 493 A.2d 1074 (1985); *Drapek v. Drapek*, 399 Mass. 240, 503 N.E.2d 946 (1987); *Krause v. Krause*, 177 Mich. App. 184, 441 N.W.2d 66 (1989), but see *Moss v. Moss*, 80 Mich. App. 693, 264 N.W.2d 97 (1978) (representing conflict between Michigan appellate courts that is not yet resolved); *Riaz v. Riaz*, 789 S.W.2d 224 (Mo. App. 1990); *Ruben v. Ruben*, 123 N.H. 358, 461 A.2d 733 (1983); *Mahoney v. Mahoney*, supra, 91 N.J. 488; *Muckleroy v. Muckleroy*, 84 N.M. 14, 498 P.2d 1357 (1972); *Haywood v. Haywood*, 106 N.C. App. 91, 415 S.E.2d 565 (1992), rev'd on other grounds, 333 N.C. 342, 425 S.E.2d 696 (1993); *Stevens v. Stevens*, 23 Ohio St. 3d 115, 492 N.E.2d 131 (1986); *Hubbard v. Hubbard*, 603 P.2d 747 (Okla. 1979); *Stuart* and *Stuart*, 107 Or. App. 549, 813 P.2d 49 (1991); *Hodge v. Hodge*, 513 Pa. 264, 520 A.2d 15 (1986); *Becker v. Perkins-Becker*, 669 A.2d 524 (R.I. 1996); *Helm v. Helm*, 289 S.C. 169, 345 S.E.2d 720 (1986); *Wehrkamp v. Wehrkamp*, 357 N.W.2d 264 (S.D. 1984); *Beeler v. Beeler*, 715 S.W.2d 625 (Tenn. App. 1986); *Frausto v. Frausto*, 611 S.W.2d 656 (Tex. App. 1980); *Martinez v. Martinez*, 754 P.2d 69 (Utah 1988); *Downs v. Downs*, 154 Vt. 161, 574 A.2d 156 (1990); *In re Marriage of Anglin*, 52 Wash. App. 317, 759 P.2d 1224 (1988); *Hoak v. Hoak*, 370 S.E.2d 473 (W. Va. 1988); *Grosskopf v. Grosskopf*, 677 P.2d 814 (Wy. 1984); but see *O'Brien v. O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (professional license is distributable as marital property); *McGowan v. McGowan*, 136 Misc. 2d 225, 518 N.Y.S.2d 346 (1987) (professional degree is distributable as marital property).↩

1. The plaintiff owned a 1985 Subaru GL-10 Wagon and the plaintiff and the defendant jointly owned a 1979 Chevrolet K-5 Blazer. The Blazer was in the defendant's possession, and the Subaru was in the plaintiff's possession.↩

1. The defendant alleges that the plaintiff owns $70,000 to $80,000 worth of collectibles including rare books and a stamp collection. This is the valuation listed on the plaintiffs answers to interrogatories. There is no specific reference to this property in the memorandum of decision. The plaintiff admits that he owned these items, but alleged that the defendant retained these items for a time after their separation. The defendant returned some of the stamp collection during the trial, but a significant number of stamps were missing. The plaintiff maintained that he is no longer in possession of the rare books and believes that the defendant destroyed them. The defendant admits that she left the books outside the house when she left the house permanently. No subsequent valuation of the reduced stamp collection was entered at trial. We have no reason to believe, and the defendant points to none, that the trial court failed to take this into account in distributing the personalty, allowing each to keep that which was already in his or her possession.↩

1. Although § 46b-84, governing child support considerations in making property settlements and alimony awards, is usually also relevant, it is inapplicable in this case because the parties had no children of the marriage.↩

1. General Statutes § 46b-82 provides: "At the time of entering the decree, the Superior Court may order either of the parties to pay alimony to the other, in addition to or in lieu of an award pursuant to section 46b-81. The order may direct that security be given therefor on such terms as the court may deem desirable, including an order to either party to contract with a third party for periodic payments or payments contingent on a life to the other party. In determining whether alimony shall be awarded, and the duration and amount of the award, the court shall hear the witnesses, if any, of each party, except as provided in subsection (a) of section 46b-51, shall consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section

46b-81, and, in the case of a parent to whom the custody of minor children has been awarded, the desirability of such parent's securing employment."↩

1. Massachusetts General Laws c. 208, § 34 provides in relevant part: "Upon divorce ... the court of the commonwealth ... may make a judgment for either of the parties to pay alimony to the other. In addition or in lieu of a judgment to pay alimony, the court may assign to either husband or wife all or any part of the estate of the other.... In determining the amount of alimony, if any, to be paid, or in fixing the nature and value of the property, if any, to be so assigned, the court ... *shall consider the length of the marriage, the conduct of the parties during the marriage, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties and the opportunity of each for future acquisition of capital assets and income.... The court may also consider the contribution of each of the parties in the acquisition, preservation or appreciation in value of their respective estates* and the contributions of each of the parties as a homemaker to the family unit." (Emphasis added.) Compare General Statutes § 46b-81 (c) as set forth in footnote 1 of this opinion.↩

1. Rhode Island General Laws § 15-5-16.1 (1956, 1988 Reenactment) provides in relevant part: "In addition to or in lieu of an order to pay alimony made pursuant to a complaint for divorce, the court may assign to either the husband or wife a portion of the estate of the other. In determining the nature and value of the property, if any, to be assigned, the court ... *shall consider the length of the marriage, the conduct of the parties during the marriage, and the contribution of each of the parties in the acquisition, preservation, or appreciation in value of their respective estates*, and the contribution and services of either party as a homemaker." (Emphasis added.)This statute was amended in 1992 by 1992 Rhode Island Public Laws , c. 269, § 2, to include a provision for the courts to consider "[t]he contribution by one (1) party to the education, training, licensure, business, or, increased earning power of the other" when making property distributions. This directive was not part of the statute considered by the court in *Becker v. Perkins-Becker*, 669 A.2d 524, 530 n.4 (R.I. 1996).↩

1. The court initially concluded that the degree was not property subject to equitable distribution because it represents future earned income, the value of which is too speculative and subject to too many variables. *Drapek v. Drapek*, supra, 399 Mass. 244.↩

1. General Statutes § 46b-86 authorizes modification of alimony and child support payments "upon a showing of a substantial change in circumstances of either party...." It provides in relevant part: "This section shall not apply to assignments under § 46b-81 or to any assignment of the estate or a portion thereof of one party to the other party under prior law...."↩

1. In *Bartlett v. Bartlett*, supra, 220 Conn. 381, we concluded that an inheritance, once vested in the heir upon death of the donor, constitutes changed circumstances and is properly considered in a request to modify alimony, notwithstanding the fact that the property was still pending probate and, thus, had not yet been distributed.↩

1. We also note that our analysis and conclusion are limited to the circumstances presented in this case and should not be expanded beyond the context of the working spouse/student spouse paradigm. In future similar cases, if the trial court concludes that alimony is inappropriate, it should clearly set forth its reasoning. See *Haugan v. Haugan*, supra, 117 Wis. 2d 215.↩

1. We are also mindful of our prior holdings recognizing that"'[t]he rendering of a judgment in a complicated dissolution case is a carefully crafted mosaic, each element of which may be dependent on the other.'" *Sunbury v. Sunbury*, 210 Conn. 170, 175, 553 A.2d 612 (1989). In light of that truism, we concluded in *Sunbury* that "[t]o limit the remand in this case to the issue of periodic alimony would impede the trial court's ability to weigh the statutory criteria for financial orders to achieve an equitable result [because t]he issues involving financial

orders are entirely interwoven." Id., 174-75. Accordingly, notwithstanding our conclusion that the property distribution pursuant to § 46b-81 was fair and within the discretion of the trial court, it is necessary on remand for the trial court to reevaluate its prior order distributing the marital property in light of our conclusion that an award of alimony should be granted. This case presents unique circumstances and we leave the decision whether to alter the prior property distribution to the sound discretion of the trial court.↩

1. The relevant portion of the defendant's summation is as follows: "I would suggest to the Court that the Court can recognize that this degree, this medical degree, has a current value. That he also has a current earning capacity higher than what he's doing, if he chooses to exercise it, and we are not asking him to exercise it. I will, however, ask the Court to recognize that this marriage was a partnership, and I refer the Court to the case *Boland* [v.] *Catalano*, which is a Connecticut case. That case was not a marriage case. That case was a case where two parties lived together, and everything ended up in the fellow's name and nothing ended up in the lady's name. And it was their game plan that they live as husband and wife, acted as husband and wife, and were planning their future. Well, I think we have a bit of a parallel here. We have a Doctor with a medical degree.... [H]e is getting the benefit of her income and education [in the form of reduced requests for alimony]. He, on the other hand, if allowed to walk out and never look back, she worked those three jobs while he was in medical school."↩

1. Although there was some testimony by both parties that there was an understanding between them, particularly the plaintiffs acknowledgment that the defendant could "take it easy" after the plaintiff obtained his degree, this is hardly adequate proof of an implied contract, especially when such a legal theory was never placed before the court. The plaintiff refused to characterize this as an agreement, but rather thought that it might be viewed as a "plan."↩

Lowery v. Lowery,

262 Ga. 20 (1992)

Stone, Christian & Raymond, Philip T. Raymond III, Susan L. Dalton, for appellant.

Harrison & Willis, Randall P. Harrison, J. Stephen Clifford, for appellee.

Hunt, Justice.

We granted this application to appeal to determine whether the husband's medical school education and license may be considered "marital property," subject to equitable division. We agree with the trial court, and the majority of jurisdictions that have decided this issue, that they are not. See generally Annot. Spouse's Professional Degree or License as Marital Property for Purposes of Alimony, Support, or Property Settlement, 4 ALR 4th 1294; see, e.g., *Hughes v. Hughes*, 438 S2d 146 (Fla. 1983); *In re Marriage of Goldstein*, 423 NE2d 1201 (Ill. 1981). These "assets" bear no similarity to even the broadest view of property for purposes of equitable division. Their value is too speculative to calculate, being simply the possibility of enhanced earnings they provide. That potential may never be realized for any number of reasons. The husband's education and license have no exchange value or transferrable value on an open market, are personal to him, terminate on his death, and cannot be assigned, sold, transferred or pledged. *In re Marriage of Graham*, 574 P2d 75 (Colo. 1978).[1]

However, on the issue of alimony, we disagree with the trial court that the wife's expert's testimony regarding the husband's earnings must be limited to the husband's actual present income. The expert may testify regarding the husband's earning capacity, to the extent the wife contends that differs from his present income. OCGA § 19-6-5 (4) and (7). *Worrell v. Worrell*, 242 Ga. 44, 45 (2) (247 SE2d 847) (1978).

1. Of course, the wife's contributions to the marriage during the time the husband earned his degree and license, including her contributions to the husband to help him attain the degree and license, may be considered relative to alimony, OCGA § 19-6-5 (5), (6) and (7), and the division of marital property. *Stokes v. Stokes*, 246 Ga. 765, 772 (273 SE2d 169) (1980) (Hill, J., concurring).↩

4.4.3. Unmarried Partners

Watts v. Watts,

137 Wis.2d 506 (1987)

For the plaintiff-appellant there was an appellant's brief (in the court of appeals) by David G. Walsh, Margaret A. Satterthwaite, and Walsh, Walsh, Sweeney and Whitney, S.C., Madison, and a reply brief by David G. Walsh. The cause was argued by David G. Walsh.

For the defendant-respondent there was a brief (in the court of appeals) and oral argument by Daniel G. Sandell, Madison.

Shirley S. Abrahamson, J.

This is an appeal from a judgment of the circuit court for Dane County, William D. Byrne, Judge, dismissing Sue Ann Watts' amended complaint, pursuant to sec. 802.06(2)(f), Stats. 1985-86, for failure to state a claim upon which relief may be granted. This court took jurisdiction of the appeal upon certification by the court of appeals under sec. (Rule) 809.61, Stats. 1985-86. For the reasons set forth, we hold that the complaint states a claim upon which relief may be granted. Accordingly, we reverse the judgment of the circuit court and remand the cause to the circuit court for further proceedings consistent with this opinion.

The case involves a dispute between Sue Ann Evans Watts, the plaintiff, and James Watts, the defendant, over their respective interests in property accumulated during their nonmarital cohabitation relationship which spanned 12 years and produced two children. The case presents an issue of first impression and comes to this court at the pleading stage of the case, before trial and before the facts have been determined.

The plaintiff asked the circuit court to order an accounting of the defendant's personal and business assets accumulated between June 1969 through December 1981 (the duration of the parties' cohabitation) and to determine plaintiff's share of this property. The circuit court's dismissal of plaintiff's amended complaint is the subject of this appeal. The plaintiff rests her claim for an accounting and a share in the accumulated property on the following legal theories: (1) she is entitled to an equitable division of property under sec. 767.255, Stats. 1985-86; (2) the defendant is estopped to assert as a defense to plaintiff's claim under sec. 767.255, that the parties are not married; (3) the plaintiff is entitled to damages for defendant's breach of an express contract or an implied-in-fact contract between the parties; (4) the defendant holds the accumulated property under a constructive trust based upon unjust enrichment; and (5) the plaintiff is entitled to partition of the parties' real and personal property pursuant to the partition statutes, secs. 820.01 and 842.02(1), 1985-86, and common law principles of partition.[1]

The circuit court dismissed the amended complaint, concluding that sec. 767.255, Stats. 1985-86, authorizing a court to divide property, does not apply to the division of property between unmarried persons. Without analyzing the four other legal theories upon which the plaintiff rests her claim, the circuit court simply concluded that the legislature, not the court, should provide relief to parties who have accumulated property in nonmarital cohabitation relationships. The circuit court gave no further explanation for its decision.

We agree with the circuit court that the legislature did not intend sec. 767.255 to apply to an unmarried couple. We disagree with the circuit court's implicit conclusion that courts cannot or should not, without express authorization from the legislature, divide property between persons who have engaged in nonmarital cohabitation. Courts traditionally have settled contract and property disputes between unmarried persons, some of whom have cohabited. Nonmarital cohabitation does not render every agreement between the cohabiting parties illegal and does not automatically preclude one of the parties from seeking judicial relief, such as statutory or common law partition, damages for breach of express or implied contract, constructive trust and quantum merit where the party alleges, and later proves, facts supporting the legal theory. The issue for the court in each case is whether the complaining party has set forth any legally cognizable claim.

A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint. All facts pleaded and all reasonable inferences therefrom are admitted as true, but only for the purpose of testing the legal sufficiency of the claim, not for trial. *Scarpaci v. Milwaukee County*, 96 Wis. 2d 663, 669, 292 N.W.2d 816, 18 A.L.R.4th 829 (1980). A complaint should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations. *Kranzush v. Badger State Mutual Cas. Co.*, 103 Wis. 2d 56, 82, 307 N.W.2d 256 (1981). The pleadings are to be liberally construed to do substantial justice to the parties. Sec. 802.02(6), Stats. 1985-86; *Scarpaci, supra*, 96 Wis. 2d at 669. Whether a complaint states a claim upon which relief may be granted is a question of law and this court need not defer to the circuit court's determination.

We test the sufficiency of the plaintiff's amended complaint by first setting forth the facts asserted in the complaint and then analyzing each of the five legal theories upon which the plaintiff rests her claim for relief.

I.

The plaintiff commenced this action in 1982. The plaintiff's amended complaint alleges the following facts, which for purposes of this appeal must be accepted as true. The plaintiff and the defendant met in 1967, when she was 19 years old, was living with her parents and was working full time as a nurse's aide in preparation for a nursing career. Shortly after the parties met, the defendant persuaded the plaintiff to move into an apartment paid for by him and to quit her job. According to the amended complaint, the defendant "indicated" to the plaintiff that he would provide for her.

Early in 1969, the parties began living together in a "marriage-like" relationship, holding themselves out to the public as husband and wife. The plaintiff assumed the defendant's surname as her own. Subsequently, she gave birth to two children who were also given the defendant's surname. The parties filed joint income tax returns and maintained joint bank accounts asserting that they were husband and wife. The defendant insured the plaintiff as his wife on his medical insurance policy. He also took out a life insurance policy on her as his wife, naming himself as the beneficiary. The parties purchased real and personal property as husband and wife. The plaintiff executed documents and obligated herself on promissory notes to lending institutions as the defendant's wife.

During their relationship, the plaintiff contributed childcare and homemaking services, including cleaning, cooking, laundering, shopping, running errands, and maintaining the grounds surrounding the parties' home. Additionally, the plaintiff contributed personal property to the relationship which she owned at the beginning of the relationship or acquired through gifts or purchases during the relationship. She served as hostess for the defendant for social and business-related events. The amended complaint further asserts that periodically, between 1969 and 1975, the plaintiff cooked and cleaned for the defendant and his employees while his business, a landscaping service, was building and landscaping a golf course.

From 1973 to 1976, the plaintiff worked 20-25 hours per week at the defendant's office, performing duties as a receptionist, typist, and assistant bookkeeper. From 1976 to 1981, the plaintiff worked 40-60 hours per week at a business she started with the defendant's sister-in-law, then continued and managed herself after the dissolution

of that partnership. The plaintiff further alleges that in 1981 the defendant made their relationship so intolerable that she was forced to move from their home and their relationship was irretrievably broken. Subsequently, the defendant barred the plaintiff from returning to her business.

The plaintiff alleges that during the parties' relationship, and because of her domestic and business contributions, the business and personal wealth of the couple increased. Furthermore, the plaintiff alleges that she never received any compensation for these contributions to the relationship and that the defendant indicated to the plaintiff both orally and through his conduct that he considered her to be his wife and that she would share equally in the increased wealth.

The plaintiff asserts that since the breakdown of the relationship the defendant has refused to share equally with her the wealth accumulated through their joint efforts or to compensate her in any way for her contributions to the relationship.

II.

The plaintiff's first legal theory to support her claim against the property accumulated during the cohabitation is that the plaintiff, defendant, and their children constitute a "family," thus entitling the plaintiff to bring an action for property division under sec. 767.02(1)(h), Stats. 1985-86,[2] and to have the court "divide the property of the parties and divest and transfer the title of any such property" pursuant to sec. 767.255, 1985-86.[3]

The plaintiff asserts that the legislature intended secs. 767.02(1)(h) and 767.255, which usually govern division of property between married persons in divorce or legal separation proceedings, to govern a property division action between unmarried cohabitants who constitute a family. The plaintiff points out that secs. 767.02(1)(h) and 767.255 are part of chapter 767, which is entitled "Actions Affecting the Family," and that in 1979 the legislature deliberately changed the title of the chapter from "Actions Affecting Marriage" to "Actions Affecting the Family."[4] The legislature has failed to provide any definition for "family" under ch. 767, or for that matter under any chapter of the Family Code.[5]

The plaintiff relies on *Warden v. Warden*, 36 Wash. App. 693, 676 P.2d 1037 (1984), to support her claim for relief under secs. 767.02(1)(h) and 767.255. In *Warden*, the Washington court of appeals held that the statute providing guidelines for property division upon dissolution of marriage, legal separation, etc., could also be applied to divide property acquired by unmarried cohabitants in what was "tantamount to a marital family except for a legal marriage." *Warden*, 36 Wash. App. at 698, 676 P.2d at 1039. *Warden* is remarkably similar on its facts to the instant case. The parties in *Warden* had lived together for 11 years, had two children, held themselves out as husband and wife, acquired property together, and filed joint tax returns. On those facts, the Washington court of appeals held that the trial court correctly treated the parties as a "family" within the meaning of the Washington marriage dissolution statute. In addition, the trial court had considered such statutory factors as the length and purpose of the parties' relationship, their two children, and the contributions and future prospects of each in determining their respective shares of the property.

Although the *Warden* case provides support for the plaintiff's argument, most courts which have addressed the issue of whether marriage dissolution statutes provide relief to unmarried cohabitants have either rejected or avoided application of a marriage dissolution statute to unmarried cohabitants. *See, e.g., Marvin v. Marvin*, 18 Cal. 3d 660, 681, 134 Cal. Rptr. 815, 557 P.2d 106 (1976); *Metten v. Benge*, 366 N.W.2d 577, 579-80 (Iowa 1985); *Glasgo v. Glasgo*, 410 N.E.2d 1325, 1331 (Ind. Ct. App. 1980); *Kozlowski v. Kozlowski*, 80 N.J. 378, 383, 403 A.2d 902, 905 (1979).[6]

The purpose of statutory construction is to ascertain the intent of the legislature and give effect to that intent. If the language of the statute is unclear, the court will endeavor to discover the legislature's intent as disclosed by

the scope, history, context, subject matter and purpose of the statute. *Ball v. District No. 4, Area Bd.*, 117 Wis. 2d 529, 538, 345 N.W.2d 389 (1984).

While we agree with the plaintiff that some provisions in ch. 767 govern a mother, father, and their children, regardless of marriage,[7] upon our analysis of sec. 767.255 and the Family Code, we conclude that the legislature did not intend sec. 767.255 to extend to unmarried cohabitants.

When the legislature added what is now sec. 767.255 in 1977 as part of the no fault divorce bill, it stated that its "sole purpose" was "to promote an equitable and reasonable adjudication of the economic and custodial issues involved in *marriage* relationships."[8] (Emphasis supplied.) Moreover, the unambiguous language of sec. 767.255 and the criteria for property division listed in sec. 767.255 plainly contemplate that the parties who are governed by that section are or have been married.[9] Finally, secs. 767.02(1)(h) and 767.255 were both in existence before the 1979 legislature changed the title of ch. 767 from "Marriage" to "Family." A change in the title of the chapter would not change the import of these statutory provisions.

Furthermore, the Family Code emphasizes marriage. The entire Family Code, of which ch. 767 is an integral part, is governed generally by the provisions of sec. 765.001(2), which states in part that "[i]t is the intent of chs. 765 to 768 to promote the stability and best interests of *marriage and the family. ... Marriage* is the institution that *is the foundation of family and of society.* Its stability is basic to morality and civilization, and of vital interest to society and the state." (Emphasis supplied.) Section 765.001(3) further states that "[c]hapters 765 to 768 shall be liberally construed to effect the objectives of sub. (2)." The conclusion is almost inescapable from this language in sec. 765.001 (2), (3) that the legislature not only intended chs. 765-768 to protect and promote the "family," but also intended "family" to be within the "marriage" context.[10]

The statutory prohibition of marriages which do not conform to statutory requirements, sec. 765.21, Stats. 1985-86,[11] further suggests that the legislature intended that the Family Code applies, for the most part, to those couples who have been joined in marriage according to law.

On the basis of our analysis of sec. 767.255 and the Family Code which revealed no clear evidence that the legislature intended sec. 767.255 to apply to unmarried persons, we decline the invitation to extend the application of sec. 767.255 to unmarried cohabitants. We therefore hold that the plaintiff has not stated a claim for property division under sec. 767.255.

III.

The plaintiff urges that the defendant, as a result of his own words and conduct, be estopped from asserting the lack of a legal marriage as a defense against the plaintiff's claim for property division under sec. 767.255. As support for her position, the plaintiff cites a 1905 Tennessee case and two law review articles that do no more than cite to the Tennessee case law.[12]

Although the defendant has not discussed this legal theory, we conclude that the doctrine of "marriage by estoppel" should not be applied in this case. We reach this result primarily because we have already concluded that the legislature did not intend sec. 767.255 to govern property division between unmarried cohabitants.[13] We do not think the parties' conduct should place them within the ambit of a statute which the legislature did not intend to govern them.

IV.

The plaintiffs third legal theory on which her claim rests is that she and the defendant had a contract to share equally the property accumulated during their relationship. The essence of the complaint is that the parties had a contract, either an express or implied in fact contract, which the defendant breached.

Wisconsin courts have long recognized the importance of freedom of contract and have endeavored to protect the right to contract. A contract will not be enforced, however, if it violates public policy. A declaration that the contract is against public policy should be made only after a careful balancing, in the light of all the circumstances, of the interest in enforcing a particular promise against the policy against enforcement. Courts should be reluctant to frustrate a party's reasonable expectations without a corresponding benefit to be gained in deterring "misconduct" or avoiding inappropriate use of the judicial system. *Merten v. Nathan*, 108 Wis. 2d 205, 211, 321 N.W.2d 173, 177 (1982); *Continental Ins. Co. v. Daily Express, Inc.*, 68 Wis. 2d 581, 589, 229 N.W.2d 617 (1975); *Schaal v. Great Lakes Mutual Fire & Marine Ins. Co.*, 6 Wis. 2d 350, 356, 94 N.W.2d 646, 649 (1959); *Trumpf v. Shoudy*, 166 Wis. 353, 359, 164 N.W. 454, 456 (1917); Restatement (Second) of Contracts sec. 178 comments b and e (1981).

The defendant appears to attack the plaintiff's contract theory on three grounds. First, the defendant apparently asserts that the court's recognition of plaintiff's contract claim for a share of the parties' property contravenes the Wisconsin Family Code. Second, the defendant asserts that the legislature, not the courts, should determine the property and contract rights of unmarried cohabitating parties. Third, the defendant intimates that the parties' relationship was immoral and illegal and that any recognition of a contract between the parties or plaintiff's claim for a share of the property accumulated during the cohabitation contravenes public policy.

The defendant rests his argument that judicial recognition of a contract between unmarried cohabitants for property division violates the Wisconsin Family Code on *Hewitt v. Hewitt*, 77 Ill. 2d 49, 31 Ill. Dec. 827, 394 N.E.2d 1204, 3 A.L.R.4th 1 (1979). In *Hewitt* the Illinois Supreme Court concluded that judicial recognition of mutual property rights between unmarried cohabitants would violate the policy of the Illinois Marriage and Dissolution Act because enhancing the attractiveness of a private arrangement contravenes the Act's policy of strengthening and preserving the integrity of marriage. The Illinois court concluded that allowing such a contract claim would weaken the sanctity of marriage, put in doubt the rights of inheritance, and open the door to false pretenses of marriage. *Hewitt*, 77 Ill. 2d at 65, 394 N.E.2d at 1211.

We agree with Professor Prince and other commentators that the *Hewitt* court made an unsupportable inferential leap when it found that cohabitation agreements run contrary to statutory policy and that the *Hewitt* court's approach is patently inconsistent with the principle that public policy limits are to be narrowly and exactly applied.[14]

Furthermore, the Illinois statutes upon which the Illinois supreme court rested its decision are distinguishable from the Wisconsin statutes. The Illinois supreme court relied on the fact that Illinois still retained "fault" divorce and that cohabitation was unlawful. By contrast, Wisconsin abolished "fault" in divorce in 1977 and abolished criminal sanctions for nonmarital cohabitation in 1983.[15]

The defendant has failed to persuade this court that enforcing an express or implied in fact contract between these parties would in fact violate the Wisconsin Family Code. The Family Code, chs. 765-768, Stats. 1985-86, is intended to promote the institution of marriage and the family. We find no indication, however, that the Wisconsin legislature intended the Family Code to restrict in any way a court's resolution of property or contract disputes between unmarried cohabitants.

The defendant also urges that if the court is not willing to say that the Family Code proscribes contracts between unmarried cohabiting parties, then the court should refuse to resolve the contract and property rights of unmarried cohabitants without legislative guidance. The defendant asserts that this court should conclude, as the *Hewitt* court did, that the task of determining the rights of cohabiting parties is too complex and difficult for the court and should be left to the legislature. We are not persuaded by the defendant's argument. Courts have traditionally developed principles of contract and property law through the case-by-case method of the common law. While ultimately the legislature may resolve the problems raised by unmarried cohabiting parties, we are not per-

suaded that the court should refrain from resolving such disputes until the legislature gives us direction.[16] Our survey of the cases in other jurisdictions reveals that *Hewitt* is not widely followed.

We turn to the defendant's third point, namely, that any contract between the parties regarding property division contravenes public policy because the contract is based on immoral or illegal sexual activity. The defendant does not appear to make this argument directly. It is not well developed in the brief, and at oral argument defendant's attorney indicated that he did not find this argument persuasive in light of the current community mores, the substantial number of unmarried people who cohabit, and the legislature's abolition of criminal sanctions for cohabitation. Although the parties in the instant case cohabited at a time when cohabitation was illegal, the defendant's counsel at oral argument thought that the present law should govern this aspect of the case. Because illegal sexual activity has posed a problem for courts in contract actions, we discuss this issue even though the defendant did not emphasize it.

Courts have generally refused to enforce contracts for which the sole consideration is sexual relations, sometimes referred to as "meretricious" relationships. *See In Matter of Estate of Steffes*, 95 Wis. 2d 490, 514, 290 N.W.2d 697 (1980), *citing* Restatement of Contracts sec. 589 (1932). Courts distinguish, however, between contracts that are explicitly and inseparably founded on sexual services and those that are not. This court, and numerous other courts,[17] have concluded that "a bargain between two people is not illegal merely because there is an illicit relationship between the two so long as the bargain is independent of the illicit relationship and the illicit relationship does not constitute any part of the consideration bargained for and is not a condition of the bargain." *Steffes, supra*, 95 Wis. 2d at 514.

While not condoning the illicit sexual relationship of the parties, many courts have recognized that the result of a court's refusal to enforce contract and property rights between unmarried cohabitants is that one party keeps all or most of the assets accumulated during the relationship, while the other party, no more or less "guilty," is deprived of property which he or she has helped to accumulate. *See e.g., Glasgo v. Glasgo*, 410 N.E.2d 1325, 1330 (Ind. App. 1980); *Latham v. Latham*, 274 Or. 421, 426, 547 P.2d 144 (Or. 1976); *Marvin v. Marvin, supra*, 18 Cal. 3d at 682, 134 Cal. Rptr at 830, 557 P.2d at 121; *West v. Knowles*, 50 Wash. 2d 311, 315-16, 311 P.2d 689 (1957).

The *Hewitt* decision, which leaves one party to the relationship enriched at the expense of the other party who had contributed to the acquisition of the property, has often been criticized by courts and commentators as being unduly harsh.[18] Moreover, courts recognize that their refusal to enforce what are in other contexts clearly lawful promises will not undo the parties' relationship and may not discourage others from entering into such relationships. *Tyranski v. Piggins*, 44 Mich. App. 570, 577, 205 N.W.2d 595 (1973). A harsh, *per se* rule that the contract and property rights of unmarried cohabitating parties will not be recognized might actually encourage a partner with greater income potential to avoid marriage in order to retain all accumulated assets, leaving the other party with nothing. *See Marvin v. Marvin*, *supra*, 18 Cal. 3d at 683, 134 Cal. Rptr. at 831, 557 P.2d at 122.

[The court distinguishes an earlier case disapproving of equitable division on "divorce" of unmarried couples.]

The plaintiff has alleged that she quit her job and abandoned her career training upon the defendant's promise to take care of her. A change in one party's circumstances in performance of the agreement may imply an agreement between the parties. *Steffes, supra*, 95 Wis. 2d at 504; *Tyranski, supra*, 44 Mich. App. at 574, 205 N.W.2d at 597.

In addition, the plaintiff alleges that she performed housekeeping, childbearing, childbearing, and other services related to the maintenance of the parties' home, in addition to various services for the defendant's business and her own business, for which she received no compensation. Courts have recognized that money, property, or services (including housekeeping or childbearing) may constitute adequate consideration independent of the parties' sexual relationship to support an agreement to share or transfer property. *See Tyranski, supra*, 44 Mich. App.

at 574, 205 N.W.2d at 597; *Carlson v. Olson*, 256 N.W.2d 249, 253-254 (Minn. 1977); *Carroll v. Lee*, 148 Ariz. 10, 14, 712 P.2d 923, 927 (1986); Steffes, *supra* 95 Wis. 2d at 501.[19]

According to the plaintiff's complaint, the parties cohabited for more than twelve years, held joint bank accounts, made joint purchases, filed joint income tax returns, and were listed as husband and wife on other legal documents. Courts have held that such a relationship and "joint acts of a financial nature can give rise to an inference that the parties intended to share equally." *Beal v. Beal*, 282 Or. 115, 122, 577 P.2d 507, 510 (1978). The joint ownership of property and the filing of joint income tax returns strongly implies that the parties intended their relationship to be in the nature of a joint enterprise, financially as well as personally. *See Beal*, 282 Or. at 122, 577 P.2d at 510; *Warden v. Warden, supra*, 36 Wash. App. at 696-97, 676 P.2d at 1038.

Having reviewed the complaint and surveyed the law in this and other jurisdictions, we hold that the Family Code does not preclude an unmarried cohabitant from asserting contract and property claims against the other party to the cohabitation. We further conclude that public policy does not necessarily preclude an unmarried cohabitant from asserting a contract claim against the other party to the cohabitation so long as the claim exists independently of the sexual relationship and is supported by separate consideration. Accordingly, we conclude that the plaintiff in this case has pleaded the facts necessary to state a claim for damages resulting from the defendant's breach of an express or an implied in fact contract to share with the plaintiff the property accumulated through the efforts of both parties during their relationship. Once again, we do not judge the merits of the plaintiff's claim; we merely hold that she be given her day in court to prove her claim.

V.

The plaintiff's fourth theory of recovery involves unjust enrichment. Essentially, she alleges that the defendant accepted and retained the benefit of services she provided knowing that she expected to share equally in the wealth accumulated during their relationship. She argues that it is unfair for the defendant to retain all the assets they accumulated under these circumstances and that a constructive trust should be imposed on the property as a result of the defendant's unjust enrichment. In his brief, the defendant does not attack specifically either the legal theory or the factual allegations made by the plaintiff.

Unlike claims for breach of an express or implied in fact contract, a claim of unjust enrichment does not arise out of an agreement entered into by the parties. Rather, an action for recovery based upon unjust enrichment is grounded on the moral principle that one who has received a benefit has a duty to make restitution where retaining such a benefit would be unjust.*Puttkammer v. Minth*, 83 Wis. 2d 686, 689, 266 N.W.2d 361, 363 (1978).

Because no express or implied in fact agreement exists between the parties, recovery based upon unjust enrichment is sometimes referred to as "quasi contract," or contract "implied in law" rather than "implied in fact." Quasi contracts are obligations created by law to prevent injustice. *Shellse v. City of Mayville*, 223 Wis. 624, 632, 271 N.W.2d 643 (1937).[20]

In Wisconsin, an action for unjust enrichment, or quasi contract, is based upon proof of three elements: (1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit. *Puttkammer, supra*, 83 Wis. 2d at 689; Wis. J.I. Civil No. 3028 (1981).

The plaintiff has cited no cases directly supporting actions in unjust enrichment by unmarried cohabitants, and the defendant provides no authority against it.

[The court reviews cases that provide some support for an unjust enrichment cause of action.]

[A]llowing no relief at all to one party in a so-called "illicit" relationship effectively provides total relief to the other, by leaving that party owner of all the assets acquired through the efforts of both. Yet it cannot seriously be argued that the party retaining all the assets is less "guilty" than the other. Such a result is contrary to the prin-

ciples of equity. Many courts have held, and we now so hold, that unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.[21]

In this case, the plaintiff alleges that she contributed both property and services to the parties' relationship. She claims that because of these contributions the parties' assets increased, but that she was never compensated for her contributions. She further alleges that the defendant, knowing that the plaintiff expected to share in the property accumulated, "accepted the services rendered to him by the plaintiff" and that it would be unfair under the circumstances to allow him to retain everything while she receives nothing. We conclude that the facts alleged are sufficient to state a claim for recovery based upon unjust enrichment.

As part of the plaintiff's unjust enrichment claim, she has asked that a constructive trust be imposed on the assets that the defendant acquired during their relationship. A constructive trust is an equitable device created by law to prevent unjust enrichment. *Wilharms v. Wilharms*, 93 Wis. 2d 671, 678, 287 N.W.2d 779, 783 (1980). To state a claim on the theory of constructive trust the complaint must state facts sufficient to show (1) unjust enrichment and (2) abuse of a confidential relationship or some other form of unconscionable conduct. The latter element can be inferred from allegations in the complaint which show, for example, a family relationship, a close personal relationship, or the parties' mutual trust. These facts are alleged in this complaint or may be inferred. *Gorski v. Gorski*, 82 Wis. 2d 248, 254-55, 262 N.W.2d 120 (1978). Therefore, we hold that if the plaintiff can prove the elements of unjust enrichment to the satisfaction of the circuit court, she will be entitled to demonstrate further that a constructive trust should be imposed as a remedy.

VI.

The plaintiff's last alternative legal theory on which her claim rests is the doctrine of partition. The plaintiff has asserted in her complaint a claim for partition of "all real and personal property accumulated by the couple during their relationship according to the plaintiff's interest therein and pursuant to Chapters 820 and 842, Wis. Stats."

Chapter 820, Stats. 1985-86, provides for partition of personal property. Sec. 820.01 states in part: "When any of the owners of personal property in common shall desire to have a division and they are unable to agree upon the same an action may be commenced for that purpose." Sec. 820.01 thus states on its face that anyone owning property "in common" with someone else can maintain an action for partition of personal property held by the parties. This section codifies a remedy long recognized at common law. *See Laing v. Williams*, 135 Wis. 253, 257, 115 N.W. 821, 128 Am. St. R. 1025 (1908) (courts of equity have general jurisdiction to maintain actions for partition of personalty and to provide any kind of relief necessary to do justice).

Ch. 842, Stats. 1985-86, provides for partition of interests in real property. Sec. 842.02(1) states in relevant part: "A person having an interest in real property *jointly or in common with others* may sue for judgment partitioning such interest unless an action for partition is prohibited elsewhere in the statutes ...." (Emphasis supplied.) Sec. 842.02(1) also codifies an action well known at common law. *See Kubina v. Nichols*, 241 Wis. 644, 648, 6 N.W.2d 657 (1943), *cert. denied, Nichols v. Kubina*, 318 U.S. 784, 63 S. Ct. 852, 87 L.Ed. 2d 1151 (1943) (partition of real property is an equitable action).

In Wisconsin partition is a remedy under both the statutes and common law. Partition applies generally to all disputes over property held by more than one party. This court has already held, in *Jezo v. Jezo*, 19 Wis. 2d 78, 81, 119 N.W.2d 471 (1964), that the principles of partition could be applied to determine the respective property interests of a husband and wife in jointly owned property where the divorce law governing property division did not apply. Because the action was not incident to divorce, separation, or annulment, the *Jezo* court rejected the parties' claim for property division under the divorce law, but did hold that a circuit court should apply the principles of

partition to settle the parties' property dispute. The court stated that the "determination of the issues relating to the property of the parties to this action is to be made … on the basis of those legal and equitable principles which would govern the rights to property between strangers." *Id.* Thus, *Jezo* appears to say that persons, regardless of their marital status, may sue for partition of property.

… .

In this case, the plaintiff has alleged that she and the defendant were engaged in a joint venture or partnership, that they purchased real and personal property as husband and wife, and that they intended to share all the property acquired during their relationship. In our opinion, these allegations, together with other facts alleged in the plaintiff's complaint (*e.g.*, the plaintiff's contributions to the acquisition of their property) and reasonable inferences therefrom, are sufficient under Wisconsin's liberal notice pleading rule to state a claim for an accounting of the property acquired during the parties' relationship and partition. We do not, of course, presume to judge the merits of the plaintiff's claim. Proof of her allegations must be made to the circuit court. We merely hold that the plaintiff has alleged sufficient facts in her complaint to state a claim for relief statutory or common law partition.

In summary, we hold that the plaintiff's complaint has stated a claim upon which relief may be granted. We conclude that her claim may not rest on sec. 767.255, Stats. 1985-86, or the doctrine of "marriage by estoppel," but that it may rest on contract, unjust enrichment or partition. Accordingly, we reverse the judgment of the circuit court, and remand the cause to the circuit court for further proceedings consistent with this opinion.

By the Court.—The judgment of the circuit court is reversed and the cause remanded.

---

1. The complaint also includes five tort claims based on allegations regarding the defendant's conduct after the termination of their relationship. The parties stipulated to the dismissal of the tort claims and they are not the subject of the appeals.↩

1. Sec. 767.02(1)(h), Stats. 1985-86, provides that "Actions affecting the family are: … (h) For property division."↩

1. Sec. 767.255, Stats. 1985-86, provides in relevant part:"Upon every judgment of annulment, divorce or legal separation, *or in rendering a judgment in an action under s. 767.02(1)(h)*, the court shall divide the property of the parties and divest and transfer the title of any such property accordingly." (Emphasis supplied.)↩

1. Laws of 1979, ch. 352, sec. 19.In a supplemental submission, and at oral argument, the plaintiff analogized its interpretation of sec. 767.255 to this court's adoption of a broad definition of "family" in the context of zoning and land use. *See, e.g. Crowley v. Knapp*, 94 Wis. 2d 421, 437, 288 N.W.2d 815 (1980), in which this court stated that a "family" in that context "may mean a group of people who live, sleep, cook, and eat upon the premises as a single housekeeping unit." In *Crowley*, the court adopted a definition of "family" serving that public policy favoring the free and unrestricted use of property.By contrast, the plaintiff here has failed to convince us that extending the definition of "family" in this case to include unmarried cohabitants will further in any way the expressed public policy of ch. 767 to promote marriage and the family.↩

1. The "Family Code" is comprised of ch. 765, Marriage; ch. 766, Marital Property; ch. 767, Actions Affecting the Family; and ch. 768, Actions Abolished.↩

1. For a discussion of whether cohabitation should be viewed as analogous to marriage, *see* Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 Wis. L. Rev. 275, 316-32.↩

1. The plaintiff correctly points out that ch. 767 includes actions for determining paternity, which are not dependent upon the marital status of the parents. *See*, secs. 767.45-767.53, Stats. 1985-86.↩

1. 1977 Wis. Laws ch. 105, sec. 1(4).↩

1. Some of the criteria listed under sec. 767.255, Stats. (1985-86), are as follows:"(1) The length of the *marriage*."(2) The property brought to the *marriage* by each party.…

"(3) The contribution of each party to the *marriage*, giving appropriate economic value to each party's contribution in homemaking and child care services.
…
"(11) Any written agreement made by the parties before or during the *marriage* concerning any arrangement for property distribution; …" (Emphasis supplied.)
↩

1. When the legislature abolished criminal sanctions for cohabitation in 1983, it nevertheless added a section to the criminal code stating that while the state does not regulate private sexual activity of consenting adults, the state does not condone or encourage sexual conduct outside the institution of marriage. The legislature adopted the language of sec. 765.001 that "[m]arriage is the foundation of family and society. Its stability is basic to morality and civilization, and of vital interest to society and this state." Sec. 944.01, Stats. 1985-86.↩

1. Common law marriages were abolished in 1917. Laws of 1917, ch. 218, sec. 21. Sec. 765.21, Stats. 1985-86, provides that marriages contracted in violation of specified provisions of ch. 765 are void.↩

1. Plaintiff cites to *Smith v. North Memphis Savings Bank*, 89 S.W. 392 (Tenn. 1905), which is one of the more "recent" in a series of Tennessee cases to apply "marriage by estoppel." The plaintiff also cites Comment, *Property Rights Upon Termination of Unmarried Cohabitation: Marvin v. Marvin*, 90 Harv. L. Rev. 1708, 1711-12 (1977); and Weyrauch, *Informal and Formal Marriage— An Appraisal of Trends in Family Organization*, 28 U. Chi. L. Rev. 88, 105 (1960). Weyrauch cites to Tennessee law, and the comment cites to Weyrauch.↩

1. This court has previously rejected application of the "marriage by estoppel" doctrine in certain cases. In *Eliot v. Eliot*, 81 Wis. 295, 299, 51 N.W. 81, 82, 15 L.R.A. 259 (1892), a man was held not estopped from pleading that he was under age to be married in an annulment action he brought, even though he fraudulently induced the defendant into marriage. *Accord Swenson v. Swenson*, 179 Wis. 536, 540-41, 192 N.W. 70, 72 (1923).↩

1. Prince, *Public Policy Limitations in Cohabitation Agreements: Unruly Horse or Circus Pony*, 70 Minn. L. Rev. 163, 189-205 (1985).↩

1. Both Illinois and Wisconsin have abolished common law marriages. In our view this abolition does not invalidate a private cohabitation contract. Cohabitation agreements differ in effect from common law marriage. There is a significant difference between the consequences of achieving common law marriage status and of having an enforceable cohabitation agreement.In *Latham v. Latham*, 274 Or. 421, 426-27, 547 P.2d 144, 147 (1976), the Oregon supreme court found that the Legislature's decriminalization of cohabitation represented strong evidence that enforcing agreements made by parties during cohabitation relationships would not be contrary to Oregon public policy.↩

1. We have previously acted in the absence of express legislative direction. *See Estate of Fox*, 178 Wis. 369, 190 N.W. 90 (1922), in which the court allowed relief under the doctrine of unjust enrichment to a woman who in good faith believed that she was married when she actually was not, discussed *infra. See also Smith v. Smith*, 255 Wis. 96, 38 N.W.2d 12 (1949), in which the court refused equitable property division to one party to an illegal common law marriage, discussed *infra;* and *Steffes.*↩

1. *See, e.g., Glasgo v. Glasgo*, 410 N.E.2d 1325, 1331 (Ind. App. 1980); *Tyranski v. Piggins*, 44 Mich. App. 570, 573-74, 205 N.W.2d 595, 598-99 (1973); *Kozlowski v. Kozlowski*, 80 N.J. 378, 387, 403 A.2d 902, 907 (1979); *Latham v. Latham*, 274 Or. 421, 426-27, 547 P.2d 144, 147 (Or. 1976); *Marvin v. Marvin*, 18 Cal. 3d 660, 670-71, 134 Cal. Rptr. 815, 822, 557 P.2d 106, 113 (1976).↩

1. *See* Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony*, 70 Minn. L. Rev. 163, 189-205 (1985); Oldham & Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts between Cohabitants*, 18 Fam. L.Q. 93, 132 (Spring 1984); Comment, *Marvin v. Marvin: Five Years Later*, 65 Marq. L. Rev. 389, 414 (1982).↩

1. Until recently, the prevailing view was that services performed in the context of a "family or marriage relationship" were presumed gratuitous. However, that presumption was rebuttable. See *Steffes*, 95 Wis. 2d at 501, 290 N.W.2d at 703-704. In *Steffes*, we held the presumption to be irrelevant where the plaintiff can show either an express or implied agreement to pay for those services, even where the plaintiff has rendered them "with a sense of affection, devotion and duty." *Id.* 95 Wis. 2d at 503, 290 N.W.2d at 703-704. For a discussion of the evolution of thought regarding the economic value of homemaking service by cohabitants, *see* Brush, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 Fam. L.Q. 101, 110-14 (Summer 1976).↩

1. For a discussion regarding the relationship between express, implied-in-fact, and implied-in-law contracts, *see Steffes, supra*, 95 Wis. 2d at 497 & n.4.↩

1. *See, e.g., Harman v. Rogers*, 147 Vt. 11, 510 A.2d 161, 164-65 (1986); *Collins v. Davis*, 68 N.C. App. 588, 315 S.E.2d 759, 761-62 (1984), *aff'd*, 312 N.C. 324, 321 S.E.2d 892; *Mason v. Rostad*, 476 A.2d 662 (D.C. 1984); *Coney v. Coney*, 207 N.J. Super. 63, 503 A.2d 912, 918 (1985); *In re Estate of Eriksen*, 337 N.W.2d 671 (Minn. 1983).↩

Grant v. Butt,

198 S.C. 298 (1941)

A. R. McGowan, of Charleston, for appellant.

J. D. E. Meyer and George H. Momeier, both of Charleston, for respondents.

Order of Special Judge Timmerman follows:

This case is before me on a demurrer to the complaint, the grounds of which will be adverted to later. Oral arguments were made in open Court, the case was marked "Heard" and, by agreement of counsel, decision on the issues raised was reserved to be entered nunc pro tunc.

The complaint alleges a most extraordinary state of facts dealing with the lives of two individuals, one a negro woman, or part negro and part Indian, and the other a white man, now deceased. The plaintiff alleges that she is a descendant of the American or Indian race; that prior to 1907, she had married a negro man by whom she had two children, only one of whom is now living; that her negro husband died prior to 1907 and after his death she met defendant's intestate, a white man, who "became interested in, infatuated with, and fell desperately in love with this plaintiff"; that for a long time the intestate forced his attentions upon her, insisted on being in her company and in her home and repeatedly and insistently begged her "to marry him and live with him as his wife"; and that the plaintiff, "appreciating that under the laws of the State of South Carolina a *negro* could not legally contract marriage with a person of the Caucasian race," refused the offer of marriage. The plaintiff then alleges that the intestate "insisted and entreated that this plaintiff should leave the State of South Carolina and go with him to some State where they could legally marry," but that she "refused to either marry him in the State of South Carolina or move with him to any other State as his wife," although she was fond of him and enjoyed his company and companionship.

Following the foregoing, the plaintiff alleges, in the fourth paragraph of the complaint, an oral contract between herself and the intestate as having been made on Thanksgiving Day in 1907. She says it was *agreed on her*

part: (a) That she would not marry so long as the deceased lived; and (b) that she would give the deceased the full benefit of her presence, companionship, care and assistance, and the absolute freedom of her home.

She then alleges that the *intestate agreed on his part*: (a) To give plaintiff his undivided affection and companionship; (b) to furnish plaintiff money for the maintenance of herself, her home and her children; (c) to take out a life insurance policy, and make the plaintiff the beneficiary thereof; (d) to assign to the plaintiff certain of his assets; and (e) to make a will giving the plaintiff one-half of his estate if she survived him and kept her agreements.

The plaintiff claims to have fully performed her part of said contract and that the intestate had fully performed his part, except that he neglected to leave her one-half of his estate on his death.

The plaintiff specifically alleges, as evidence of her complete compliance with the terms of the contract, that she gave the intestate "her presence, companionship, care and assistance, and the absolute freedom of her home and table; and the deceased, regularly and without interruption, over the span of years, accepted her companionship, care, assistance, and the absolute freedom of her home and table"; that the intestate "entertained his white friends in her home," that he "ate at her table," that he "s*lept in her bed*," that he "treated her home *** as his home," that he "acted there as though it were his home," that he "kept at all times in his possession a key to her dresser drawer, her trunk, and her lock box," and that he "exercised complete access to her every and most personal and intimate belonging." In fact the plaintiff alleges that both she and the intestate fully performed every obligation assumed under the oral contract, except that the intestate had failed to will or leave her one-half of his property on his death.

The plaintiff then proceeds to allege certain acts on the part of the intestate in confirmation of the oral contract originally entered into, as the giving of a ring with one diamond after the contract had been in force for ten years, then a ring with two diamonds after the contract had been in force twenty years, and finally a ring with three diamonds after the contract had been in force for thirty years.

The plaintiff concludes by alleging that, after due diligence, she had been unable to find any will or other instrument in writing, left by the intestate, through which she could enforce her rights under the contract, and that by reason of the contract she is entitled to one-half of the net assets of the intestate's estate. She fixes the value of the estate at $143,000.

The demurrer makes seven grounds of attack upon the complaint. They are as follows:

> 1. In that it appears from the facts set forth on the face of complaint that the Court has no jurisdiction of the subject of the action, the principle of public policy being dolo malo non oritur actio.
>
> 1. In that it appears upon the face of the complaint that the plaintiff has not the legal capacity to sue, in that no Court will lend its aid to one who founds his cause of action upon an illegal act.
>
> 1. In that it appears upon the face of the complaint that the plaintiff has not the legal capacity to sue, in that the contract alleged in the complaint and the part performance alleged therein are repugnant to the public policy of the State of South Carolina, and no Court of this State will lend its aid to one who founds his cause of action upon a contract that contravenes the public policy of this State.
>
> 1. In that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action in that it appears upon the face of the complaint that plaintiff's cause of action is based upon a contract, and part performance thereof, which are

> repugnant to the public policy of the State of South Carolina, and the public policy of the State of South Carolina demands that plaintiff cannot benefit by virtue of her own wrong in entering into a contract which is void in its inception as being against the public policy of the State of South Carolina.
>
> 1. In that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action, in that it appears upon the face of the complaint that the plaintiff's cause of action is based upon an alleged contract, the consideration of which is illegal and against public policy.
>
> 1. In that it appears upon the face of the complaint that the complaint does not state facts sufficient to constitute a cause of action in that it appears upon the face of the complaint that the plaintiff's cause of action is based upon an alleged contract which lacks mutuality and which could not be enforced by the deceased against the plaintiff.
>
> 1. In that the complaint does not state facts sufficient to constitute a cause of action in that there appears upon the face of the complaint no legal cause of action in favor of the plaintiff.

The defendant contends that the contract is inherently illegal, that it is against public policy, that it lacks proper legal consideration and mutuality, that it contemplates illicit relations between a man and woman as the primary consideration thereof, that it contravenes the statutes and the Constitution of the State of South Carolina relating to marriage between the races, that it attempts to accomplish by indirection what the law directly prohibits, that it is a contract in general restraint of marriage as to each of the parties for the life of the contract and for so long as both shall live; and that, therefore, it is unenforceable as against the public policy of the State.

Assuming all of the allegations of the Complaint to be true and drawing therefrom the inferences that reason would require one to draw from such a state of facts, it appears that the contracting parties agreed that they could not legally contract matrimony, or otherwise legally sustain the relationship toward each other of man and wife; that they desired to sustain that relationship to each other and did sustain it, the law to the contrary notwithstanding; that they agreed to maintain that illegal relationship with each other, and that each would refrain from entering into the legal status of marriage which the law so highly favors between persons legally entitled to enter into such a relationship.

Certainly the plaintiff could not have given to "the deceased the full benefit of her presence, her companionship, and the absolute freedom of her home and table" or have allowed him to sleep in her bed, if she had married another; nor could the intestate have given the plaintiff "his undivided affection and companionship" or "slept in her bed," if he had contracted marriage with a woman legally competent to enter into such a relationship with him.

The conclusion seems inescapable that the parties really intended by their alleged contract to establish illicit sexual relations, to circumvent the Constitution and statutes of the State of South Carolina relating to the intermarriage of the races, and to set at defiance a sound public policy which gives to every person of age and discretion, white or black, male or female, the right of marriage to another of the same race and of the opposite sex. This contract strikes at the sanctity of the home, the security of family relationships, the legitimate propagation of the race to which one belongs, and at moral standards that have been recognized and enforced, voluntarily and by compulsion of law, since the foundation of this republic.

Article III, Section 33, of the State Constitution provides: "The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more negro blood shall be unlawful and void."

Section 1438 of the Code 1932, provides:

> It shall be unlawful for any white man to intermarry with any woman of *either the Indian or negro races, or any mulatto, mestizo, or half-breed*, or for any white woman to intermarry with any person other than a white man, or for any mulatto, half-breed, Indian, negro or mestizo to intermarry with a white woman; *and any such marriage, or attempted marriage, shall be utterly null and void and of none effect*; and any person who shall violate this section, or any one of the provisions thereof, shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than five hundred dollars, or imprisonment for not less than twelve months, or both, in the discretion of the court. Any clergyman, minister of the gospel, magistrate, or other person authorized by law to perform the marriage ceremony, who shall knowingly and wilfully unite in the bonds of matrimony any persons of different races, as above prohibited, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be liable to the same penalty or penalties as provided in this section.

(Emphasis added.)

Section 8571 of the Code 1932, provides:

> It shall be unlawful for any white man to intermarry with any woman of *either the Indian or negro races, or any mulatto, mestizo, or half-breed*, or for any white woman to intermarry with any person other than a white man, or for any mulatto, half-breed, negro, Indian or mestizo to intermarry with a white woman; and any such marriage, or attempted marriage, shall be utterly null and void and of none effect.

(Emphasis added.)

Then there are the laws against adultery and fornication. Sections 1435, 1436 and 1437, Code of 1932.

The action here is based upon an alleged express contract. There is no claim that defendant is indebted to plaintiff on *quantum meruit* for services rendered, of a purely domestic nature or otherwise. The plaintiff simply says, in effect, that she agreed to live with the intestate in a state of concubinage, after the fashion of a married couple, and that the intestate in turn agreed, in consideration of plaintiff's meretricious conduct, to do certain things for her, one of which was to leave her one-half of his estate on his death.

It appears from the allegations of the complaint, and I hold that the only logical conclusion to be drawn therefrom is, that the primary consideration of said contract, on the part of plaintiff, as contemplated by the parties, was that she would live with the intestate and submit herself completely to his adulterous embraces; and that, as secondary considerations therefor, the plaintiff would remain unmarried and maintain a home for the two of them, at the intestate's expense, so that the illicit relations agreed upon could be conveniently consummated to the satisfaction of both parties.

This contract not only violates the law of the land the plaintiff now invokes for its enforcement, it defies the basic moral principles upon which family relationships exist and upon which the social order of the State must of necessity rest.

Mr. Justice McIver, writing the unanimous opinion in *McConnell v. Kitchens*, 20 S.C. 430, said: "The general rule, undoubtedly is, that a contract to do an act which is prohibited by statute, or which is contrary to public policy, is void, and cannot be enforced in a court of justice."

In *Wiggins vs. Postal Telegraph Co.*, 130 S.C. 292, 125 S.E. 568, 569, 44 A.L.R. 781, the Court said:

> We know of no principle of law based upon comity or interstate commerce transactions, which would require a state court to recognize the validity of a contract which under its laws is declared to be against

> public policy, immoral and void. *[Building & Loan] Association v. Rice*, 68 S.C. , 241; 2 Kent Comm., 458; *Thornton v. Dean*, 19 S.C. 587; 3 A. & E. Enc. Law, 561.

It seems to be well established in this State that contracts having for their object anything that is obnoxious to the principles of the common law, or contrary to statutory enactments or constitutional provisions, or repugnant to justice and morality, are void; and that the Courts of this State will not lend aid to the enforcement of contracts that are in violation of law or opposed to sound public policy. *Magwood v. Duggan*, 1 Hill 182; *Craig v. U.S. Health & Accident Ins. Co.*, 80 S.C. 151.

In *Weeks v. New York Life Ins. Co.*, 128 S.C. 223, Mr. Justice Marion speaking for the Court said:

> Public policy has been aptly described by one of our judges as "a wide domain of shifting sands." Gage, J., in *McKendree v. Southern States Life Insurance Co.*, 112 S.C. 335. The term in itself imports something that is uncertain and fluctuating, varying, with the changing economic needs, *social customs, and moral aspirations of a people*. Story on Contracts (5th Ed.) § 675; 23 A. & E. Ency. (2d Ed.) 456. For that reason it has frequently been said that the expressive public policy is not susceptible of exact definition. But for purposes of juridical application it may be regarded as well settled that a state has no public policy, properly cognizable by the courts, which is not derived or derivable by clear implication from the established law of the state, as found in its Constitution, statutes, and judicial decisions.

(Emphasis added.)

The *Weeks* case was cited with approval in *Sandel v. Philadelphia Life Ins. Co.*, 128 S.C. 239, and in *Temple v. McKay*, 172 S.C. 305. *See also Alderman v. Alderman*, 178 S.C. 9; *Tedder vTedder*, 108 S.C. 271; 6 R.C.L. 689, Section 104, 701, Section 107, 707, Section 114, and 712, Section 120.

Among the early cases of this State, the following principles were announced: *Bostick v. McClaren*, 2 Brev. 275: "Where a note, under seal, was given for an illegal consideration, it was declared that, *as both parties had acted illegally in the transaction, neither could be entitled to the countenance of a court of justice*." (Emphasis added.)

Lowe v. Moore, 1 McCord Eq. 243: "The general principle is correct that equity will not interfere to set aside an executed contract; as in case of an unlawful contract, both parties being in pari delicto."

Wallace v. Lark, 12 S.C. 576: "T*here can be no recovery on a contract based upon an illegal transaction in which the prosecutor actually participated*." (Emphasis added.)

In the late case of *Rountree v. Ingle*, 94 S.C. 231, the Court said: "T*he authorities in this state are full to the effect that, where a plaintiff brings into court on a claim which has no other support than a contract forbidden by law, he cannot recover. McConnell v. Kitchens*, 20 S.C. 430." (Emphasis added.) *Elder Harrison Co. v. Jervey*, 97 S.C. 185; *McMullen v. Hoffman*, 174 U.S. 639.

The case of *Prince v. Mathews*, 159 S.Ct. 526, appears to be conclusive of this case. In that case Mr. Justice Cothran, speaking for the Court, said:

> The authorities hold that a consideration of past cohabitation is good; *but that for future cohabitation, or in part for past and in part for future, it is bad. Cusack v. White*, 2 Mill Const. 284; *Singleton v. Bremar*, Harp. 213; *Burton v. Belvin*, 142 N.C. 151; *Smith v. Du Bose*, 78 Ga. 413; *Sherman v. Barrett*, 1 McMul. 147; *McConnell v. Kitchens*, 20 S.C. 430; *Harlow v. Leclair*, 82 N.H. 506; *Bank [of United States] v. Owens*, 2 Pet. 527; *Gordon v. Gordon*, 168 Ky. 409; *Maybank [& Co.] v. Rodgers*, 98 S.C. 279; *Rountree v. Ingle*, 94 S.C. 234; *Groesbeck v. Marshall*, 44 S.C. 538; *Hall v. [James T.] Latimer [& Son]*, 81 S.C. 90; *Denton v. English*, 2 Nott & McC. 581.[Emphasis added.]

> *It is impossible*, in the light of the circumstances surrounding the assignor, and of the letter to Mathews, set forth above, *to conclude otherwise than that the consideration of the assignment was future as well as past cohabitation. That conclusion renders it impossible for the plaintiff to recover upon the assignment or upon a claim for breach of warranty in the assignment.*

(Emphasis added.)

The prevailing rule in other jurisdictions is clearly stated in 12 American Jurisprudence 675, Section 176, as follows:

> Where a woman lives with a man as his mistress and performs only such services as are incidental to such relationship she cannot recover compensation therefor, even though she alleges a separate agreement. Likewise, *where a part of the consideration for the agreement is a continuance of the illicit relations, the agreement is for that reason wholly void and unenforceable.* An agreement or understanding founded upon a consideration in whole or in part for the commencement or continuance of meretricious sexual intercourse if directly contrary to law or public policy and the best interests of society. Thus, a loan by a man to a woman on consideration that she serve as his mistress cannot be recovered.

(Emphasis added.)

Mr. Justice Holmes, speaking for the United States Supreme Court in *Sage v. Hampe*, 235 U.S. 99 said:

> A contract that on its face requires an illegal act, either of the contractor or a third person, no more imposes a liability to damages for nonperformance than it creates an equity to compel the contractor to perform. A contract that invokes prohibited conduct makes the contractor a contributor to such conduct. *Kalem Co. v. Harper Bros.*, 222 U.S. 55, 63. And more broadly, it long has been recognized that contracts that obviously and directly tend in a marked degree to bring about results that the law seeks to prevent cannot be made the ground of a successful suit.

It seems to be equally well settled that contracts in restraint of marriage are nonenforceable, for "as a general rule, restrictions on marriage are contrary to public policy, and therefore agreements or conditions creating or involving such restrictions are illegal and void." 17 Corpus Juris Secundum, Contracts, p. 615, § 233.

Mr. Justice Field in delivering the opinion in the case of *Maynard v. Hill*, 125 U. S. 190, in referring to marriage, used this language: "It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress."

In *Strickland v. Anderson*, 186 S.C. 482, Mr. Justice Fishburne, speaking for the Court, quoted from *Noice vs. Brown*, 38 N.J.L. 228, *affirmed in* 39 N.J.L. 133, as follows: "A contract is totally void, if, when it is made, it is opposed to morality or public policy. The institution of marriage is the first act of civilization, and the protection of the married state against all molestation or disturbance is a part of the policy of every people possessed of morals and laws."

Suppose the intestate, prior to his death, had applied to the Court to require his paramour to specifically perform the obligation of the contract to permit him access to her bed and person for the satisfaction of his licentious appetite, would the Court have heard him, or, what is more, would the Court have granted the relief demanded? I think not.

I am of the opinion that the demurrer to the complaint should be sustained; and it is so ordered.

Stukes, Justice.

This Court is in full accord with the result of the judgment of the Circuit Court reached on several grounds in the order of Special Judge George Bell Timmerman sustaining the demurrer to the complaint. This order sufficiently states the pleadings and issues; it will be reported. Appellant's exceptions thereto have been carefully considered and are overruled and the judgment below affirmed.

Bonham, C.J., Baker, and Fishburne, JJ., and G. Duncan Bellinger, A. A. J., concur.

4.4.4. Children's Claims on Family Assets

Ex parte Bayliss,

550 So.2d 986 (Ala. 1989)

Frank M. Bainbridge of Porterfield, Scholl, Bainbridge, Mims & Harper, Birmingham, for petitioner.

Stephen R. Arnold of Durwood & Arnold, Birmingham, for respondent.

Houston, Justice.

We granted certiorari in this case to address the following issue: In Alabama, does a trial court have jurisdiction to require parents to provide post-minority support for college education to children of a marriage that has been terminated by divorce?

… .

Patrick Bayliss was born of the marriage of Cherry R. Bayliss and John Martin Bayliss III. This marriage was terminated by divorce when Patrick was 12 years old. When Patrick was 18, his mother filed a petition to modify the final judgment of divorce; that petition, as amended, alleged:

> (5) That the child, Patrick Bayliss, completed high school at a private school in Birmingham, Alabama, The Altamont School, with an outstanding record and graduated with honors. That after graduation, said child sought admission to, and was accepted as a student at a four-year institution of higher learning, namely, Trinity College, located in Hartford, Connecticut. That the child, Patrick Bayliss, enrolled in Trinity College in the Fall of 1987, has successfully completed his first semester and as of the date hereof, is attending Trinity College. That the said minor child desires and deserves to be allowed to complete a four-year college education.
>
> (6) That the child, Patrick Bayliss, is now and after he attains nineteen years of age will continue to be a 'dependent' child of John Martin Bayliss, III, and absent support from his said father, the said child will not be able to complete his college education. The said minor child was not self-supporting or self-sustaining at the time of the Final Decree of Divorce, is not self-supporting or self-sustaining as of the date hereof, and will not be self-supporting or self-sustaining until he has completed his college education. That the plaintiff lacks the funds to finance the college education for the child, Patrick Bayliss.
>
> (7) That the defendant, John Martin Bayliss, III, the father of Patrick Bayliss, is an extremely wealthy individual, having a net worth in excess of $1,000,000.00). The defendant had total income in 1986, the last year for which a Federal Tax Return is available, in excess of $370,000.00, and in excess of $330,000.00 for 1985. That the defendant has no substantial debts and has sufficient estate, earning capacity, and income to enable him to pay the cost of a college education at Trinity College without undue hardship.

> (8) That both the plaintiff and defendant attended colleges and universities and that but for the divorce in this cause, the defendant father, in all likelihood, would have paid and provided for a college education of the type and kind being pursued by Patrick Bayliss.
>
> (9) That the defendant has failed and refused to contribute any sum toward the college expenses of the child, Patrick Bayliss....

... .

Alabama Code 1975, § 30-3-1, provides, in pertinent part:

> Upon granting a divorce, the court may give the custody and *education of the children of the marriage* to either father or mother, *as may seem right and proper*....

(Emphasis supplied.)

... .

In *Ex parte Brewington*, 445 So.2d 294 (Ala.1983), this Court held that the term "children" in § 30-3-1 did not apply only to "minor" children. Mr. Justice Beatty, in overruling cases that had given the word "children" that limited definition, wrote, for a majority of the Court:

> The statute, however, does not express such a limitation, and such a narrow interpretation is unacceptable. In the frame of reference of the present case, we believe the legislature intended that support be provided for *dependent* children, regardless of whether that dependency results from minority, or from physical and/or mental disabilities that continue to render them incapable of self-support beyond minority.

445 So.2d at 296.

Looking at the word "children," "[i]n the frame of reference of the present case," we note that the pertinent portions of § 30-3-1 have been part of the codified law of Alabama continuously since Alabama Code 1852, § 1977. From 1852 to 1975, the age of majority in Alabama was 21 years.

We have found no early Alabama appellate court cases that even discussed whether a college education was a "necessary" that a divorced parent had to provide a *minor child.* The earliest case that we have found involving the question of whether a college education is a necessary is *Middlebury College v. Chandler*, 16 Vt. 683, 42 Am.Dec. 537 (1844). In that case, which involved a suit brought by Middlebury College against the father of a minor college student for the student's tuition and other college expenses, the Vermont Supreme Court refused to hold that a college education was a necessary, for the following reasons:

> The practical meaning of the term [necessaries] has always been in some measure relative, having reference as well to what may be called the conventional necessities of others in the same walks of life with the infant, as to his own pecuniary condition and other circumstances. Hence a good common school education, at the least, is now fully recognized as one of the necessaries for an infant. Without it he would lack an acquisition which would be common among his associates, he would suffer in his subsequent influence and usefulness in society, and would ever be liable to suffer in his transactions of business. Such an education is moreover essential to the intelligent discharge of civil, political, and religious duties.
>
> But it is obvious that the more extensive attainments in literature and science must be viewed in a light somewhat different. Though they tend greatly to elevate and adorn personal character, are a source

> of much private enjoyment, and may justly be expected to prove of public utility, yet in reference to men in general they are far from being necessary in a legal sense. The mass of our citizens pass through life without them. I would not be understood as making any allusion to professional studies, or to the education and training which is requisite to the knowledge and practice of mechanic arts. These partake of the nature of apprenticeships, and stand on peculiar grounds of reason and policy. I speak only of the regular and full course of collegiate study; for such was the course upon which the defendant professedly entered. Now it does not appear that extraneous circumstances existed in the defendant's case, such as wealth, or station in society, or that he exhibited peculiar indications of genius or talent, which would suggest the fitness and expediency of a college education for him, more than for the generality of youth in community."

16 Vt. at 538-39.

Beginning with the landmark case of *Esteb v. Esteb*, 138 Wash. 174, 244 P. 264 (1926), courts have increasingly recognized a college education as a legal necessary for *minor* children of divorced parents. Justice Askren wrote:

> ... .
>
> "Applying the rule as stated by the courts and the text-writers, it will be seen that the question of what sort of an education is necessary, being a relative one, the court should determine this in a proper case from all the facts and circumstances. Nor should the court be restricted to the station of the minor in society, but should, in determining this fact, take into consideration the progress of society, and the attendant requirements upon the citizens of to-day. The rule in *Middlebury College v. Chandler*, supra, was clearly based upon conditions which existed at that time. An opportunity at that early date for a common school education was small, for a high school education less, and for a college education was almost impossible to the average family, and was generally considered as being only within the reach of the most affluent citizens. While there is no reported case, it is hardly to be doubted that the courts at that time would have even held that a high school education was not necessary, inasmuch as very few were able to avail themselves of it. But conditions have changed greatly in almost a century that has elapsed since that time. Where the college graduate of that day was the exception, to-day such a person may almost be said to be the rule. The law in an attempt to keep up with the progress of society has gradually placed minimum standards for attendance upon public schools, and even provides punishment for those parents who fail to see that their children receive at least such minimum education. That it is the public policy of the state that a college education should be had, if possible, by all its citizens, is made manifest by the fact that the state of Washington maintains so many institutions of higher learning at public expense. It cannot be doubted that the minor who is unable to secure a college education is generally handicapped in pursuing most of the trades or professions of life, for most of those with whom he is required to compete will be possessed of that greater skill and ability which comes from such an education.

138 Wash. at 181, 244 P. at 266-67.

This Court in deciding this issue in *Ogle v. Ogle*, 275 Ala. 483, 486, 156 So.2d 345, 348 (1963), wrote:

> While there are divergent views on the question, it seems to us that the cases from other jurisdictions holding that a father may be required to contribute toward the college education of his minor child, who is in his mother's custody pursuant to a divorce decree, are supported by the better reasoning.

Patrick was born March 5, 1969. If the age of majority had remained 21 years, as it was from 1852 to 1975, Patrick would have been entitled to have his father contribute toward his college education, at least until March 5, 1991. But in 1975, the age of majority was reduced to 19 years in Alabama, with certain exceptions. Alabama Code 1975, § 26-1-1; for exceptions see § 26-1-1(d) (youthful offenders) and § 28-1-5 (purchase of alcoholic beverages, since May 29, 1985).

> It is ironic that legislatures reduced the age of majority in a period when college education was becoming available to all. In the past, when a college education was relatively uncommon, children were accustomed to supporting themselves at an earlier age. In contrast, 'today, since children remain in school longer, they frequently do not mature or become self-sufficient until later in life.' Thus, they are maturing later and assuming responsibility earlier.

Kathleen Conrey Horan, *Postminority Support for College Education–A Legally Enforceable Obligation in Divorce Proceedings?* 20 Family Law Quarterly (American Bar Association) 589, 604 (1987).

In *Davenport v. Davenport*, 356 So.2d 205, 208 (Ala.Civ.App.1978), the Court of Civil Appeals held that "minority is a status rather than a fixed or vested right and... the legislature has full power to fix and change the age of majority." See, *Hutchinson v. Till*, 212 Ala. 64, 101 So. 676 (1924). In *New Jersey St. Pol. Ben. Ass'n v. Town of Morristown*, 65 N.J. 160, 320 A.2d 465, 470 (1974), Justice Pashman wrote of the pragmatic age of majority:

> There is no magic to the age of 21. The 21-year age of maturity is derived only from historical accident. It is not a mystical figure whose importance as the age of majority has captured every civilization. While many societies have had laws or conventions regulating the age at which young people were considered adults, those ages have varied. Military service has frequently been a determining factor. Historians of the Roman empire indicate that the barbarians considered 15 as the proper age of majority because young people then became eligible for military service. The ability to bear arms and the age of majority were identical under Ripuarian tradition.
>
> The male child of an Athenian citizen reached majority at 18 and was qualified for membership in the assembly at age 20; however, age 30 was a requirement for service on a jury. In ancient Sparta, males did not reach majority until 31. In Rome, increased emphasis on education led to a correlation of understanding of the law to the age of majority, which was eventually set at 14. This prevailed in northern parts of Europe and in England during the ninth, tenth and eleventh centuries. The expanding role of the mounted knight after the Norman Conquest led to heavier mail shirts and coifs, as well as shields and armor. With the advent of knighthood, the age of majority rose to 21; for at that time, young men were first capable of meeting its physical and mental demands. This age, however, did not initially apply to agricultural tenants, where one's ability to complete husbandry and farming chores was paramount. Such commoners reached majority at age 15, although 21 later became the age of majority for all classes.
>
> From this point on, the age of 21 [seemed] gradually to be accepted, even though the specific reasons for its appearance had long since passed. The province of Massachusetts Bay, in 1641, established 21 as the age for giving votes, verdicts or sentences.

Until *Brewington*, supra, our cases and the cases of the Court of Civil Appeals held that a trial court had no continuing equitable jurisdiction over the issues or parties to a divorce to require that a noncustodial parent provide support of any kind to any child that had reached the legislatively prescribed age of majority. See, *Hutton v. Hutton*, 284 Ala. 91, 222 So.2d 348 (1969); *Davenport v. Davenport*, supra. In *Brewington*, supra, we expanded our interpretation

of the word "children" in the Alabama child support statute, to impose a duty on a divorced, noncustodial parent to support his children who continue to be disabled beyond the legislatively prescribed age of majority. We have previously interpreted the word "education" in the Alabama child support statute to include a college education as a necessary. (*Ogle v. Ogle*, supra). We now expand the exception to the general rule–i.e., the rule that a divorced, noncustodial parent has no duty to contribute to the support of his or her child after that child has reached the legislatively prescribed age of majority– beyond *Brewington*, supra (dealing with a physically or mentally disabled child) to include the college education exception.

… .

In the six years since *Brewington* was announced, the Legislature has not seen fit to modify § 30-3-1 by adding the word "minor" before the word "children." We do not suggest that the failure of the Legislature to act in this area necessarily constitutes its approval of our construction in *Brewington* of § 30-3-1;[1] however, clearly it knew how to alter the status quo by adding the word "minor" before "children" in § 30-3-1 as it did in § 30-3-4.

In expanding the exception to the general rule (that a divorced, noncustodial parent has no duty to support his child after that child reaches majority) to include the college education exception, we are merely refusing to limit the word "children" to minor children, because of what we perceive to be just and reasonable in 1989. The Latin phrase *"stare decisis et not quieta movere"* (stare decisis) expresses the legal principle of certainty and predictability; for it is literally translated as "to adhere to precedents, and not to unsettle things which are established." *Black's Law Dictionary* (5th ed. 1979). By this opinion, we are unsettling things that have been established by the appellate court of this State (the Court of Civil Appeals) that has exclusive appellate jurisdiction of "all appeals in domestic relations cases, including annulment, divorce, adoption and child custody cases." Ala.Code 1975, § 12-3-10. However, we are persuaded that the ground or reason of those prior decisions by the Court of Civil Appeals would not be consented to today by the conscience and the feeling of justice of all those whose obedience is required by the rule on which the *ratio decidendi* of those prior decisions was logically based.

Therefore, we overrule that portion of the following cases that are inconsistent with this opinion: *English v. English*, 510 So.2d 272 (Ala.Civ.App.1987); [and seven other cases.].

In making this holding, we are not the first by whom this new is tried, for we have cases from other jurisdictions, referred to by Justice Holmes as "the evening dress which the newcomer puts on to make itself presentable according to conventional requirements," Book Notice, 14 Am.L.Rev. 233-34 (1880). We had cases from other jurisdictions that we followed in *Ogle v. Ogle*, 275 Ala. at 486, 156 So.2d at 348.

Had the Bayliss family unit not been put asunder by divorce, would the father, who had attended college and was a man of significant means, have continued to provide a college education for Patrick (a young man who would be an Alpha Plus if this were Huxley's *Brave New World*) after Patrick reached 19 years of age? If so, the father's educational support obligations should not cease when Patrick reached 19 years of age.

The Legislature has given circuit courts the "power" to divorce persons for certain causes. While the rights of the parties to the divorce action must be fully respected, the public occupies the position of a third party in a divorce action; and the court is bound to act for the public. *Flowers v. Flowers*, 334 So.2d 856 (Ala.1976); *Hartigan v. Hartigan*, 272 Ala. 67, 128 So.2d 725 (1961); *Ex parte Weissinger*, 247 Ala. 113, 22 So.2d 510 (1945).

This Court in *Ogle*, 275 Ala. at 487, 156 So.2d at 349, quoted the following from *Pass v. Pass*, 238 Miss. 449, 118 So.2d 769, 773 (1960), with approval:

> [W]e are living today in an age of keen competition, and if the children of today… are to take their rightful place in a complex order of society and government, and discharge the duties of citizenship as well as meet with success the responsibilities devolving upon them in their relations with their fellow man, the

> church, the state and nation, it must be recognized that their parents owe them the duty to the extent of their financial capacity to provide for them the training and education which will be of such benefit to them in the discharge of the responsibilities of citizenship. It is a duty which the parent not only owes to his child, but to the state as well, since the stability of our government must depend upon a well-equipped, a well-trained, and well-educated citizenship. We can see no good reason why this duty should not extend to a college education. Our statutes do not prohibit it, but they are rather susceptible of an interpretation to allow it. The fact is that the importance of a college education is being more and more recognized in matters of commerce, society, government, and all human relations, and the college graduate is being more and more preferred over those who are not so fortunate. No parent should subject his worthy child to this disadvantage if he has the financial capacity to avoid it.

This is the public policy of our State. Since the normal age for attending college extends beyond the age of 19 years, under § 30-3-1 courts have the right to assure that the children of divorced parents, who are minors at the time of the divorce, are given the same right to a college education before and after they reach the age of 19 years that they probably would have had if their parents had not divorced.

The trial courts of this state that handle the dissolution of marriages have long dealt with hard problems of alimony and child support and the hardest problem of all, child custody. King Solomon is noted for his wisdom, primarily because of his judgment in a child custody case. Our trial courts have demonstrated that they have the wisdom of Solomon in these domestic matters. We know that they will continue to demonstrate that wisdom in deciding whether to require a parent to provide, or help defray the cost of, a college education for a child, even after that child attains the age of 19 years.

The father suggests that to require him to pay for Patrick's college education after Patrick attained the age of 19 years, would deny the father equal protection under the law. We adopt the following reasoning from Smith, *Educational Support Obligations of Noncustodial Parents*, 36 Rutgers L.Rev. 588, which discusses, in some detail at pages 626-41, the constitutionality of post-minority college support obligations, and concludes with this observation:

> Following divorce the noncustodial parent, most frequently the father, often establishes a new life for himself, possibly including a new spouse, stepchildren, and new children. One result is that the interest, concern, care, and money of the noncustodial parent that is available for the children of the original marriage often declines or vanishes altogether. This is particularly true in such matters as the cost of education for their post-majority children. By imposing an educational support obligation on these parents, at least one of the disadvantages caused children by divorce can be reduced or eliminated. It is true that the imposition of this burden on divorced noncustodial parents establishes a classification with discriminatory obligations. However, as the *Childers* [v. Childers] [89 Wash.2d 592, 604, 575 P.2d 201, 208 (1978)] court pointed out, instead of an arbitrary, inequitable, unreasonable, or unjust classification, what exists is a package of special powers in equity that the courts, regardless of legislation, have long used to protect the interests of children of broken homes and to assure that the disadvantages of divorce on these children are minimized. In short, the courts have found a reasonable relationship between this classification and the legitimate state interest in minimizing the disadvantages to children of divorced parents….

36 Rutgers L.Rev. at 641.

Almon, Justice (dissenting).

The writ of certiorari was improvidently granted in this case. Therefore, the writ should be quashed. For that reason, I dissent.

---

1. Justice Scalia, in his dissent in *Johnson v. Transportation Agency*, 480 U.S. 616, 671-72, 107 S.Ct. 1442, 1473, 94 L.Ed.2d 615 (1987), wrote:"[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The 'complicated check on legislation,' The Federalist No. 62, p. 378 (C. Rossiter ed. 1961), erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice."↩

5. Easements

Christian Turner

AN INTRODUCTION TO SERVITUDES

Our discussion of future interests introduced us to the ways that people can share property over time and the problems that tend to arise when they do so. The materials on co-ownership showed ways that people can actually own property together at the same time. We now come to another kind of shared, concurrent interest in land.

Servitudes are interests in the lands of others that confer the power *to use* another's land or *to control* what a landowner does with his land. Though courts and commentators have used a variety of words and modifiers to describe servitudes, they can be boiled down to two basic types: easements and covenants. At bottom, these are just contracts. One party promises to allow access to her land or that she will do or not do something on her own land, and the other party promises something in return.

What distinguishes easements and covenants from other contracts is that they can be made to bind not just the parties who agree to them but also the people who later acquire the lands these agreements burden and benefit. For example, assume two people come to an agreement that would let one of them drive over the property of the other. After a number of years, both parties have sold these lands. This easement, assuming a few conditions were met, will bind the new owners, even though these new owners were not parties to the original agreement and did not come to any new agreement among themselves.

The binding of future owners to an agreement struck by their predecessors is described as an easement's or covenant's *running with the land.* But for this feature, easements and covenants would be governed by more ordinary contract principles. While some of the historical cruft that has accumulated around these interests in land may still have arisen – after all, this is land we're talking about – it likely would have been jettisoned far sooner. Now, however, the Third Restatement is making a concerted and explicit effort to clean up the doctrine of servitudes and to replace as much of it as possible with ordinary contract law, too much of it according to some critics.

Some sort of clean-up was plainly necessary. In fact, this area of law has been described as "an unspeakable quagmire" of silly and useless distinctions. This is at once unsurprising, given the historical development of the area, and surprising, given the simplicity of the underlying ideas.

Simply put, an *easement* is the right to use the land of another. A *covenant* is an obligation to do something or to refrain from doing something on one's own land. Repeat those sentences to yourself a few times. As always, keeping in mind key examples makes things much easier.

Examples of easements: a trail across *A*'s property that connects *B*'s property to a lake; a driveway across *A*'s property that *B* uses to get from his property to a public road; the right of the utility company, *B*, to string wires on poles across a strip of *A*'s property.

Examples of covenants: a promise by *A* to *B* that *A* will not make commercial use of his property; a promise that *A* will not build a second story; a promise that *A* will only build additions that meet with the approval of a homeowner association's architectural review committee; a promise that *A* will maintain a wall that separates his property from *B*'s.

It is worth re-emphasizing that easements and covenants are really just particular kinds of contracts (or perhaps gifts). Though they are often distinguished as being "property rights" rather than "contractual," this distinction does not mean much. Rather than thinking about these obligations as completely different from ordinary contracts, it is more useful to concentrate on the doctrine specific to these kinds of contracts, in particular the practical and policy problems posed by contracts that run with the land.

Easements

Remember that an easement is the *right* to use the land of another. When you go to a friend's house for dinner, you are using their land. But you do not have a right to do so. Rather, you are there by the permission of your host. Such permission to use the land of another is called a *license*.

What's the difference between a license and an easement? Well, plainly, it comes down to the difference between *permission* to use land and a *right* to use land. Permission can be granted and revoked at will. A right to use land, however, is irrevocable. Once *A* grants an easement, *A* cannot change his or her mind and end the arrangement unilaterally. If *A* invites you over for dinner, granting you a license, *A* can revoke the offer at anytime, and kick you off the property.

This is not to say that easements are necessarily permanent. Irrevocable does not mean the easement lasts forever. By its own terms, the easement may expire after one year, one day, when a certain event happens, or otherwise. The key is that the grantor cannot unilaterally rescind the grant. There are a few instances in which licenses are deemed irrevocable, and thus essentially converted into easements by the court. We will study a few of them.

Creation

Being interests in land, easements are subject to the statute of frauds, meaning that they must be in writing in order to be valid. The writing requirement contains a number of exceptions, including estoppel and implication, which we will study. But it is useful to remember that writing is at least formally a "requirement" that must be met unless an exception applies. In particular, easements are granted by deeds, just like grants of land. Sometimes an easement is created or transferred in a deed that also grant lands subject to the easement, and sometimes an easement is the only thing granted in a deed.

Running with the land

When we say an easement "runs with the land," we are really talking about two different things, and it is important that we analyze each of these separately. *First*, we must decide whether the *burden* of an easement runs with ownership of the burdened land. That is, if I own land that another has a right to cross, I am burdened by an easement. If when I grant this land to another the burden remains on the land, we say that the burden of the easement has run with the ownership of the burdened or servient holding.

So when does this happen? In a nutshell, there are three requirements that must be met before the burden is determined to run. (1) The easement must be in *writing*. It need not appear in every deed subsequent to the one in which was created, so long as the easement is in the chain of title. (2) The burden of the easement must be *intended*

to run with the burdened land. Intent may be presumed, and so ambiguity doesn't defeat this element. But if it is plain that the easement was not intended to run, then this element will not be met. (3) The owner of the burdened property must have had notice of the easement.

Note that the third requirement differs from the first two in the following respect. The first two elements are directed at the original grant of the easement. That is, we can decide whether they are met by looking only at what was going on, perhaps a long time ago, when the easement was created. What did the original parties to the easement intent? And did they put it in writing?

The third element, by contrast, looks at whether the *new* owner of the burdened land had notice of the easement, without regard to the effect of the easement on prior owners of that land, however many of them there may have been. If the new owner lacked notice, the easement does not burden him or her. Notice can come in three forms: (1) actual notice, which means that the new owner actually knows about the easement, (2) record (or constructive) notice, which exists if the easement could have been found in a title search, and (3) inquiry notice, which exists if there is something about the land or some other clue that *should have* led the new owner to inquire further thus discovering the existence of the easement. Importantly, if an easement expressing an intent to run with the land is duly recorded, all three elements will be met, and the burden of the easement will run with the land.

Second, we must decide whether the *benefit* of an easement runs with the ownership of some parcel of land. That is, if I have the right to use someone else's land, I have the *benefit* of an easement. If when I sell property I own, the benefit of that easement automatically transfers to the grantee, then we say that the benefit of the easement runs with the ownership of the benefitted, or dominant holding.

Formally, it is simple for the benefit of an easement to run. It does so whenever it was intended to run. An easement intended to run with some benefitted land is called *appurtenant* to the benefitted land (also called the dominant tenement holding or dominant estate). Otherwise, the easement is personal to the grantee and is called *in gross*.

Unfortunately, it is not always clear whether a grantor intended for an easement to stay with the grantee or run with the grantee's land. What then? Consider the easement examples above, where *B* is given a right to use *A*'s property. Sometimes the easement benefits *B* because of *B*'s location. That is, the easement benefits *B* because of the relation of the easement to land *B* owns. For example, the driveway and the trail are useful to *B* because *B* owns property that is made more convenient or enjoyable by the easement. Such easements are deemed to be appurtenant absent grantor intent to the contrary. Courts will often presume an easement is appurtenant unless it is clearly otherwise.

When, on the other hand, the easement is useful to *B* regardless of any land *B* might hold, the easement is deemed to be *in gross* absent contrary intent. The easement to run utility lines across a strip of *A*'s property is the most common example. There the utility company has the easement and will benefit from the easement to the same degree no matter where it moves its corporate headquarters or other property, including power plants. The usefulness of the easement is the same, practically regardless of where *B* owns land.

In sum: The burden runs when there is writing, intent, and notice. The benefit runs if intended, i.e. appurtenant rather than in gross.

Transferability

Appurtenant easements are transferred automatically with the transfer of the lands burdened and benefitted by them. They may not be severed. That is, one may not prevent the benefit of an appurtenant easement from passing to the grantee of the dominant parcel without terminating or modifying the easement, which requires the agreement of the holder of the burdened parcel.

The benefit of easements held in gross was traditionally held to be nontransferable. This has changed. Unless the benefit of the easement was intended to be nontransferable, must courts will allow it to be alienated. Some courts distinguish commercial, in gross easements from personal, in gross easements, allowing the former but not the latter to be transferred. (Remember that when we say that the benefit can be transferred, we mean that the holder of the benefit can give that benefit away to someone else, without obtaining the consent of the servient holder.)

Termination

Easements will last until they are not terminated. This can occur when: (1) the *terms* of the easement itself set a time or condition for termination; (2) the dominant and servient holders *agree* to terminate the easement; (3) the dominant and servient lands are *merged* under a single owner (one cannot have an easement over one's own land); (4) the dominant holder by words or deed *abandons* the easement; (5) the servient holder takes over the easement by *prescription*; (6) *condemnation* by the state; (7) the death of the in-gross holder if not intended to be transferable.

In addition to these courts have long had ways to terminate easements that have outlived their usefulness. Courts have readily found abandonment in such cases or have declared that the easement's purpose has been frustrated. The modern trend is towards applying the changed conditions doctrine of covenants to easements as well. We will study this doctrine in the covenants context.

5.1. Easements by Estoppel

Holbrook v. Taylor,

532 S.W.2d 763 (Ky. 1976)

Harry M. Caudill, Whitesburg, for appellants.

Ronald G. Polly, Polly & Craft, Whitesburg, for appellees.

Sternberg, J.

This is an action to establish a right to the use of a roadway, which is 10 to 12 feet wide and about 250 feet long, over the unenclosed, hilly woodlands of another. The claimed right to the use of the roadway is twofold: by prescription and by estoppel. Both issues are heatedly contested. The evidence is in conflict as to the nature and type of use that had been made of the roadway. The lower court determined that a right to the use of the roadway by prescription had not been established, but that it had been established by estoppel. The landowners, feeling themselves aggrieved, appeal. We will consider the two issues separately.

In *Grinestaff v. Grinestaff*, Ky., 318 S.W.2d 881 (1958), we said that an easement may be created by express written grant, by implication, by prescription, or by estoppel. It has long been the law of this commonwealth that "(an) easement, such as a right of way, is created when the owner of a tenement to which the right is claimed to be appurtenant, or those under whom he claims title, have openly, peaceably, continuously, and under a claim of right adverse to the owner of the soil, and with his knowledge and acquiescence, used a way over the lands of another for as much as 15 years." *Flener v. Lawrence*, 187 Ky. 384, 220 S.W. 1041 (1920); *Rominger v. City Realty Company*, Ky., 324 S.W.2d 806 (1959).

In 1942 appellants purchased the subject property. In 1944 they gave permission for a haul road to be cut for the purpose of moving coal from a newly opened mine. The roadway was so used until 1949, when the mine closed. During that time the appellants were paid a royalty for the use of the road. In 1957 appellants built a tenant house

on their property and the roadway was used by them and their tenant. The tenant house burned in 1961 and was not replaced. In 1964 the appellees bought their three-acre building site, which adjoins appellants, and the following year built their residence thereon. At all times prior to 1965, the use of the haul road was by permission of appellants. There is no evidence of any probative value which would indicate that the use of the haul road during that period of time was either adverse, continuous, or uninterrupted. The trial court was fully justified, therefore, in finding that the right to the use of this easement was not established by prescription.

As to the issue on estoppel, we have long recognized that a right to the use of a roadway ever the lands of another may be established by estoppel. In *Lashley Telephone Co. v. Durbin*, 190 Ky. 792, 228 S.W. 423 (1921), we said:

> Though many courts hold that a licensee is conclusively presumed as a matter of law to know that a license is revocable at the pleasure of the licensor, and if he expend money in connection with his entry upon the land of the latter, he does so at his peril * * *, yet it is the established rule in this state that HN3where a license is not a bare, naked right of entry, but includes the right to erect structures and acquire an interest in the land in the nature of an easement by the construction of improvements thereon, the licensor may not revoke the license and restore his premises to their former condition after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense; * * *.

In *Gibbs v. Anderson*, 288 Ky. 488, 156 S.W.2d 876 (1941), Gibbs claimed the right, by estoppel, to the use of a roadway over the lands of Anderson. The lower court denied the claim. We reversed. Anderson's immediate predecessor in title admitted that he had discussed the passway with Gibbs before it was constructed and had agreed that it might be built through his land. He stood by and saw Gibbs expend considerable money in this construction. We applied the rule announced in *Lashley Telephone Co. v. Durbin*, supra, and reversed with directions that a judgment be entered granting Gibbs the right to the use of the passway.

In *McCoy v. Hoffman*, Ky., 295 S.W.2d 560 (1956), the facts are that Hoffman had acquired the verbal consent of the landowner to build a passway over the lands of the owner to the state highway. Subsequently, the owner of the servient estate sold the property to McCoy, who at the time of the purchase was fully aware of the existence of the roadway and the use to which it was being put. McCoy challenged Hoffman's right to use the road. The lower court found that a right had been gained by prescription. In this court's consideration of the case, we affirmed, not on the theory of prescriptive right but on the basis that the owner of the servient estate was estopped. After announcing the rule for establishing a right by prescription, we went on to say:

> * * * On the other hand, the right of revocation of the license is subject to the qualification that where the licensee has exercised the privilege given him and erected improvements or made substantial expenditures on the faith or strength of the license, it becomes irrevocable and continues for so long a time as the nature of the license calls for. In effect, under this condition the license becomes in reality a grant through estoppel. * * *.

In *Akers v. Moore*, Ky., 309 S.W.2d 758 (1958), this court again considered the right to the use of a passway by estoppel. Akers and others had used the Moore branch as a public way of ingress and egress from their property. They sued Moore and others who owned property along the branch seeking to have the court recognize their right to the use of the roadway and to order the removal of obstructions which had been placed in the roadway. The trial court found that Akers and others had acquired a prescriptive right to the use of the portion of the road lying on

the left side of the creek bed, but had not acquired the right to the use of so much of the road as lay on the right side of the creek bed. Consequently, an appeal and a cross-appeal were filed. Considering the right to the use of the strip of land between the right side of the creek bed and the highway, this court found that the evidence portrayed it very rough and apparently never improved, that it ran alongside the house in which one of the protestors lived, and that by acquiescence or by express consent of at least one of the protestors the right side of the roadway was opened up so as to change the roadway from its close proximity to the Moore residence. The relocated portion of the highway had only been used as a passway for about six years before the suit was filed. The trial court found that this section of the road had not been established as a public way by estoppel. We reversed. In doing so, we stated:

> We consider the fact that the appellees, Artie Moore, et al, had stood by and acquiesced in (if in fact they had not affirmatively consented) the change being made and permitted the appellants to spend money in fixing it up to make it passable and use it for six years without objecting. Of course, the element of time was not sufficient for the acquisition of the right of way by adverse possession. But the law recognizes that one may acquire a license to use a passway or roadway where, with the knowledge of the licensor, he has in the exercise of the privilege spent money in improving the way or for other purposes connected with its use on the faith or strength of the license. Under such conditions the license becomes irrevocable and continues for so long a time as its nature calls for. This, in effect, becomes a grant through estoppel. *Gibbs v. Anderson*, 288 Ky. 488, 156 S.W.2d 876; *McCoy v. Hoffman*, Ky., 295 S.W.2d 560. It would be unconscionable to permit the owners of this strip of land of trivial value to revoke the license by obstructing and preventing its use.

In the present case the roadway had been used since 1944 by permission of the owners of the servient estate. The evidence is conflicting as to whether the use of the road subsequent to 1965 was by permission or by claim of right. Appellees contend that it had been used by them and others without the permission of appellants; on the other hand, it is contended by appellants that the use of the roadway at all times was by their permission. The evidence discloses that during the period of preparation for the construction of appellees' home and during the time the house was being built, appellees were permitted to use the roadway as ingress and egress for workmen, for hauling machinery and material to the building site, for construction of the dwelling, and for making improvements generally to the premises. Further, the evidence reflects that after construction of the residence, which cost $25,000, was completed, appellees continued to regularly use the roadway as they had been doing. Appellant J. S. Holbrook testified that in order for appellees to get up to their house he gave them permission to use and repair the roadway. They widened it, put in a culvert, and graveled part of it with "red dog", also known as cinders, at a cost of approximately $100. There is no other location over which a roadway could reasonably be built to provide an outlet for appellees.

No dispute had arisen between the parties at any time over the use of the roadway until the fall of 1970. Appellant J. S. Holbrook contends that he wanted to secure a writing from the appellees in order to relieve him from any responsibility for any damage that might happen to anyone on the subject road. On the other hand, Mrs. Holbrook testified that the writing was desired to avoid any claim which may be made by appellees of a right to the use of the roadway. Appellees testified that the writing was an effort to force them to purchase a small strip of land over which the roadway traversed, for the sum of $500. The dispute was not resolved and appellants erected a steel cable across the roadway to prevent its use and also constructed "no trespassing" signs. Shortly thereafter, the suit was filed to require the removal of the obstruction and to declare the right of appellees to the use of the roadway without interference.

The use of the roadway by appellees to get to their home from the public highway, the use of the roadway to take in heavy equipment and material and supplies for construction of the residence, the general improvement of the premises, the maintenance of the roadway, and the construction by appellees of a $25,000 residence, all with the actual consent of appellants or at least with their tacit approval, clearly demonstrates the rule laid down in *Lashley Telephone Co. v. Durbin*, supra, that the license to use the subject roadway may not be revoked.

The evidence justifies the finding of the lower court that the right to the use of the roadway had been established by estoppel.

The judgment is affirmed.

All concur, except Stephenson, J., who dissents.

Henry v. Dalton,

89 R.I. 150 (1959)

Goodman, Mackenzie, Gorin & Blease, for complainants.

Shannahan & Cunningham, James M. Shannahan, Matthew C. Cunningham, for respondent.

Powers, J.

This bill in equity was brought to establish an irrevocable right in the land of the respondent for use as a driveway to the garage of the complainants. The cause was heard in the superior court on bill, answer and proof, and thereafter a decree was entered denying and dismissing the bill of complaint. From such decree the complainants have prosecuted an appeal to this court.

Their reasons of appeal are that the decree and the decision on which it is based are against the law, against the evidence and against the law and the evidence and the weight thereof.

The testimony discloses that on May 27, 1922 the complainants purchased a house on Carver street in the city of Pawtucket and that within a month thereafter respondent's husband purchased the adjoining property. It further appears that the distance between the foundations of both houses is approximately 14.5 feet, only 5.8 feet of which is the property of complainants. It is mutually agreed that at the time the parties purchased their respective properties a wooden fence separated the properties along the boundary lines. A few years later this fence was taken down and replaced by a hedge, which although planted by respondent's husband was a joint venture and Henry and Dalton each contributed one half of its cost.

It is undisputed that prior to 1938 the respondent and her husband owned a garage in the rear of their property, which from time to time was rented to different tenants, one of whom was the complainant William E. Henry. Access to the garage was had over the property of respondent between her house and the hedge.

In 1938 complainant William E. Henry spoke to respondent's husband about removing the hedge from the boundary line and making common use of their respective properties as a driveway. Henry explained that he wished to construct a two-car garage at the rear of his property since he and his son each had a car. It is undisputed that William Dalton, husband of respondent, readily gave his permission and respondent states in her deposition that her husband advised her of the request and of his consent. The hedge was removed and complainants filled in their own strip to bring it up to grade with their neighbors' land. At the same time the Henrys constructed a two-car garage at the rear of their property.

Although there is conflicting testimony as to whether or not thereafter the Daltons were careful to drive only over the strip which constituted their exclusive property, it is undisputed that until sometime in 1957 the Henrys and the Daltons and their friends used the driveway freely without incident and relations between the parties were friendly and harmonious. In 1954 respondent and her husband placed two posts in the driveway with a chain be-

tween them to prevent strangers from backing in and out. It appears that this was done because the Daltons were concerned for the safety of their grandchildren. This measure was taken without consulting the Henrys, but complainant William Henry testified that relations remained as friendly as ever.

In November 1956 complainants negotiated for the sale of their home in Pawtucket intending to purchase a home in the town of Cumberland, which property they had visited with the Daltons in June of that year. The complainant husband testified that in June 1956 he told William Dalton of this intention. He stated that both Mr. and Mrs. Dalton accompanied them on a visit to the Cumberland property and at that time Mr. Dalton assured him that there would be no trouble about the driveway in the sale of the Pawtucket property.

It is undisputed that about the second week in November 1956 Mr. Henry called on the Daltons and requested that they execute an instrument which would have granted an easement in the driveway, with covenants for each of the parties to maintain one-half thereof and binding on them, their heirs and assigns forever. William Dalton, who at that time was seriously ill and died the following January, refused to execute the agreement stating that signing it was out of the question and he intended to close the driveway.

After the death of William Dalton in January 1957 relations between complainants and respondent apparently became strained. It appears from the testimony of complainants' daughter Dorothy L. Henry that until September 1957 complainants continued to use the driveway despite admitted differences, but in that month she and Mrs. Dalton exchanged words and two days thereafter complainants were notified by Mrs. Dalton's attorney that, unless the wishes of his client regarding the use of the driveway were respected, permission for its use by complainants would be withdrawn. It does not appear in the record whether any discussions or conferences were had between the parties following receipt of this communication, but on December 4, 1957, complainants brought their bill of complaint.

The testimony of complainant William E. Henry was substantially corroborated by that of his wife and their daughter. Because of illness, respondent Jane E. Dalton was unable to testify at the trial, but her testimony was taken by deposition and was substantially corroborated by her son Raymond.

The parties differed in their testimony in that while the Henrys insisted that they had paid for the crushed stone, that maintenance of the driveway in such things as clearing it of snow was a joint venture without regard for boundary lines, and that the Daltons drove their car down the center, respondent and her son insisted that William Dalton paid for the crushed stone, that each family removed snow only from their respective portion of the driveway, and that the Daltons drove only on that part of the driveway constituting a part of their land. The trial justice found these conflicting statements were not material to the issue and we agree with him.

The complainants make no claim that they have acquired an easement by adverse use. They could not prevail on such a theory since it is undisputed that the use originated by permission. *Earle v. Briggs*, 49 R.I. 6, 139 A. 499; *Foley v. Lyons*, 85 R.I. 86, 125 A.2d 247. However, they contend that a license even though orally granted becomes irrevocable when the licensee, relying on the parol agreement, changes his position by making alterations on his property. They argue that in such circumstances withdrawal of the permission by the licensor would constitute "fraud" within the meaning of proceedings in equity.

The complainants maintain that when they expended money and labor in bringing the grade of their property up to respondent's property and constructed a garage, ingress and egress to which depended upon the permanence of the license, they had changed their position in reliance upon their understanding with Mr. Dalton and by implication with respondent, so that the license became executed and by the rule adopted in some jurisdictions was irrevocable. They rely on a line of cases apparently beginning with *Rerick v. Kern*, 14 S. & R. (Pa.) 267.

In that case the respondent gave oral permission to the complainant to divert a stream of water and thus permit the complainant to construct a mill which after considerable expense apparently became very profitable. The Pennsylvania court held that, when the complainant relying on the respondent's permission expended money and

labor, the license became executed and on the theory of estoppel could not be revoked. That principle has been adopted in some other jurisdictions, notably Ohio, Maine, New Hampshire, Oregon, Georgia, Minnesota and Indiana. The complainants have commended for our consideration decisions in the latter four of these jurisdictions, citing *Powers v. Coos Bay Lumber Co.*, 200 Ore. 329, 263 P.2d 913; *Shepard v. Purvine*, 196 Ore. 348, 248 P.2d 352; *Brantley v. Perry*, 120 Ga. 760, 48 S.E. 332; *Stoering v. Swanson*, 139 Minn. 115, 165 N.W. 875; *Indianapolis & Cincinnati Traction Co. v. Arlington Tel. Co.*, 47 Ind. App. 657, 95 N.E. 280.

They acknowledge that the authorities are divided on the question, but contend that this court indicated commendation of their contention in *Foster v. Browning*, 4 R.I. 47. That was an action of trespass for breaking and entering the plaintiff's close in which the court reversed the trial justice for instructing the jury that if the plaintiff's predecessor in title had orally licensed a right of way to Browning, and the latter relying on said license had expended moneys in opening and building the way, the license thereby became irrevocable. This was an action at law and Ames, C. J., in speaking for this court, stated at page 52: "In Maine, New Hampshire, Pennsylvania, and Ohio, and perhaps in some other states, the exploded doctrine of some of the earlier English cases is still maintained at law upon equitable grounds of estoppel, and part-performance of a parol contract, which certainly from their inherent justice would commend themselves to our attention as a court of law, had we not full powers as a court of equity to do justice in a proper case of this sort when applied to on that side of the court."

It appears from the discussion by Ames, C. J. that the license to Browning, although parol, was to him and his heirs in perpetuity. In the instant case there was no definiteness as to time. We are convinced furthermore that the Foster case, as it relates to the case at bar, is authority only for the proposition that a contention such as that made by complainants here has no validity in law and could be advanced for consideration only in equity proceedings. We are persuaded that the rule contended for is in the minority and should not be adopted by this court.

We are of the opinion that in reason and justice the better rule is expressed in the case of *Crosdale v. Lanigan*, 129 N.Y. 604, 29 N.E. 824. There the plaintiff was required to remove a wall built on the property of the defendant pursuant to a license. The court stated the rule at page 610 as follows:

> * * * a parol license to do an act on the land of the licensor, while it justifies anything done by the licensee before revocation, is, nevertheless, revocable at the option of the licensor, and this, although the intention was to confer a continuing right and money had been expended by the licensee upon the faith of the license. This is plainly the rule of the statute. It is also, we believe, the rule required by public policy. It prevents the burdening of lands with restrictions founded upon oral agreements, easily misunderstood. It gives security and certainty to titles, which are most important to be preserved against defects and qualifications not founded upon solemn instruments. The jurisdiction of courts to enforce oral contracts for the sale of land, is clearly defined and well understood, and is indisputable; but to change what commenced in a license into an irrevocable right, on the ground of equitable estoppel, is another and quite different matter. It is far better, we think, that the law requiring interests in land to be evidenced by deed, should be observed, than to leave it to the chancellor to construe an executed license as a grant, depending upon what, in his view, may be equity in the special case.

The complainants call to our attention the case of *Weeden v. Babcock*, apparently decided in this jurisdiction, and of which some discussion is had by Ames, C. J. in *Foster v. Browning*, supra. It is not published in our reports and we are unable to discover that it is otherwise reported. In any event it would appear that in the *Weeden* case the complainant yielded up an existing easement in return for a promise from the respondent that an equally acceptable easement would be substituted for that surrendered by the complainant. No such circumstances are present in the instant case and for whatever authority *Weeden v. Babcock* may stand, it is not applicable to the case at bar.

Counsel for the complainants urge that the statute of frauds was conceived and is designed to protect against fraud and should not be used to assist in the perpetration of fraud. We are in accord with this contention, but are not convinced that in the circumstances of the instant case the respondent's revocation of the complainants' license is fraudulent within any acceptable definition of that term. The right which complainants seek to establish in the land of the respondent is essentially an easement and should be the subject of a grant, expressed in the solemnity of a written instrument. It is no hardship for one in the position of these complainants either to secure an easement in perpetuity in the manner provided by the statute, or, such being refused, to weigh the advantages inuring to them as against the uncertainty implicit in the making of expenditures on the basis of a revocable license.

The complainants' appeal is denied and dismissed, the decree appealed from is affirmed, and the cause is remanded to the superior court for further proceedings.

Decker Car Wash, Inc. v. BP Products North America, Inc.,

649 S.E.2d 317 (Ct. App. Ga. 2007)

W. Dent Acree, Atlanta, for Appellant.

Karsten Bicknese, Seacrest, Karesn, Tate & Bicknese, Atlanta, for Appellee.

Ellington, Judge.

The Superior Court of Fulton County granted the motion for summary judgment filed by BP Products North America, Inc. in the action to enforce an easement filed by Decker Car Wash, Inc. The trial court denied Decker's cross-motion for summary judgment. Decker appeals, contending that, pursuant to OCGA § 44-9-4, a parol license to use BP's property had ripened into an easement running with the land in favor of Decker's property. For the reasons that follow, we affirm.

Viewed in the light most favorable to Decker,[1] the undisputed evidence showed that Miles F. Daly, Sr. bought 2980 Piedmont Road, Atlanta, in 1964 and operated a car dealership there for the next 30 years. When Daly bought the property, Gulf Oil owned and operated a gas station on the adjacent property, which was at the corner of Piedmont Road and Pharr Road. Daly deposed, without contradiction, that

> [s]tarting in approximately 1965, and continuing to 1995, [he] had several verbal conversations with the owners and operators of the Gulf Station property[.] ... In the course of these conversations, [Daly and the owners and operators of the Gulf Station] agreed to maintain a mutually beneficial black topped driveway on an area of [Daly's] property, whereby parties leaving [Daly's] property could use this area for egress to the Gulf Station property for vehicular and pedestrian traffic, to allow [his] customers to go and purchase gas at the station, and exit through the Gulf Property to the curb cuts on Pharr Road and to enable such customers to turn left onto Pharr Road or to turn right onto Pharr Road to use the traffic signal at that corner.

Daly and Gulf Oil constructed a driveway connecting the properties. BP became the owner of the gas station in 1985, through a corporate merger, and Daly's customers continued using the driveway.

Daly closed the car dealership in 1995. After dividing 2980 Piedmont Road into two subparcels, Daly leased the subparcel adjacent to the gas station to Decker in 2001. Decker built a large car wash on the property, at great expense, which opened in 2003. In 2004, Decker's owner, Francis Lynch, learned that BP had decided to replace the store on its property and to reconfigure the parking lot. BP erected a chain barricade across the driveway that connected the BP station and Decker's car wash and later built a solid wall there.

Decker brought this action seeking a declaratory judgment, a temporary restraining order, and damages. After a hearing, the trial court denied Decker's request for injunctive relief. After a second hearing to consider the parties' cross-motions for summary judgment, the trial court granted BP's motion and denied Decker's motion.

Decker asserts that, because Daly and Gulf Oil mutually agreed to link their properties with a driveway and to allow use by the other for ingress and egress and then Daly incurred expenses in the execution of the license, the license ripened into an easement running with the land which Decker is entitled to enforce. In the alternative, Decker asserts that in 2003 BP gave Decker a parol license to use the gas station property for ingress and egress, and similarly that it incurred expenses in the execution of the license which ripened into an easement running with the land.

Under the Statute of Frauds, an oral agreement conveying an interest in land is unenforceable. OCGA § 13-5-30(4). One limited exception to the Statute of Frauds is set out in OCGA § 44-9-4, as follows:

> A parol license to use another's land is revocable at any time if its revocation does no harm to the person to whom it has been granted. A parol license is not revocable when the licensee has acted pursuant thereto and in so doing has incurred expense; in such a case it becomes an easement running with the land.

This executed parol license doctrine is essentially one of estoppel.[2] As the Supreme Court of Georgia explained in a case upon which the Code section was based, "where acts have been done by one party, upon the faith of a license given by another, the [licensor] will be estopped from revoking it to the injury of the [licensee], and this even if the exercise of the right given by the license, is of a nature to amount to the enjoyment of an easement or other incorporated hereditament." *Sheffield v. Collier*, 3 Ga. 82, 87 (1847). A license subject to this exception is one such as permission to erect a building or other structure, "which in its own nature seems intended to be permanent and continuing." Id. at 86. In the case of such a license, the licensee would necessarily have to incur expense to execute the agreement and would sustain a resulting loss if the licensor were entitled to later revoke the license. Id.[3] When the enjoyment of a license must necessarily be preceded by the expenditure of money, and when the licensee "has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration." Id. at 88.[4] This is so because such a license "is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived." (Punctuation omitted.) Id. at 88-89. In other words, where the license has been executed, "in distinction from cases where it is executory only," it becomes irrevocable. Id. at 85.[5]

As noted in the Restatement, "[t]he power to dispense with the Statute [of Fraud]'s requirements to give effect to the intent of the parties [to an oral agreement to create a servitude] should be exercised with caution[,] because of the risk that exceptions will undermine the policies underlying the Statute of Frauds[,]" and only when necessary to prevent injustice. Restatement of the Law (Third) of Property: Servitudes, § 2.9(b). Where the execution of a parol license does not require erecting a structure on the licensor's land, Georgia courts have generally recognized the creation of an irrevocable easement only where the licensee's enjoyment of the license is necessarily preceded by some investment of funds which increases the value of the licensor's land to the licensor. *Cox v. Zucker*, 214 Ga. 44, 51-52(3), 102 S.E.2d 580 (1958) (despite the fact that in reliance on a license the licensee erected a building that could only be reached by crossing the licensor's property, the license was revocable where the licensee did nothing to improve the burdened estate); *Tift v. Golden Hardware Co.*, 204 Ga. 654, 667-669(6), 51 S.E.2d 435 (1949) (license was revocable where a hardware company built a warehouse in anticipation of using a spur track across the licensor's property but did nothing to enhance the value of the spur track on the subservient property). In these cases,

the mere fact that a licensee erects improvements upon his own land in the expectation of enjoying a parol license, and thereby incurs expense, is not enough to make the license irrevocable under OCGA § 44-9-4.[6]

To the extent Decker contends a license of ingress and egress granted to Daly ripened into an easement that runs with the land, there is no evidence that Daly built any structure or improvement on BP's land such as would bring it within the cases cited in note 5, supra. Furthermore, despite Daly's expenditures improving his own land in the expectation of enjoying the license, there is no evidence Daly invested a substantial amount in improving BP's land. As a result, we conclude that the undisputed evidence established that Daly did not act pursuant to the oral license of ingress and egress and in so doing incur expense in consequence of the license, as those terms are used in OCGA § 44-9-4. See *McCorkle v. Morgan*, 268 Ga. 730, 731, 492 S.E.2d 891 (1997) (where licensees used a parking lot for six years before incurring any expenses in connection with it, "the licensee's enjoyment of the license was not preceded necessarily by the expenditure of money," and, therefore, the license did not ripen into an easement pursuant to OCGA § 44-9-4). Before BP's predecessor-in-interest granted Daly the license, Daly operated a car dealership (and later Decker operated a car wash) on his property, and ingress and egress was on Piedmont Road. After BP revoked the license, Decker operated the existing car wash, and ingress and egress for Daly's property was on Piedmont Road. Because Daly's parol license to use BP's land did not ripen into an easement pursuant to OCGA § 44-9-4, it follows that BP was entitled to revoke the license.

To the extent Decker contends a license of ingress and egress granted directly to it ripened into an easement, there is no evidence that BP granted Decker any such license. OCGA § 44-9-4 "is operative only where there is an express oral license; [i]t does not apply to implied licenses[,]" as may be presumed from the acts of the licensor. *Berolzheimer v. Taylor*, 230 Ga. 595, 600, 198 S.E.2d 301 (1973). While there is evidence that Decker's owner believed and assumed that Decker had permission to use the gas station for ingress and egress, there is no evidence that an authorized agent of BP ever granted Decker *express* permission to do so.[7] It follows that BP was entitled to terminate Decker's use of the BP's property. Id.

Because no jury issue has been presented regarding whether any parol license to use the gas station property ripened into an easement running with the land, the trial court correctly granted BP's motion for summary judgment.

Judgment affirmed.

Andrews, P.J., and Adams J., concur.

---

1. In order to prevail on a motion for summary judgment under OCGA § 9-11-56,the moving party must show that there exists no genuine issue of material fact, and that the undisputed facts, viewed in the light most favorable to the nonmoving party, demand judgment as a matter of law. Moreover, on appeal from the denial or grant of summary judgment the appellate court is to conduct a de novo review of the evidence to determine whether there exists a genuine issue of material fact, and whether the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law.(Citations and punctuation omitted.) *Benton v. Benton*, 280 Ga. 468, 470, 629 S.E.2d 204 (2006).↩

1. See *Cherokee Mills v. Standard Cotton Mills*, 138 Ga. 856, 859-860(1), (2), 76 S.E. 373 (1912) (where one mill company granted another company a license to use a spur railroad track that crossed licensor's property, and in reliance thereon the licensee built a mill on its own property at great expense and thereby executed the license, the license ripened into an easement appurtenant to the land). See also, Restatement of the Law (Third) of Property: Servitudes, § 2.9 (2000 ed.); Herbert T. Tiffany and Basil Jones, 3 Tiffany Real Prop. § 834 (Revocability of license Effect of improvements by licensee) (1939).↩

1. As examples of licenses *not* subject to this exception, on the other hand, the Court noted "acts which consist in repetition, as to walk in a park, to use a carriage-way, to fish in the waters of another, or the like; which license, if countermanded, the party is but in the same situation he was before it was granted." *Sheffield v. Collier*, 3 Ga. at 86. See also *Strozzo v. Coffee Bluff Marina Property*, 250 Ga.App. 212, 215-216(2), 550 S.E.2d 122 (2001) (where the licensor expressly permitted the licensee to erect a gear shack on her riverfront property and to conduct its marine rescue operations from there, and licensee built the gear shack and thereby executed the license, which was "a license to construct something permanent and enduring attended with expense" and "not a mere license to walk in a park, to use a roadway, to fish in the waters of another, or the like," the license ripened into an easement).↩

1. See also *McCorkle v. Morgan*, 268 Ga. 730, 731, 492 S.E.2d 891 (1997) (OCGA § 44-9-4 "is based on the principle that a license becomes an agreement for a valuable consideration, and the licensee a purchaser for value, where the enjoyment of the license must necessarily be preceded by the expenditure of money") (citations and emphasis omitted).↩

1. See also *Bell Indus. v. Jones*, 220 Ga. 684, 686-688, 141 S.E.2d 533 (1965) (where a licensor granted a licensee permission to install a pipe on the licensor's land and to use it to dispose of its industrial waste water on the licensor's land, and the licensee expended money to install the pipe and thereby executed the license, the license ripened into an easement running with the land); *Mathis v. Holcomb*, 215 Ga. 488, 488-490(1), 111 S.E.2d 50 (1959) (where a licensor granted a licensee permission to build a private way on the licensor's land and to use it to pass from a public road to the licensee's back yard, and the licensee expended money to build the driveway and thereby executed the license, the license ripened into an easement running with the land); *Brantley v. Perry*, 120 Ga. 760, 761-762, 48 S.E. 332 (1904) (where a licensor granted a licensee permission to construct a ditch on the licensor's land and to use it to drain the licensee's land, and the licensee expended money to construct the ditch and thereby executed the license, the license ripened into an irrevocable easement); *Southwestern R. v. Mitchell*, 69 Ga. 114, 122-125(2) (1882) (where a licensor granted a licensee permission to erect a part of a mill dam on the licensor's land and to overflow a part of that land, and the licensee expended money to build the dam and thereby executed the license, the license became irrevocable); *Lowe's Home Centers v. Garrison Ridge Shopping Center*, 283 Ga.App. 854, 855-856, 643 S.E.2d 288 (2007) (where a licensor granted a licensee permission to install a sign on the licensor's property, and the licensee expended money to install the sign and thereby executed the license, the license ripened into an easement running with the land); *Hopkins v. Virginia Highland Assoc.*, 247 Ga.App. 243, 244-245(1), 541 S.E.2d 386 (2000) (where a licensor granted a licensee permission to install a sewer line across the licensor's property and to use it to connect with the municipal water system, and the licensee expended money to install the sewer line and thereby executed the license, the license ripened into an easement running with the land).↩

1. See also *Dolvin v. Caldwell*, 214 Ga. 687, 689-690(2), 107 S.E.2d 199 (1959) (approving this jury instruction: "[I]n cases where a person claims that he has an irrevocable parol license to use lands of another, the person claiming such right must show that he has invested some substantial amount in exercising the license on the land effected thereby, and expenditures made in connection with improvements on adjacent land of the one claiming the license are not to be considered as such expense as will prevent the revocation of such license, even though these improvements were made with the expectation of being able to continue using the license."); *Miller v. Slater*, 182 Ga. 552, 558-559(2), 186 S.E. 413 (1936) (license to use a neighbor's driveway was revocable, even though the plaintiff built a garage "so near to the driveway that it is impossible for her to drive a car in or out of the garage without at the same time using the way" on the licensor's property, based on the following factors: the driveway was already intact and suitable for use and there was no necessity for the licensee to incur any expense in passing over the driveway or in putting it in condition for such use; the

improvements the licensee made were on her own property "in the expectation of enjoying the license" and "did not enhance the value of the driveway in the slightest degree so far as the licensor was concerned"; there was nothing to show that the "location of the garage was actually necessary to the enjoyment of the license or that a different and equally suitable location could not have been selected"; and the licensee did not part with anything amounting to a consideration, in that she had surrendered no right and still had her lot and all of the improvements made thereon); *Blake v. RGL Assoc.*, 267 Ga.App. 709, 710(1), 600 S.E.2d 765 (2004) (where a licensor granted a parol license to cross the licensor's property to access an adjacent highway and the licensee incurred expenses in making necessary improvements both to its property and to the licensor's property, the license ripened into an easement).↩

1. Decker's owner deposed that, before leasing the subparcel from Daly, he "saw that cars were exiting onto [Pharr Road] – it was defacto an exit, so [he] imagined that that was something you could do." Use of the driveway connecting the parcels "didn't need to be discussed because it was defacto, a fact. There was no need… . Everybody knew … that the cars were going in both directions through this" driveway. Decker's owner further deposed that a man he "took to … be" a BP manager told him that BP's business had increased as a result of the opening of Decker's car wash and that someone a Decker employee "believed to be like an area manager type person" reportedly "discussed the beneficial effects of the [car wash] patrons going to purchase gas at the BP pumps." Pretermitting whether these statements were admissible, they do not amount to an express license to use BP's property.↩

5.2. Easements by Implication

Van Sandt v. Royster,

148 Kan. 495 (1938)

Guy Lamer and DeWitt M. Stiles, both of Iola, for appellant.

T. R. Evans, B. M. Dunham, and James A. Allen, all of Chanute, for appellees.

Allen, Justice.

The action was brought to enjoin defendants from using and maintaining an underground lateral sewer drain through and across plaintiff's land. The case was tried by the court, judgment was rendered in favor of defendants, and plaintiff appeals.

In the city of Chanute, Highland avenue running north and south intersects Tenth street running east and west. In the early part of 1904 Laura A. J. Bailey was the owner of a plot of ground lying east of Highland avenue and south of Tenth street. Running east from Highland avenue and facing north on Tenth street the lots are numbered, respectively, 19, 20 and 4. In 1904 the residence of Mrs. Bailey was on lot 4 on the east part of her land.

In the latter part of 1903, or the early part of 1904, the city of Chanute constructed a public sewer in Highland avenue, west of lot 19. About the same time a private lateral drain was constructed from the Bailey residence on lot 4 running in a westerly direction through and across lots 20 and 19 to the public sewer.

On January 15, 1904, Laura A. J. Bailey conveyed lot 19 to John J. Jones, by general warranty deed with usual covenants against encumbrances, and containing no exceptions or reservations. Jones erected a dwelling on the north part of the lot. In 1920 Jones conveyed the north 156 feet of lot 19 to Carl D. Reynolds; in 1924 Reynolds conveyed to the plaintiff, who has owned and occupied the premises since that time.

In 1904 Laura A. J. Bailey conveyed lot 20 to one Murphy, who built a house thereon and by mesne conveyances the title passed to the defendant Louise Royster. The deed to Murphy was a general warranty deed without exceptions or reservations. The defendant Gray has succeeded to the title to lot 4 upon which the old Bailey home stood at the time Laura A. J. Bailey sold lots 19 and 20.

In March, 1936, plaintiff discovered his basement flooded with sewage and filth to a depth of six or eight inches, and upon investigation he found for the first time that there existed on and across his property a sewer drain extending in an easterly direction across the property of Royster to the property of Gray. The refusal of defendants to cease draining and discharging their sewage across plaintiff's land resulted in this lawsuit.

The trial court returned findings of fact, from which we quote:

> The plaintiff and the defendants Louise Royster and Lael Bailey Gray are the present owners, respectively, of properties adjoining one another in Bailey's Addition to the City of Chanute, Kansas, on each of which properties there is a residence, the plaintiff being the owner of Lot 19, the defendant Louise Royster being the owner of part of Lot 20, and the defendant Lael Bailey Gray being the owner of Lot 4, part of original Lot 9 in Block 3, in said Addition. All of said properties front to the north on Tenth Street. Plaintiff's property is farthest west. Immediately adjoining it on the east is the Royster property and immediately adjoining the Royster property on the east is the Gray property. Immediately adjoining plaintiff's property on the west is Highland Avenue, a public street.
>
> 2. Laura A. J. Bailey was originally the owner of all the above described properties and other land adjacent thereto and prior to the summer of 1904 the only residence or dwelling house on any of said properties was the house on the property fartherest east, namely Lot 4, being the property now owned by Gray.
>
> 3. On January 15, 1904, Laura A. J. Bailey sold to John J. Jones said Lot 19 (and other land) and conveyed same to him by general warranty deed, and with usual covenants against encumbrances, and containing no exceptions or reservations whatsoever. The deed was duly recorded. John Jones erected a dwelling house on the north 156 feet of Lot 19. On January 12, 1920, John Jones conveyed the north 156 feet of Lot 19 to Carl D. Reynolds by general warranty deed containing usual covenants against encumbrances, and containing no exceptions or reservations whatsoever, but also included the "appurtenances thereunto belonging," etc. This deed was duly recorded. On November 7, 1934, Carl D. Reynolds conveyed said last described property to plaintiff by general warranty deed with usual covenants against encumbrances excepting only a mortgage thereon, but also including the "appurtenances thereunto belonging," etc. Plaintiff has owned and occupied said property ever since.
>
> 4. On April 14, 1904, Laura A. J. Bailey conveyed part of Lot 20 to W. P. Murphy who erected a dwelling house on the lot and later sold that property to W. E. Royster, conveying the same by general warranty deed without reservation but including the 'appurtenances thereunto belonging,' etc., and from said W. E. Royster the property passed to the defendant Louise Royster.
>
> 5. The defendant Lael Bailey Gray has succeeded to the title to Lot 4 upon which the old Bailey house stood at the time Laura Bailey sold the other lots.
>
> 6. In the latter part of the year 1903 or the early part of 1904 the City of Chanute extended its public sewer system and constructed a public sewer running north and south in Highland Avenue immediately west of Lot 19 above mentioned. When this public sewer was constructed a private sewer was laid from the old Bailey house on Lot 4 in a general westerly direction across Lots 20 and 19 to the public sewer in Highland Avenue and the old Bailey house was connected through this private sewer to the public sewer.

When the houses were erected on Lot 19 and Lot 20 respectively, these houses were connected with this private sewer, and the same has been in continuous use for all of said properties ever since.

7. At the time Laura A. J. Bailey sold Lot 19 to Jones she owned Lot 18 which lies south of Lots 19 and 20, extends in an east and west direction from the west boundary of Lot 4 (or original Lot 9) near the southwest corner thereof to Highland Avenue. The east boundary of Lot 18 is contiguous with the west boundary of original Lot 9 for a distance of at least 20 feet north from the southwest corner of said Lot 9. Lot 18 was not sold by Mrs. Bailey until November, 1905.

8. There is not now and was not at the time plaintiff purchased his property anything on record in the office of the Register of Deeds of the county pertaining to the private sewer above referred to.

9. At the time plaintiff purchased his property he and his wife made a careful and thorough inspection of the same, knew that the house they were buying was equipped with modern plumbing and knew that the plumbing had to drain into a sewer, but otherwise had no further knowledge of the existence of said lateral sewer.

10. That the lateral sewer in controversy was installed prior to the sale of the property by Mrs. Laura A. J. Bailey to John J. Jones on January 15, 1904; but if not, the said lateral sewer certainly was installed shortly after the sale to John J. Jones and with the knowledge and acquiescence of said John J. Jones, and that the said John J. Jones paid the said Mrs. Laura A. J. Bailey one-third of the cost of the installation of the said sewer.

11. That all of the original owners of the three properties in controversy, to-wit, Laura A. J. Bailey, John J. Jones and W. P. Murphy, had notice and knowledge of the existence of the lateral sewer in controversy, and all acquiesced in the use of the sewer by all parties, and the use of the sewer by the said parties and their successors in interest has been continuous from the time of its installation to the present time-a period of more than 33 years-and has been a mutual enterprise and the said lateral sewer was an appurtenance to the properties belonging to plaintiff and Louise Royster, and the same is necessary to the reasonable use and enjoyment of the said properties of the parties.

The drain pipe in the lateral sewer was several feet under the surface of the ground. There was nothing visible on the ground in the rear of the houses to indicate the existence of the drain or the connection of the drain with the houses.

As a conclusion of law the court found that "an appurtenant easement existed in the said lateral sewer as to all three of the properties involved in the controversy here." Plaintiff's prayer for relief was denied and it was decreed that plaintiff be restrained from interfering in any way with the lateral drain or sewer.

Plaintiff contends that the evidence fails to show that an easement was ever created in his land, and assuming there was an easement created, as alleged, that he took the premises free from the burden of the easement for the reason that he was a bona fide purchaser, without notice actual or constructive.

Defendants contend: (1) That an easement was created by implied reservation on the severance of the servient from the dominant estate of the deed from Mrs. Bailey to Jones; (2) there is a valid easement by prescription.

In finding No. 11, the court found that the lateral sewer "was an appurtenance to the properties belonging to plaintiff and Louise Royster, and the same is necessary to the reasonable use and enjoyment of the said properties of the parties."

As an easement is an interest which a person has in land in the possession of another, it necessarily follows that an owner cannot have an easement in his own land. *Johnston v. City of Kingman*, 141 Kan. 131, 39 P.2d 924, 98 A.L.R. 588; *Ferguson v. Ferguson*, 106 Kan. 823, 189 P. 925.

However, an owner may make use of one part of his land for the benefit of another part, and this is frequently spoken of as a quasi easement. "When one thus utilizes part of his land for the benefit of another part, it is frequently said that a quasi easement exists, and the part of the land which is benefited being referred to as the 'quasi dominant tenement' and the part which is utilized for the benefit of the other part being referred to as the 'quasi servient tenement.' The so called quasi easement is evidently not a legal relation in any sense, but the expression is a convenient one to describe the particular mode in which the owner utilizes one part of the land for the benefit of the other.

"If the owner of land, one part of which is subject to a quasi easement in favor of another part, conveys the quasi dominant tenement, an easement corresponding to such quasi easement is ordinarily regarded as thereby vested in the grantee of the land, provided, it is said, the quasi easement is of an apparent continuous and necessary character." 2 Tiffany, *Real Property* (2d Ed.) pp. 1272, 1273.

Following the famous case of *Pyer v. Carter*, 1 Hurl. & N. 916, some of the English cases, and many early American cases, held that upon the transfer of the quasi servient tenement there was an implied reservation of an easement in favor of the conveyor. Under the doctrine of *Pyer v. Carter*, no distinction was made between an implied reservation and an implied grant.

The case, however, was overthrown in England by *Suffield v. Brown*, 4 De G.J. & S. 185, and *Wheeldon v. Burrows*, L.R. 12 Ch.D. 31. In the former case the court said:

> It seems to me more reasonable and just to hold that if the grantor intends to reserve any right over the property granted, it is his duty to reserve it expressly in the grant, rather than to limit and cut down the operation of a plain grant (which is not pretended to be otherwise than in conformity with the contract between the parties), by the fiction of an implied reservation. If this plain rule be adhered to, men will know what they have to trust, and will place confidence in the language of their contracts and assurances.
>
> * * *
>
> But I cannot agree that the grantor can derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement which remains the property of him the grantor.

Many American courts of high standing assert that the rule regarding implied grants and implied reservations is reciprocal and that the rule applies with equal force and in like circumstances to both grants and reservations. *Washburn on Easements*, 4th Ed., 75; *Miller v. Skaggs*, 79 W.Va. 645, 91 S.E. 536, Ann.Cas.1918 D, 929.

On the other hand perhaps a majority of the cases hold that in order to establish an easement by implied reservation in favor of the grantor the easement must be one of strict necessity, even when there was an existing drain or sewer at the time of the severance.

Thus in *Howley v. Chaffee et al.*, 88 Vt. 468, 474, 93 A. 120, 122, L.R.A.1915D, 1010, the court said:

> With the character and extent of implied grants, we now have nothing to do. We are here only concerned with determining the circumstances which will give rise to an implied reservation. On this precise question the authorities are in conflict. Courts of high standing assert that the rule regarding implied grants and implied reservation of "visible servitudes" is reciprocal, and that it applies with equal force and in like circumstances to both grants and reservations. But upon a careful consideration of the whole subject, studied in the light of the many cases in which it is discussed, we are convinced that there is a clear distinction between implied grants and implied reservations, and that this distinction is well founded

> in principle and well supported by authority. It is apparent that no question of public policy is here involved, as we have seen is the case where a way of necessity is involved. To say that a grantor reserves to himself something out of the property granted, wholly by implication, not only offends the rule that one shall not derogate from his own grant, but conflicts with the grantor's language in the conveyance, which by the rule is to be taken against him, and is wholly inconsistent with the theory on which our registry laws are based. If such an illogical result is to follow an absolute grant, it must be by virtue of some legal rule of compelling force. The correct rule is, we think, that where, as here, one grants a parcel of land by metes and bounds, by a deed containing full covenants of warranty and without any express reservation, there can be no reservation by implication, unless the easement claimed is one of "strict necessity," within the meaning of that term as explained in *Dee v. King*, 73 Vt. 375, 50 A. 1109.

See, also, *Brown v. Fuller*, 165 Mich. 162, 130 N.W. 621, 33 L.R.A.,N.S., 459, Ann.Cas.1912C, 853. The cases are collected in 58 A.L.R. 837.

We are inclined to the view that the circumstance that the claimant of the easement is the grantor instead of the grantee, is but one of many factors to be considered in determining whether an easement will arise by implication. An easement created by implication arises as an inference of the intentions of the parties to a conveyance of land. The inference is drawn from the circumstances under which the conveyance was made rather than from the language of the conveyance. The easement may arise in favor of the conveyor or the conveyee. In the Restatement of Property, Tentative draft No. 8, Section 28, the factors determining the implication of an easement are stated:

> Sec. 28. Factors Determining Implication of Easements or Profits.
>
> In determining whether the circumstances under which a conveyance of land is made imply an easement or a profit, the following factors are important: (a) whether the claimant is the conveyor or the conveyee, (b) the terms of the conveyance, (c) the consideration given for it, (d) whether the claim is made against a simultaneous conveyee, (e) the extent of necessity of the easement or the profit to the claimant, (f) whether reciprocal benefits result to the conveyor and the conveyee, (g) the manner in which the land was used prior to its conveyance, and (h) the extent to which the manner of prior use was or might have been known to the parties.

Comment (j) under the same Section, reads:

> The extent to which the manner of prior use was or might have been known to the parties. The effect of the prior use as a circumstance in implying, upon a severance of possession by conveyance, an easement or a profit results from an inference as to the intention of the parties. To draw such an inference, the prior use must have been known to the parties at the time of the conveyance, or, at least, have been within the possibility of their knowledge at the time. Each party to a conveyance is bound not merely to what he intended, but also to what he might reasonably have foreseen the other party to the conveyance expected. Parties to a conveyance may, therefore, be assumed to intend the continuance of uses known to them which are in a considerable degree necessary to the continued usefulness of the land. Also they will be assumed to know and to contemplate the continuance of reasonably necessary uses which have so altered the premises as to make them apparent upon reasonably prudent investigation. The degree of necessity required to imply an easement in favor of the conveyor is greater than that required in the case of the conveyee (see Comment b). Yet, even in the case of the conveyor, the implication from necessity will be aided by a previous use made apparent by the physical adaptation of the premises to it.

Illustrations:

9. A is the owner of two adjacent tracts of land, Blackacre and Whiteacre. Blackacre has on it a dwelling house. Whiteacre is unimproved. Drainage from the house to a public sewer is across Whiteacre. This fact is unknown to A who purchased the two tracts with the house already built. By reasonable effort, A might discover the manner of drainage and the location of the drain. A sells Blackacre to B who has been informed as to the manner of drainage and the location of the drain and assumes that A is aware of it. There is created by implication an easement of drainage in favor of B across Whiteacre.

10. Same facts as in Illustration 9, except that both A and B are unaware of the manner of drainage and the location of the drain. However, each had reasonable opportunity to learn of such facts. A holding that there is created by implication an easement of drainage in favor of B across Whiteacre is proper.

At the time John J. Jones purchased lot 19 he was aware of the lateral sewer, and knew that it was installed for the benefit of the lots owned by Mrs. Bailey, the common owner. The easement was necessary to the comfortable enjoyment of the grantor's property. If land may be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied in favor of either the grantor or grantee on the basis of necessity alone. This is the situation as found by the trial court.

Neither can it be claimed that plaintiff purchased without notice. At the time plaintiff purchased the property he and his wife made a careful and thorough inspection of the property. They knew the house was equipped with modern plumbing and that the plumbing had to drain into a sewer. Under the facts as found by the court, we think the purchaser was charged with notice of the lateral sewer. It was an apparent easement as that term is used in the books. *Wiesel v. Smira*, 49 R.I. 246, 142 A. 148, 58 A.L.R. 818; 19 C.J. 868.

The author of the annotation on easements by implication in 58 A.L.R. at page 832, states the rule as follows: "While there is some conflict of authority as to whether existing drains, pipes, and sewers may be properly characterized as apparent, within the rule as to apparent or visible easements, the majority of the cases which have considered the question have taken the view that appearance and visibility are not synonymous, and that the fact that the pipe, sewer, or drain may be hidden underground does not negative its character as an apparent condition; at least, where the appliances connected with and leading to it are obvious."

As we are clear that an easement by implication was created under the facts as found by the trial court, it is unnecessary to discuss the question of prescription.

The judgment is affirmed.

Harvey, J., concurs in the order of affirmance, but not in all that is said in the opinion.

Wedell, J., not sitting.

5.3. Easements by Necessity

Pierce v. Wise,

639 S.E.2d 348 (Ga. Ct. App. 2006)

Greer, Klosik, Daugherty, Swank & McCune, Frank J. Klosik, Jr., Alina A. Krivitsky, Atlanta, for appellant.

Charles D. Joyner, Buford, for appellees.

Phipps, Judge.

… .

Pierce owns a triangular 0.40-acre parcel of property located in Lot 31 of Lawson Manor Subdivision. He bought the property for $10,000 in 2000. The adjacent Lots 30 and 32 are owned by Wise and Hopeful, respectively. According to Pierce, the tip of his triangular parcel touches the adjacent public roadway, Lawson Drive, at a point so narrow that it does not permit him to access the roadway without traversing either Wise's property on the one side or Hopeful's property on the other. According to Pierce, the base of the triangle gives him approximately "100 foot coverage of waterfront on Lake Lanier."

Following his purchase, the United States Army Corps of Engineers allowed Pierce to build a boat dock in Lake Lanier, thereby giving Pierce access to his property via the waterway. In addition, Wise orally gave Pierce permission to cross over Wise's Lot 30 to gain access to Pierce's Lot 31 via Lawson Drive. Subsequently, however, Wise and Hopeful sent Pierce letters instructing him to cease and desist from gaining access to his property from Lawson Drive over their properties.

Evidence was presented showing that Pierce currently accesses his property by land by parking at the end of Lawson Drive and walking about 650 to 700 feet along the shore of Lake Lanier through Army Corps of Engineers property down a path that is between four and ten feet wide depending on the height of the lake water. As a member of the public, Pierce may use this pathway and remove minor landscaping insofar as that obstructs his ability to traverse the pathway by foot. But he cannot construct improvements to the pathway to provide vehicular access.

Evidence sought to be admitted by Pierce showed that Wise's ex-wife's mother acquired ownership of Lots 30, 31, and 32 in 1986; that she had the property surveyed in 1993; and that Lot 30 (which had been a rectangular lot with adequate access to Lawson Drive) became a triangular-shaped lot with no usable road frontage only as a result of an error in the survey. Hopeful, through its owner Newt Anderson, subsequently acquired Lot 32 as a real estate investment in foreclosure proceedings. After purchasing the property, Anderson discovered that Lot 32 included property that he thought would have been in Lot 31. Wise acquired Lot 30 from his ex-wife. For over 25 years, he had used the property as a lake house and then as his primary residence.

1. Pierce first contends that the trial court erred in denying his pretrial motion for partial summary judgment, as well as his motion for directed verdict at the conclusion of the presentation of evidence at trial, on the question of necessity for the private way.

OCGA § 44-9-40(b) permits any person or corporation who owns real estate in this state to file a petition in the superior court of the county having jurisdiction praying for a judgment condemning an easement of access, ingress, and egress over and across the property of another. To prove the necessity of such a private way, OCGA § 44-9-40(b) requires the petitioner or condemnor to show he has no other reasonable means of access to his property, i.e., that he is landlocked.[1] OCGA § 44-9-40(b) additionally authorizes the court to find that the condemnation and declaration of necessity constitute an abuse of discretion and to enjoin the proceeding based on a finding that the exercise of such right of condemnation by the condemnor is "otherwise unreasonable."[2]

Intl. Paper Realty Corp. v. Miller[3] addressed the issue of whether, under the statute, navigable waters alone may afford a person "reasonable" access to his property. *Miller* held that in this day and age, a navigable stream is seldom considered a reasonable way to travel to and from one's property. Accordingly, *Miller* decided to treat property to which there is no access other than by navigable waterway as property to which there is presumptively no *reasonable* means of access for purposes of proving necessity under OCGA § 44-9-40(b).

> Thus where the condemnor establishes that the only access to his property is by way of navigable waters, he has established a prima facie case that he has no reasonable means of access under OCGA § 44-9-40(b). The burden then shifts to the condemnee to go forward with the evidence and demonstrate that access

to the navigable waters constitutes a reasonable means of access under the peculiar circumstances of the case.[4]

Mersac, Inc. v. Nat. Hills Condo. Assn.[5] held that where a property owner landlocks himself voluntarily or as a result of negligence in selling off surrounding property and failing to reserve an easement, condemnation of a private way of necessity over lands of another may be found to be "otherwise unreasonable" under OCGA § 44-9-40(b). *Blount v. Chambers*[6] found declaration of a private way unreasonable where the petitioners had other, albeit more inconvenient, means of access to their property and condemnation of the private way would have greatly inconvenienced the condemnees.

Clearly, Pierce has no vehicular access to his property; his pedestrian access by land either is extremely cumbersome and inconvenient via the Lake Lanier shoreline or is limited to no more than a two-foot gap between his lot and one of the adjacent lots along Lawson Drive; and his only remaining access is by the navigable waters of Lake Lanier. Unlike the petitioner in *Mersac*, Pierce did not landlock himself either voluntarily or negligently by failing to reserve an easement. Property owners' "actions in voluntarily creating their hardship are distinguishable from cases [such as this] wherein the landowner purchases property with knowledge that it is landlocked. In such a case, the purchaser's knowledge does not preclude a finding of 'strict necessity.' ..."[7] The law of this state gives a property owner the right to condemn an easement over his neighbors' property if he needs that land as a means of ingress and egress to his property and if condemnation of the easement would not unreasonably inconvenience them. Unquestionably, Pierce needs the easement to provide vehicular access to his property. And, unlike in *Blount*, no undue inconvenience to the condemnees appears. In fact, evidence proffered by Pierce shows that all three lots were previously rectangularly shaped, but became irregularly reconfigured so as to deny his tract adequate access to Lawson Drive only as a result of a surveying error. Grant of the private way would simply restore his property's prior access. The trial court thus erred in denying Pierce's motions for partial summary judgment and directed verdict.

... .

---

1. *Intl. Paper Realty Corp. v. Miller*, 255 Ga. 676, 677, 341 S.E.2d 445 (1986).↩

1. *Mersac, Inc. v. Nat. Hills Condo. Assn.*, 267 Ga. 493, 494(1), 480 S.E.2d 16 (1997); see *Blount v. Chambers*, 257 Ga.App. 663, 572 S.E.2d 32 (2002).↩

1. Supra.↩

1. 255 Ga. at 677-678, 341 S.E.2d 445.↩

1. Supra.↩

1. Supra.↩

1. *Graff v. Scanlan*, 673 A.2d 1028, 1035, n. 12 (Pa.Commw.Ct.1996) (citation omitted).↩

5.4. Scope and Overburdening

Cox v. Glenbrook Company,

371 P.2d 647 (Nev. 1962)

Bible, McDonald & Jensen and Donald L. Carano, Reno, for appellants.

Laxalt & Laxalt, Carson City, for respondent.

Thompson, Justice.

In this case Glenbrook Company, a family corporation, by complaint, and Cox and Detrick, copartners, by answer and counterclaim, each request a declaratory judgment as to the scope and extent of a certain right-of-way berein referred to as the 'Quill Easement,' granted Henry Quill by the Glenbrook Company in 1938. The conveying instrument reads:

> That said grantor, in consideration of the sum of ten dollars ($10.00), lawful money of the United States of America, to it in hand paid by the grantee, receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey to the said grantee an easement and right-of-way, with full right of use over the roads of the grantor as now located or as they may be located hereafter (but such relocation to be entirely at the expense of the grantor) from the State Highway known as U. S. Route 50 to the following described property: [description of Quill property]
>
> To have and to hold said right-of-way and easement unto the said grantee, his heirs and assigns forever.

1. The Facts.

The relevant facts are not disputed. The Quill property contains 80 acres. Henry Quill died in 1943. In 1945 the administratrix of his estate sold the property, with appurtenances, to Kenneth F. Johnson for $8,600. In 1960 Johnson sold the property to Cox and Detrick for $250,000, $50,000 down, with the balance secured by trust deed and payable over an extended period.

Cox and Detrick propose to subdivide their property into parcels of one acre or more, resulting in a minimum of 40 or a maximum of 60 separate parcels.[1] The building on each parcel is to be limited to a residence and a guesthouse. Permanent, as distinguished from seasonal, homes are planned. A commercial development of the property is not contemplated. Zoning will permit the proposed development. Cox and Detrick have incurred expenses of about $17,000 in preliminary development work, including leveling of the 'back road,' drilling a well, testing the soil, and staking out four one-acre parcels which were released from the deed of trust. In leveling the 'back road,' four pieces of equipment were taken on a transport from U. S. Highway 50 to said road. In doing the work some trees were 'barked' and at least two trees were knocked down. The 'back road' was too narrow to permit passage of the caterpillars. An advertising program to sell the individual parcels was commenced. Cox and Detrick anticipate a fully developed subdivision in ten years. The 80 acres are said to be surrounded on two sides by property owned by George Whittel, and on two sides by the property of Glenbrook Company. The Quill Easement is the only existing ingress to and egress from that tract.

The property of Glenbrook Company fronts on Glenbrook Bay, Lake Tahoe. For more than 25 years it has operated a resort business. Its facilities consist of a beach, approximately 30 guest cottages, a tennis court, riding stables, foot paths for hiking, horse trails for riding, a golf course, a post office, a rodeo area, a service station, a bar, and a dining room and lounge at the Glenbrook Inn. The golf course may be used by nonguests upon paying a higher green fee. The bar is open to the public, as is the dining room when not completely reserved by guests. There is no gambling. Glenbrook is operated on a seasonal basis from mid-June through September and is widely known as a beautiful summer vacation resort for families, many of whom return year after year. The atmosphere sought to be maintained is that of peace, seclusion and quiet. The roads through the property are generally unpaved except for the main road from U. S. Highway 50 to the golf course. At the entrance to the main road is a sign stating that permission to pass over is revocable at any time. The main road is the only way in or out from the

Glenbrook properties. In years past, from time to time, Glenbrook Company has sold small parcels of its property to individuals. In each instance it has granted the purchaser a right-of-way for ingress and egress.

The following rought sketch will, perhaps, be of some assistance.

To get to the Cox and Detrick property one may take either the 'golf course road' or the 'back road.' Before this action started, the 'golf course road' was fenced off at the point indicated. A portion of the 'back road' was built in 1936 to provide a way to water tanks which supplied water for the solf course. In the late 1930's it was extended to the Quill (now Cox and Detrick) properties. Glenbrook Company, because of friendship with Quill, supplied the tractor and blade used in so extending the road. The road was, and is, narrow and unpaved. In most places it is wide enough for only one car. Trees, rocks and manzanita generally border it. There is an occasional 'turn out.' A worker, who extended the road to the Quill property in the late 1930's, stated that Quill just wanted 'a rought road, so that he could go on up with a car.'Cox frankly stated that he would like to use the 'back road' if it 'were passable,' and that he definitely wanted to widen the road. That road has seldom been used by anyone except the four or five families having homes along its course, and their guests.

2. The lower court's judgment.

After trial before the court without a jury, judgment was entered declaring that the Quill Easement is limited in three respects: (a) 'to such uses as are and will be reasonably consistent with the use to which the servient property is employed, that is, a conservative, family, mountain resort operation, and is further limited, as to reasonable use, to the use contemplated in the original grant to Quill, that is, access to and egress from the entire dominant parcel by a single family in occupancy, and their guests'; (b) 'to use of the Glenbrook roads as those roads are presently constructed and maintained, or as the Glenbrook Company by its own action or by mutual agreement with interested parties, may hereafter locate and construct roads in the Glenbrook estate'; and (c) that 'The proposed use of the so-called Quill Easement by the defendants herein, that is, the use of the Glenbrook roads by purchasers of subdivided parcels of the former Quill property, would constitute an illegal and unjustified burden and surcharge upon the servient estate.'

3.Area of contention.

The primary contentions which we are called upon to resolve are: first, whether the Quill conveyance with regard to its extent is clear and without ambiguity; and, second, whether the limitations of its use placed thereon by the lower court are justified by the law and the facts presented. The assignments of error by appellants Cox and Detrick are primarily directed to these two areas of contention and related matters. However, they also assigned, as error, two incidental points which are referred to and disposed of by footnote.[2]

4. Is the Quill conveyance clear as to its extent?

We have heretofore quoted the Quill Easement. By its terms the grantor conveyed 'an easement and right-of-way, with full right of use over the roads of the grantor as now located or as they may be located hereafter... from the State Highway known as U. S. Route 50 to the following described property: ...' The trial court announced in a conclusion of law that the terms of the grant are not so clear and precise as to exclude interpretation regarding its true extent and limit. The appellant subdividers urge that the meaning of the conveyance is clear; that 'full right of use' cannot mean a restricted or limited use; that the lower court should not have looked to extrinsic evidence to aid it in ascertaining the parties' intention at the time the grant was made. On the other hand, Glenbrook Company argues that the phrase 'full right of use' must be considered in the light of circumstances existing at the time the grant was made, and the actual use of the way thereafter; that such circumstances are relevant and admissible to aid the court in ascertaining the extent of an easement created by conveyance.

No issue regarding admissibility of evidence was raised during trial. Objection was not made to any of the evidence offered, except as to testimony relating to whether the grant was gratuitously made, which we have al-

ready discussed.[3] Yet the court below, by way of a conclusion of law after trial, held that it could refer to 'extrinsic evidence' for the purpose of interpreting the meaning of the grant with regard to its 'true extent and limits.' The record does not reveal what 'extrinsic evidence' was considered by the lower court for this purpose, and we do not propose to speculate in this connection.

By the phrase 'extent of an easement' is meant the scope of the privilege of use authorized by the easement. Here the grantor conveyed an easement with 'full right of use.' To our mind, that phrase is clear and without ambiguity. It may not, under the veil of interpretation, be considered to mean a 'restricted right of use.' Keeler v. Haky, 160 Cal.App.2d 471, 325 P.2d 648. In Keeler, the grantor gave 'the full and free right, to pass and repass along, over and upon said private road.' The court there said: 'The language of the grant deed, dated April 17, 1934, is clear and free from ambiguity and uncertainty and does not create such a condition as to require or authorize the court to consider extrinsic evidence as to the meaning of the written agreement between the parties.'Furthermore, the court held that the right to pass and repass over the private road was unrestricted.

The process which creates an easement necessarily fixes its extent. The extent of an easement created by prescription, is fixed by the use which created it. Likewise, the extent of an easement created by conveyance is fixed by the conveyance, Restatement, property, s 482, comment (a), at p. 3010, if clear and unambiguous.[4]

We therefore conclude that the trial court committed error in deciding that the phrase 'full right of use' was subject to judicial interpretation. This error probably resulted in the restrictions placed upon the Quill Easement by the judgment entered. However, we cannot be certain that this is so. In any event, it is our view that the judgment is too restrictive in certain respects, incomplete in others, and premature as to a third aspect of the litigation. It will be our purpose to point out wherein the judgment imposes unwarranted restrictions upon the possessors of the dominant tenement, to define the rights of the parties in the areas where the judgment is silent, and announce why, as to a certain phase of this case, a definitive determination cannot yet be made.

5.The unwarranted restrictions.

(A)

We shall first discuss that portion of the judgment restricting the use to ingress to and egress from the entire dominant parcel 'by a single family in occupancy and their guests.'Such a restriction, in our view, destroys the appurtenant character of the easement. Yet, there can be no question but that the Quill Easement was appurtenant to the 80 acre tract then owned by him. The terms of the conveyance, 'to have and to hold said right-of-way and easement unto the said grantee, his heirs and assigns forever', make it clear that one who succeeds to the possession of the dominant tenement, succeeds as well to the privileges of use of the servient tenement authorized by the conveyance. Furthermore, those who succeed to the possession of each of the parts into which the dominant tenement may be subdivided, also succeed to such privileges of use, unless otherwise provided by the terms of the conveyance. Bang v. Forman, 244 Mich. 571, 222 N.W. 96; Crawford Realty Company v. Ostrow (R.I.1959), 150 A.2d 5;Restatement, Property, s 488, comments (b) and (c); Akers v. Baril, 300 Mich. 619, 2 N.W.2d 791; Hewitt v. Perry, 309 Mass. 100, 34 N.E.2d 489; Martin v. Music (Ky.1953), 254 S.W.2d 701; Annots. 8 A.L.R. 1368, 34 A.L.R. 972. The Quill conveyance does not contain a restriction that the easement granted is to be appurtenant to the dominant estate only while such estate remains in single possession, and none may be imposed by judicial declaration.

(B)

The judgment further restricts the use of the easement to 'use of the Glenbrook roads as those roads are presently constructed and maintained.'We are uncertain as to the precise meaning of this restriction. If such language prohibits the owner of the dominant estate from making any improvements or repairs of the way, it is too restrictive. As a general rule, the owner of an easement may prepare, maintain, improve or repair the way in a manner and to an extent reasonably calculated to promote the purposes for which it was created. The owner may

not, however, by such action, cause an undue burden upon the servient estate, nor an unwarranted interference with the independent rights of others who have a similar right of use.[5] Annot. 112 A.L.R. 1303. The action of Cox and Detrick in leveling or 'rough grading' the 'back road,' to the extent that it was confined to the area within the exterior borders of the road as they existed when the easement was originally granted, was an improvement reasonably calculated to promote the purposes for which the easement was created. Such leveling or rough grading as so confined, would not, in itself, cause an undue burden upon the servient estate, nor constitute an unwarranted interference with the easement rights of other private property owners.

However, their conduct in attempting to widen the way is another matter. A careful study of the record makes it clear that the ultimate intention of the subdividers is to widen the 'back road' in order that two cars going in opposite directions may pass comfortably at all points along its course. The conveying instrument does not specify the width of the way expressly; it does, however, refer to the 'roads as now located.' The 'back road' as it existed at the time of the grant of easement, was described as a 'small road,' and wide enough for just one car. The record does not disclose that the predecessors of Cox and Detrick ever sought or attempted to widen the 'back road.' There is no evidence tending to indicate that either Glenbrook Company or Henry Quill contemplated or intended a wider road than existed when the grant was made. When the width is not specified, the conveying instrument must be construed in the light of the facts and circumstances existing at its date and affecting the property, the intention of the parties being the object of inquiry. Annot. 28 A.L.R.2d 253. Lipsky v. Heller, 199 Mass. 310, 85 N.E. 453; Dunham v. Dodge, 235 Mass. 367, 126 N.E. 663; Drummond v. Foster, 107 Me. 401, 78 A. 470. Indeed, it is sometimes held, as a matter of law, that where the width of a right-of-way is not specified in the grant, it is limited to the width as it existed at the time of the grant. Good v. Petticrew, 165 Va. 526, 183 S.E. 217. We need not go that far. We believe that the intention of the parties at the time of the grant, when there is evidence to indicate such intention, controls as to width.[6]

As already stated, the only evidence in the record with reference to the 'back road' indicates that Henry Quill desired a way wide enough for one car; that such was the character of the 'back road' at that time, with occasional 'turn outs.' We must conclude, therefore, that such was the parties' intention in 1938 when the grant was made. If the width of the way is what the lower court had in mind when it restricted the easement to 'use of the Glenbrook roads as those roads are presently constructed and maintained' (the record revealing no substantial change from 1938 to time of trial, except for the work of Cox and Detrick before mentioned), then we find ourselves in accord.

6.Area wherein judgment is silent.

Glenbrook Company erected a fence or barrier across the 'golf course road' at or near the point indicated on the sketch. Cox and Detrick desire permission to use that road. They removed the barrier, but it was again erected by Glenbrook Company. The predecessors of Cox and Detrick used the 'back road' for ingress and egress; the 'golf course road' was, however, used occasionally. The judgment belower does not touch on this aspect of the case.

The conveyance gave full right of use over 'the roads.' Both roads existed at that time. However, the conveyance also permitted relocation of the roads by Glenbrook Company at its own expense.

The evidence purpose of the conveyance is to assure ingress to and egress from the dominant parcel, over the servient estate, to U. S. Highway 50. It is admitted by Cox and Detrick that Glenbrook Company could discontinue the use of, or barricade the existing roads, and relocate them without infringing upon the Quill Easement so long as ingress and egress was given to the dominant parcel over the roads as relocated. The action by Glenbrook Company in barricading the 'golf course road' is, to a degree, a 'relocation' of that portion of the right-of-way, and authorized by the terms of the conveyance. Cf. Heyna v. Lyons, 228 Ky. 211, 14 S.W.2d 766; Lyon v. Lea, 84 Me. 254, 24 A. 844. The purpose of the conveyance is not frustrated by such conduct.

7.Area wherein judgment is premature.

The judgment entered also declared that the proposed use of the Quill Easement would constitute an illegal burden and surcharge upon the servient estate. This declaration, we believe, deals with the subject with which the parties are most deeply concerned. They earnestly desire a specific declaration of their legal rights arising out of the Quill conveyance in order that their future courses of action may be planned. Though this be so, every judgment following a trial upon the merits must be based upon the evidence presented; it cannot be based upon an assumption made before the facts are known or have come into existence. The announced intention by the owners of the dominant estate as to their proposed future use of the easement does not, of itself, constitute an unreasonable burden upon the servient estate. When the facts concerning that use become known, an unreasonable burden upon the servient estate may, or may not result. That determination must await the presentation of evidence then in existence.

NRS 30.110 of the Uniform Declaratory Judgments Act contemplates that the determination of an issue of fact is to be tried and determined in the same manner as issues of fact are tried and determined in other civil actions. All parties concede that the issue as to whether the actual use to which an easement is devoted, constitutes an unreasonable burden upon the servient estate, is primarily a question of fact and not of law. The authorities so hold. Bang v. Forman, 244 Mich. 571, 222 N.W. 96, a subdivision case, where the court said, 'The extent to which the use of the easement had been increased was a question of fact for the court.'; Wall v. Rudolph, Cal.App., 18 Cal.Rptr. 123, 131,'Ordinarily the question of whether there has been an unreasonable use of an easement is one of fact...'; Siedler v. Waln, 266 Pa. 361, 109 A. 643, 645, 8 A.L.R. 1363, where the court stated, 'While 'it is difficult, if not impossible, to lay down a clear and definite rule to determine what may be construed a reasonable and proper use [of an easement], as distinguished from an unreasonable and improper one, and such questions must, of necessity, be usually left to the determination of a jury or the trial court, as questions of fact'..., here the chancellor has found the facts against defendants; and we are convinced of reversible error in that regard.'

A distinction must be drawn between the construction of a writing as contemplated by NRS 30.040 of the Uniform Declaratory Judgments Act, and the determination of an issue of fact provided for by NRS 30.110 of that act. As applied to the case before us, matters respecting the extent of the privilege to use the easement are governed by the terms of the instrument itself, if mentioned. The phrase 'full right of use' as used therein we have declared to be clear, and not the subject of interpretation. On the other hand, the problem respecting the width of the way, which was not designated by the instrument itself, was the subject of determination based upon factual information in existence and received during trial. The conveying instrument was, therefore, interpreted to mean the width of the way as it existed at the time of the grant. Each of these matters dealt with the extent of the privilege of use.

However, problems arising from the actual use of the way as distinguished from the privilege to use it, do not, in most cases, depend upon a construction of the conveying instrument, but rather upon the consequences resulting from such actual use. This being so, factual circumstances which may arise in the future cannot be fairly determined now. As to this phase of the case we are asked to make a hypothetical adjudication, where there is presently no justiciable controversy, and where the existence of a controversy is dependent upon the happening of future events. Cf. Prashker v. United States Guarantee Company, 1 N.Y.2d 584, 154 N.Y.S.2d 910, 136 N.E.2d 871. A declaratory judgment should deal with a present, ascertained or ascertainable state of facts. See Hunt v. Smith (Fla.App.1962), 137 So.2d 232, where plaintiff asked the court to decree that it would have an easement of necessity if certain events occurred in the future.

Indeed, Glenbrook Company has stated that its purpose in initiating this suit is not to enjoin the proposed subdivision. It is vitally interested, however, in maintaining the atmosphere of peace, seclusion and quiet for which it is widely known. Whether a subdivision, on the one hand, can coexist with the maintenance of such an atmosphere, on the other, cannot now be determined because of the lack of sufficient evidence. Consequently, a judgment cannot now be announced which will supply all of the answers desired by the parties. For example: Suppose we

were to assume a completed subdivision, 40 or 60 homes with guesthouses, within 10 years, and declared, at this time, that the use of the Quill Easement by the possessors of the subdivided parcels, would unreasonably burden the servient estate. Such a declaration by us would not determine whether such use by a lesser number would likewise surcharge the servient estate. Nor can we forecast whether the character of Glenbrook will remain the same or change within the next 10 years. There is no feasible method, at this time, by which we can declare in advance the point at which the burden upon the servient estate becomes unreasonable. Such court declaration must await the knowledge and presentation of proper evidence. In our judgment the lower court erred in declaring that the proposed use of the Quill Easement would constitute an unreasonable burden upon the servient estate, in the absence of existing evidence. It should have done no more than to announce, in general terms, the applicable legal principle within which a subsequent factual determination could be made if occasion therefor arises.

Conclusions:

From the foregoing it is apparent that the parties seek a declaration of rights in the following respects:

1. The scope and extent of the easement as described by the words 'full right of use' in the conveying instrument.

2. The legal right, if any, of the owners of the easement to maintain, repair and improve the way.

3. The legal right, if any, of the owners of the easement to widen the way.

4. The legal right, if any, of the owner of the servient estate to barricade that portion of the way referred to as the 'golf course road.'

5. A declaration now as to whether uses of the way, concomitant with a future proposed subdivision, will, if completed, or during the course of its development, cause an unreasonable burden upon the servient estate.

As to these matters, we conclude:

First: The privilege of use of the Glenbrook roads as located on January 7, 1938 (the date of the grant of easement) is not restricted by the terms of the grant, and is appurtenant to the dominant estate, and may be enjoyed by those who succeed to the possession of the dominant estate in its entirety or by those who succeed to the possession of the parts into which such estate may be subdivided.

Second: The owners of the easement may maintain, repair and improve the way in a manner reasonably calculated to promote the purposes for which the easement was created, provided, however, (a) such maintenance, repair or improvement is confined to the area within the exterior borders of the way as it existed on January 7, 1938 (the date of the grant of easement); (b) that such maintenance, repair, or improvement will not cause an undue burden upon the servient estate; (c) that such maintenance, repair or improvement will not cause an unwarranted interference with the independent rights of others who have a similar right of use.

Third: The owners of the easement may not widen the way, its width being limited, by reason of the evidence introduced, to the width of the way on January 7, 1938 (the date of the grant of easement); and, insofar as the portion of the way herein referred to as the 'back road' is concerned, that width is sufficient only for one car with occasioned 'turn outs.'

Fourth: The owner of the servient estate has the right to relocate the way at its own expense, which right includes the right to barricade that portion of the existing way herein referred to as the 'golf course road.'

Fifth: The owners of the easement may not, by reason of their proposed subdivision development, or otherwise, cause an undue burden upon the servient estate, or an unwarranted interference with the independent rights of others who have a similar right of use. Whether such a burden or interference will occur cannot be conclusively declared upon existing evidence. In the event the owners of the easement proceed with their announced plan, their use of the way is limited to the extent herein noted. We believe it proper, however, at this time, to note that, should they proceed with their proposed plan, the trier of the facts in subsequent litigation, if it occurs, might or might not determine upon evidence then existing, that their use of the way causes an unreasonable burden upon the servient

estate or an unwarranted interference with the independent rights of others who have a similar right of use; hence, any further action on their part to develop their property in the manner proposed is subject to such contingency.

Modified and remanded for judgment in accordance with this opinion. Each party shall bear his own costs on this appeal.

McNamee, J., concurs

I concur in the conclusions reached by Mr. Justice Thompson, but fear that some of the expressions used in the opinion might in some future case be taken to limit unduly the power of the court in actions under the Declaratory Judgments Act. While it is undoubtedly true that 'factual circumstances which may arise in the future cannot be fairly determined now,' it is likewise true that an expressed purpose and intention to perform acts that will, under satisfactory proof, surcharge the servient tenement with an unreasonable burden is a present threat of invasion of plaintiff's rights and subject to declaratory determination. It need not await the event.NRS 30.030, 30.040, 30.050, 30.070, 30.140. See Kress v. Corey, 65 Nev. 1, 189 P.2d 352, and cases therein cited.

---

1. The lower court apparently assumed that 80 separate parcels would be created. The evidence does not bear this out.↩

1. (a) Cox and Detrick objected to hearsay evidence offered to show that the Quill conveyance was gratuitously given. Ruling upon the objection was reserved, and the record does not reflect that a ruling was ever made. The original findings determined that a nominal consideration was paid for the conveyance. That finding was deleted upon motion of Cox and Detrick. The amended findings are silent on the subject. In the absence of a ruling upon the objection, and it being apparent that the point had no significance in the determination of the case, there can be no merit to this claim of error.(b) Cox and Detrick urge that the lower court took judicial notice that the use of the Glenbrook roads was exclusive in nature. The record simply does not establish this to be so. It reflects only that the 'court has first-hand knowledge of that condition'; it does not tell us what 'that condition' was or is. Obviously this claim of error is without validity.↩

1. The reason for the absence of objection is evident. No person was available to testify that the terms of the grant did not state the true intention of the persons named therein. W. M. Bliss, who signed as vice-president of grantor, is dead. His cosigner for grantor, Herbert E. Hall, at that time its assistant secretary, did not testify and the record does not tell us why. The grantee, Henry Quill, died in 1943. A witness was not presented who sought to declare the intention of those persons as being different than expressed in the grant of easement. Had such testimony been offered, perhaps objection would have been made. Under the circumstances here presented, no reason existed for any party to object to the evidence offered.↩

1. Glenbrook Company urges that the trial court, by virtue of the 'rule of practical construction' could properly consider evidence of the actual use of the way by predecessors of Cox and Detrick, to fix the extent of the use created by the conveying instrument. That rule does not apply where the instrument is clear. Woods v. Bromley, 69 Nev. 96, 241 P.2d 1103.↩

1. The factual background related mentions other property owners to whom Glenbrook Company has given similar rights of ingress and egress. To the extent mentioned by the general rule of law, this litigation is of significance to them.↩

1. The 'full right of use' phrase, previously discussed, does not embrace the problem of width. There can be a 'full right to use' a narrow as well as a wide road.↩

5.5. Easements in Gross

Green v. Lupo,

647 P.2d 51 (Wash. Ct. App., 1982).

Christopher Boutelle, Tacoma, for appellants.

Alan Rasmussen, Spanaway, for respondents.

Petrich, Acting Chief Judge.

The plaintiffs, Don Green and his wife Florence, initiated this suit to specifically enforce an agreement to grant an easement. From a decree which determined that the contemplated easement was personal rather than appurtenant to their land as claimed, plaintiffs appeal. We reverse.

The issue raised on appeal is whether parol evidence is admissible to construe an easement as personal to the grantees where the easement is agreed in writing to be for ingress and egress for road and utilities purposes but the writing does not expressly characterize the easement as either personal or appurtenant. We believe that parol evidence was properly admitted here but the conclusion that the easement is personal to plaintiffs was erroneous.

The parties involved are adjoining landowners. The plaintiffs, once the owners of the entire tract, now retain several acres located south of the defendants' property. The defendants purchased their parcel (the north tract) from the plaintiffs by real estate contract. While they were still paying on that contract, the defendants requested a deed release to a small section of the north tract to allow financing for the construction of a home. The plaintiffs agreed in return for the promise of an easement along the southern 30 feet of the north tract when the defendants eventually obtained title. The express terms of the promised easement were contained in a written agreement which was executed in the form required for the conveyance of an interest in real property.RCW 64.04.

The plaintiffs' development of their land for mobile home occupancy caused tension between the landowners. Apparently some of the occupants of plaintiffs' mobile home development used the easement as a practice runway for their motorcycles. When the defendants obtained title to the north tract they refused to formally grant the easement as promised. They also placed logs along the southern boundary of the easement to restrict access from the plaintiffs' property. The plaintiffs brought this action to obtain specific performance of the promise to grant an easement and to enjoin any interference with their use of the easement.

Evidence was admitted describing a single-family cabin or residence built by or for the plaintiffs in the northeast corner of the plaintiffs' tract. It was defendants' contention, and they so testified, that the purpose of the easement was to serve the plaintiffs in their personal use and occupancy of this cabin or home. They claimed the easement was not intended to serve the plaintiffs' entire tract, part of which had been developed as a mobile home site, and which had access by other existing roads.

The trial court concluded that an easement was granted for the use and benefit of the plaintiffs alone and could not be assigned or conveyed. The court ordered the plaintiffs' use to be limited to ingress and egress for their own home or cabin and prohibited the passage of motorcycles.

It was the duty of the court in construing the instrument which created the easement to ascertain and give effect to the intention of the parties. The intention of the parties is determined by a proper construction of the language of the instrument. Where the language is unambiguous other matters may not be considered; but where the language is ambiguous the court may consider the situation of the property and of the parties, and the surrounding circumstances at the time the instrument was executed, and the practical construction of the instrument given by the parties by their conduct or admissions. *Seattle v. Nazarenus*, 60 Wash.2d 657, 665, 374 P.2d 1014 (1962); *Broadacres, Inc. v. Nelsen*, 21 Wash.App. 11, 583 P.2d 651 (1978). Simply stated parol evidence may always be used

to explain ambiguities in written instruments and to ascertain the intent of the parties. *Levy v. North American Ins. Co.*, 90 Wash.2d 846, 852, 586 P.2d 845 (1978); *see also Green River Valley Foundation, Inc. v. Foster*, 78 Wash.2d 245, 473 P.2d 844 (1970); *Corinthian Corp. v. White & Bollard*, 74 Wash.2d 50, 442 P.2d 950 (1968); *The Brower Co. v. Baker & Ford Co.*, 71 Wash.2d 860, 431 P.2d 595 (1967); *Harding v. Warren*, 30 Wash.App. 848, 639 P.2d 750 (1982); *Weyerhaeuser Co. v. Burlington Northern, Inc.*, 15 Wash.App. 314, 549 P.2d 54 (1976); Lynch v. Higley, 8 Wash.App. 903, 510 P.2d 663 (1973); *Dennis v. Southworth*, 2 Wash.App. 115, 467 P.2d 330 (1970).

The pivotal issue in deciding the propriety of admitting parol evidence is whether the written instrument is ambiguous. A written instrument is ambiguous when its terms are uncertain or capable of being understood as having more than one meaning. *Ladum v. Utility Cartage, Inc.*, 68 Wash.2d 109, 116, 411 P.2d 868 (1966); *Harding v. Warren, supra*; *Rydman v. Martinolich Shipbuilding Corp.*, 13 Wash.App. 150, 534 P.2d 62 (1975); *Spahn v. Pierce County Medical Bureau*, Inc., 7 Wash.App. 718, 502 P.2d 1029 (1972); *Murray v. Western Pacific Ins. Co.*, 2 Wash.App. 985, 472 P.2d 611 (1970).

The written instrument promised the easement specifically to the plaintiffs, to "Don Green and Florence B. Green," and described the easement as "for ingress and egress for road and utilities purpose."The designation of named individuals as dominant owners evidences an intent that the easement be personal to the named parties. *Kemery v. Mylroie*, 8 Wash.App. 344, 506 P.2d 319 (1973). The grant of an easement for ingress, egress and utilities to the owners of adjacent land is evidence of an intent that the easement benefit the grantees' adjacent land. *Winsten v. Prichard*, 23 Wash.App. 428, 597 P.2d 415 (1979). We find that the instrument was ambiguous as to whether the easement granted was personal to the plaintiffs or appurtenant to their land. We therefore conclude that parol evidence was properly admitted.

The trial court's findings of fact are supported by competent evidence and are not assigned as error; they must be considered as verities on appeal. *McIntyre v. Fort Vancouver Plywood Co.*, 24 Wash.App. 120, 600 P.2d 619 (1979). The court's findings do not, however, support the conclusion that the easement was personal. The court found that the easement was granted for ingress, egress, for road and utilities purposes. As we have noted, the grant of such an easement supports the conclusion that the easement was intended to be an easement appurtenant. In addition, the trial court found "the use of the easement by the plaintiff was to obtain access to the land, retained by plaintiff, for the construction and habitation by plaintiff in a cabin."(Italics ours.) This finding also supports the conclusion that the easement was intended to benefit plaintiffs' land.

The trial court's conclusion that the easement was personal to the plaintiffs was erroneous. There is a strong presumption in Washington that easements are appurtenant to some particular tract of land; personal easements, easements in gross, are not favored. *Pioneer Sand & Gravel Co. v. Seattle Construction & Dry Dock Co.*, 102 Wash. 608, 173 P. 508 (1918); *Roggow v. Hagerty*, 27 Wash.App. 908, 621 P.2d 195 (1980); *Kemery v. Mylroie, supra.* An easement is not in gross when there is anything in the deed or the situation of the property which indicates that it was intended to be appurtenant to land retained or conveyed by the grantor. 2 G. Thompson, Real Property s 324 at 78 (1980 repl.). Viewed in this light, the court's factual findings mandate the conclusion that the easement was intended to be appurtenant to plaintiffs' property.

Easements appurtenant become part of the realty which they benefit. Unless limited by the terms of creation or transfer, appurtenant easements follow possession of the dominant estate through successive transfers. The rule applies even when the dominant estate is subdivided into parcels, with each parcel continuing to enjoy the use of the servient tenement. *Clippinger v. Birge*, 14 Wash.App. 976, 547 P.2d 871 (1976). *See also Winsten v. Prichard, supra.* The terms of the easement promised do not limit its transfer. The easement promised the plaintiffs is appurtenant to their property and assignable to future owners of that property.

The defendants request that equitable limitations be imposed on any easement granted. A servient owner is entitled to impose reasonable restraints on a right of way to avoid a greater burden on the servient owner's estate

than that originally contemplated in the easement grant, so long as such restraints do not unreasonably interfere with the dominant owner's use. *Rupert v. Gunter*, 31 Wash.App. 27, 640 P.2d 36 (1982).

Testimony presented at trial showed that youngsters who now live on the dominant estate use their motorcycles on the easement in a fashion that constitutes a dangerous nuisance which was not considered when the easement was created. This evidence supports the imposition of equitable restrictions on the dominant owners' use, restrictions which will not unreasonably interfere with that use.

The trial court enjoined the use of motorcycles on the easement. There is insufficient evidence on the record to assess the impact of a complete ban on motorcycle use on the dominant estate's owners. Motorcycles are a common means of transportation. On its face, the ban appears to unreasonably interfere with the dominant owners' use of the easement. Although an equitable solution to the motorcycle problem is necessary, the trial court abused its discretion in imposing a ban on motorcycles without proper consideration of the ban's effect on the dominant owners' use of the easement.

Reversed and remanded with directions to modify the decree so as to declare the easement for ingress and egress for road and utility purposes to be appurtenant to plaintiffs' property and to devise reasonable restrictions to assure that the easement shall not be used in such a manner as to create a dangerous nuisance.

Petrie, J., and Thompson, J. pro tem., concur.

Henley v. Continental Cablevision of St. Louis County, Inc.,

692 S.W.2d 825 (Mo. App. E.D. 1985)

Stuart M. Haw, Norman Bierman, St. Louis, for plaintiffs-appellants.

Nathan B. Kaufman, Shelley Weinhaus, S. Sheldon Weinhaus, St. Louis, for defendant-respondent.

Carl. R. Gaertner, Judge.

Plaintiffs, as trustees of University Park subdivision, appeal from an order dismissing their petition for failure to state a claim in an action against defendant Continental Cablevision of St. Louis County, Inc. We affirm.

The facts essential to a resolution of this matter are not in dispute.[1] Pursuant to an indenture recorded on April 8, 1922, plaintiffs' predecessors as trustees, were expressly granted the right to construct and maintain electric, telephone and telegraphic service on or over the rear five feet of all lots in the subdivision, and to grant easements to other parties for the purposes of creating and maintaining such systems. In July, 1922 and August, 1922, respectively, the trustees conveyed an easement to Southwestern Bell Telephone Company to "construct, reconstruct, repair, operate and maintain its lines for telephone and electric light purposes" and similarly to Union Electric to "keep, operate and maintain its lines consisting of cables, manholes, wires, fixtures and appurtenances thereto." Subsequently, in 1981 and 1982, defendant exercised licenses acquired from both utilities to enter upon these easements, and erected cables, wires and conduits for the purpose of transmitting television programs.

Plaintiffs filed an action for an injunction on December 29, 1983, seeking not only to enjoin a continuing trespass and compel the removal of defendant's wires and cables, but also seeking $300,000 in damages and the reasonable value of the use of plaintiffs' property for defendant's profit based upon quantum meruit. Defendants then filed a motion to dismiss for failure to state a cause of action, which was supported by both the affidavit of defendant's chief executive officer and copies of the easements granted by plaintiffs' predecessors to Southwestern Bell Telephone Company and Union Electric.[2] Said motion was sustained by the trial court on July 30, 1984 and this appeal ensued with plaintiffs contending in effect that the easements granted the utilities were not apportionable and did not authorize the right to run television cables over the property in question.

Both parties agree that the subject easements are easements in gross, i.e. easements which belong to the owner independently of his ownership or possession of other land, and thus lacking a dominant tenement. *See Three-o-Three Investments, Inc. v. Moffitt*, 622 S.W.2d 736 (Mo.App.1981); 3 Powell, the Law of Real Property; 34-22 (1984). The dispositive issue here is whether or not these easements are exclusive and therefore apportionable by the utilities to, in this case, defendant Continental Cablevision.

We believe the very nature of the 1922 easements obtained by both utilities indicates that they were intended to be exclusive and therefore apportionable. It is well settled that where the servient owner retains the privilege of sharing the benefit conferred by the easement, it is said to be "common" or non-exclusive and therefore not subject to apportionment by the easement owner. Conversely, if the rights granted are exclusive of the servient owners' participation therein, divided utilization of the rights granted are presumptively allowable. This principle stems from the concept that one who grants to another the right to use the grantor's land in a particular manner for a specified purpose but who retains no interest in exercising a similar right himself, sustains no loss if, within the specifications expressed in the grant, the use is shared by the grantee with others. On the other hand, if the grantor intends to participate in the use or privilege granted, then his retained right may be diminished if the grantee shares his right with others. Thus, insofar as it relates to the apportionability of an easement in gross, the term "exclusive" refers to the exclusion of the owner and possessor of the servient tenement from participation in the rights granted, not to the number of different easements in and over the same land. Powell at 344-224-25.[3]

Here, there is no claim that plaintiffs' predecessors had at the time the easements were granted, any intention to seek authority for, or any interest whatsoever in using the five foot strips for the construction and maintenance of either an electric power system or telephone and telegraphic service. Moreover, at no time during the ensuing sixty-three years have the trustees been authorized to furnish such services by any certificate of convenience and necessity issued by the Public Service Commission pursuant to ss 392.260 and 393.170, RSMo.1978. Accordingly, the easements granted to Southwestern Bell and Union Electric were exclusive as to the grantors thereof and therefore apportionable.

Plaintiffs also argue defendant could acquire no rights from the utilities since their easements did not mention television cables, and that the cable attachments themselves constituted an extra burden on the property. We disagree. The owner of an easement may license or authorize third persons to use its right of way for purposes not inconsistent with the principal use granted. *Eureka Real Estate and Investment Company v. Southern Real E. and F. Company*, 355 Mo. 1199, 200 S.W.2d 328, 332 (1947). The 1922 easements granted to Union Electric expressly provided the right of ingress and egress by Union Electric, it successors and assigns, to "add to the number of and relocate all wires, cables, conduits, manholes, adding thereto from time-to-time…." Similarly, the easement conveyed to Southwestern Bell expressly contemplated the construction and maintenance of "all poles, cables, wires, conduits, lateral pipes, anchor guys and all other fixtures and appurtenances deemed necessary at anytime by [Southwestern Bell], its successors and assigns…." It can hardly be said that the addition of a single coaxial cable to the existing poles for the purpose of transmitting television images and sound by electric impulse increases the burden on the servient tenement beyond the scope of the intended and authorized use.

Plaintiffs' reliance on *Consolidated Cable Utilities, Inc. v. City of Aurora*, 108 Ill.App.3d 1035, 64 Ill.Dec. 464, 439 N.E.2d 1272 (1982) is misplaced. Basing their decision upon the undisputed principle that the owner of property subject to an easement burden is entitled to prevent such burden from being increased, the Illinois court held that landowners were necessary parties to an action by a cable television company against certain utilities seeking a mandatory injunction authorizing the use of the utilities' easements. In 12 of the subdivisions involved, ordinances required underground installation of public utility equipment. In the absence of homeowner participation in the trial and evidence from them about the exact nature of the easements through their property, the cause was re-

manded for a more specific delineation of which easements the cable company did or did not have a right to use. *Id.* 64 Ill.Dec. at 469, 439 N.E.2d at 1277. Obviously, excavation upon a homeowner's property for the installation of underground cable poses a much greater burden than the attachment of an aerial cable to existing poles.

Although this is a case of first impression in Missouri, courts in other jurisdictions have addressed the legal effect of adding coaxial cables for television transmission to existing electric and telephone poles erected on easements without the consent of the owners of the fees. These courts have uniformly rejected arguments identical to those made by plaintiffs herein and have reached a conclusion similar to ours.

In *Jolliff v. Hardin Cable Television Co.*, 26 Ohio St.2d 103, 269 N.E.2d 588 (1971), an easement granted to a power company for the transmission of electric power, including telegraph or telephone wires, was held to be an apportionable easement in gross by reason of the express language of the conveyance authorizing the grantee to lease some portion of its interest to third parties. In addressing the question of an additional burden on the servient tenements, the court noted that the attachment of a television coaxial cable to existing poles constituted no more of a burden than would installation of telephone wires, a burden clearly contemplated at the time of the grants. *Id.* 269 N.E.2d at 591.

In *Crowley v. New York Telephone Company*, 80 Misc.2d 570, 363 N.Y.S.2d 292 (1975) it was held that the failure to make specific mention of cable television in 1949 easement to locate telephone poles and wires on plaintiff's property could not be so narrowly interpreted as to prohibit the addition of television cables to the telephone poles. "Just as we must accept scientific advances, we must translate the rights of parties to an agreement in the light of such developments." *Id.* 363 N.Y.S.2d at 294.

In *Hoffman v. Capitol Cablevision System, Inc.*, 52 A.D.2d 313, 383 N.Y.S.2d 674 (1976), the court concluded that the rights granted to two utilities were exclusive vis a vis the landowner, and were, therefore apportionable by the grantees. The addition of cable and equipment to already existing poles was held to constitute no additional burden since the defendant was doing only what the utilities were enabled to do. Id. 383 N.Y.S.2d at 677. The court noted the general rule that easements in gross for commercial purposes are particularly alienable and transferable. See 5 Restatement of the Law, Property s 489. For these reasons, the court held the failure to foresee and specifically refer to cable television in the grant was of no consequence. *Id.*

The reasoning of the Hoffman court has recently been found persuasive by the California court in *Salvaty v. Falcon Cable Television*, 165 Cal.App.3d 798, 212 Cal.Rptr. 31 (1985). The court stated:

> In the case at bench, the addition of cable television equipment on surplus space on the telephone pole was within the scope of the easement. Although the cable television industry did not exist at the time the easement was granted, it is part of the natural evolution of communications technology. Installation of the equipment was consistent with the primary goal of the easement, to provide for wire transmission of power and communication. We fail to see how the addition of cable equipment to a pre-existing utility pole materially increased the burden on appellant's property.

Id. 212 Cal.Rptr. at pages 34-35.

The unsurprising fact that the drafters of the 1922 easements did not envision cable television does not mandate the narrow interpretation of the purposes of the conveyance of rights and privileges urged by plaintiffs. The expressed intention of the predecessors of plaintiff trustees was to obtain for the homeowners in the subdivision the benefits of electric power and telephonic communications. Scientific and technological progress over the ensuing years have added an unforeseen dimension to such contemplated benefits, the transmission by electric impulse of visual and audio communication over coaxial cable. It is an inescapable conclusion that the intention of plaintiffs' predecessors was the acquisition and continued maintenance of available means of bringing electrical power

and communication into the homes of the subdivision. Clearly, it is in the public interest to use the facilities already installed for the purpose of carrying out this intention to provide the most economically feasible and least environmentally damaging vehicle for installing cable systems.

Accordingly, the judgment of the trial court dismissing plaintiffs' petition for failure to state a claim is affirmed.

Pudlowski, P.J., and Karohl, J., concur.

---

1. Defendant has moved to strike from the legal file the indenture of University Park subdivision contending it was not timely presented nor properly identified in the trial court. Plaintiffs have moved to strike from the legal file the copies of the recorded easements of Southwestern Bell Telephone Company and Union Electric Company on the grounds they were not authenticated in the trial court. No objection to any of these documents was made in the trial court nor was their consideration by the court complained of by pre or post-submission motion. Objections not presented to and decided by the trial court may not be considered by the appellate court for the first time on appeal. *Ohlendorf v. Feinstein*, 636 S.W.2d 687, 690 (Mo.App.1982). Both motions are therefore overruled.↩

1. Because the motion to dismiss was supported by matters outside the pleadings, it should have been treated as a motion for summary judgment. Rule 55.26(a). In view of the fact that plaintiff had ample opportunity from the date the motion was filed on March 5, 1984, until the date the motion was argued and submitted on May 24, 1984, and did file on the latter date a copy of the subdivision indenture, we find compliance with the intent of the rule and decline to remand this cause, sua sponte, for semantical corrections necessitated by the improper denomination of defendant's motion.↩

1. A thorough explanation of the rule and its logical foundation is set forth in 5 Restatement of the Law, Property, section 493, Comments c and d.↩

6. Covenants

Christian Turner

AN INTRODUCTION TO SERVITUDES, Part II

Covenants

Recall that a covenant is a contract that imposes an obligation to do something or to refrain from doing something on one's own land. Examples we cited included: a promise by *A* to *B* that *A* will not make commercial use of his property; a promise that *A* will not build a second story; a promise that *A* will only build additions that meet with the approval of a homeowner association's architectural review committee; a promise that *A* will maintain a wall that separates his property from *B*'s.

One can distinguish affirmative and negative covenants as, respectively, requiring or prohibiting conduct on the part of the owner of the burdened land. Though some courts treat these two types of covenants differently, we note this difference only in one respect below.

Another distinction, often seen in the case law, is between *real covenants* and *equitable servitudes*. This distinction goes back to the difference between law and equity. To make a long and complex story short, we will refer to a covenant as a real covenant when damages are sought for breach and as an equitable servitude when an injunction is sought.

Running with the Land

We deal here with what a court will insist upon before it will decide that a covenant runs to subsequent landowners. That is, when are people who buy land bound by a contract signed by prior owners of that land. As you will see in the cases, this area of the law is in flux. Below we will discuss the traditional requirements. But some courts, and the Third Restatement, are taking the view that many of the traditional elements should be dropped in favor of finding covenants to run whenever "reasonable," which word applies to the agreement of the original parties and the impact of the covenant today. Because such an analysis tends to replicate many of the features of the traditional analysis, and because many courts adhere to the traditional analysis, we will start there.

As with easements we look separately at whether the *burden* of a covenant runs with the burdened land and whether the *benefit* of a covenant runs with the benefitted land. For the burden of a real covenant to run, the following elements, which will be defined below, must be found: (1) writing, (2) intent, (3) notice, (4) horizontal privity, (5) vertical privity, and (6) touch and concern. The privity elements are not required for the burden of an equitable servitude to run. For the benefit of a real covenant to run, the following elements must be found: (1) writing, (2) intent, (3) vertical privity, and (4) touch and concern. Again, privity is not required to enforce an equitable servitude, so long as the plaintiff is an intended beneficiary of the covenant.

A successor of an owner of the servient, or burdened, land is only liable under a covenant if the burden runs to that owner. Likewise, the successor of an owner of the dominant, or benefitted, land may only enforce a covenant if the benefit of the covenant runs to that owner. These are two separate questions, and the running of the benefit and the running of the burden must be analyzed separately.

Writing

This seems like a straightforward requirement. As with easements, we do not require that every subsequent deed contain the covenant – only that the original covenant is in writing. Covenants may be included in original deeds of conveyance, or may be contained in separate agreements. They may also be contained in *declarations*, which are documents setting out covenants applicable to a whole subdivision rather than just individual parcels. The important thing here is that there is a writing. Whether that writing provides notice is a separate matter considered below.

Intent

Intent is not difficult to find. A covenant may use magic words – expressly declaring that it binds future owners or that it runs with the land – but will often be found to be intended to run with the land regardless. Most, but not all, courts will find intent to run where the touch and concern element is satisfied.

Notice

As with easements, notice can be either actual, inquiry, or record. And what is needed to show each is more or less identical to what is required there. Covenants contained in a declaration applicable to an entire subdivision are determined by some courts to constitute record notice even when the deeds of land in that subdivision do not reference the declaration. Other courts will insist on a reference to the declaration in a deed of the individual parcel itself before determining that the owner of that parcel had notice. The question comes down to whether a court (or legislature) believes it is reasonable to require title searchers to look for declarations, rather than just looking at the deeds of conveyance in the chain of title.

Horizontal Privity

This requirement measures the relationship between the two *original contracting parties* to a covenant. So if the covenant was executed in 1850, we care only about the relation between the parties that executed the agreement back in 1850, not about any subsequent owners. While the Third Restatement would do away with this requirement altogether, many states retain it. Note, though, that it is not required when seeking an injunction (i.e., enforcement of an equitable servitude).

The requirement can be satisfied in few ways. The original form of horizontal privity is known as tenurial privity and exists only when the parties are in a landlord-tenant relationship. Later, it was expanded to cover situations in which one party had an easement in the land of the other, called substituted privity. Together, these two kinds of privity are called *mutual privity*, which exists, more generally, when the parties have a simultaneous interest in the same parcel of land.

By far the most common way to find horizontal privity is also the most recent. *Instantaneous privity* is found when the covenant is created at the same time as a parcel is transferred. So, a covenant contained in a deed of sale will meet the horizontal privity requirement, as the covenant is created at the same instant as the parcel of land is deeded over.

There is no horizontal privity when neighbors simply come together and contract for restrictions. Suppose a group of neighbors is concerned about preserving trees and wants to impose reciprocal covenants on each of them not to cut trees unless certain conditions exist. They will not be in horizontal privity with one another, and therefore will not create a covenant enforceable by damages by simply contracting among themselves. They can get around this, however, by deeding over their properties to a third party who deeds the properties back with the covenants. This *straw transaction* creates horizontal privity.

Vertical Privity

Each of the above elements is purely formal. People who want to create a covenant that will run can do so by observing the requirements and executing the covenant so as to comply with them. Vertical privity, however, cannot be created where it does not exist. This requirement measures the relationship between an owner of land and his or predecessor in interest. So a real covenant may only be enforced, for damages, against an owner of burdened land if that owner is in vertical privity with a predecessor who was bound.

There are two kinds of vertical privity: relaxed and strict. Strict vertical privity between a predecessor and successor is found only if the predecessor retains no interest in the land. A landlord-tenant relationship fails this test, because the landlord retains an interest when he or she leases to a tenant. In a nutshell, sellers and buyers are generally in strict vertical privity but landlords and tenants are not.

Relaxed vertical privity is found between any two possessors. A neighbor of the owner of a piece of land is not in relaxed vertical privity with the predecessor of the owner. Also, an adverse possessor is usually deemed not to be in vertical privity with a predecessor.

Only relaxed vertical privity is required on the benefit side. Courts differ over which form is required on the burden side. The Third Restatement is a little more complex. It would eliminate the vertical privity requirement on the burden side of *negative covenants* but require strict vertical privity on the burden side of *affirmative covenants*. This means that the Restatement would not bind lessees with affirmative obligations, only with negative obligations. However, there is an escape hatch: the Third Restatement would require enforcement without strict vertical privity even of an affirmative covenant where the burden is "more reasonably performed" by the person in possession (i.e., the lessee).

Touch and Concern

This is the only requirement for a covenant to run with the land that looks at the substance of the covenant. Like strict vertical privity, it cannot be created if it does not exist. But further, it is a restriction on the kinds of covenants that will be deemed to run. There are at least three different kinds of tests for touch and concern. Only a brief outline will be given here, with further elaboration of the doctrine in the cases below.

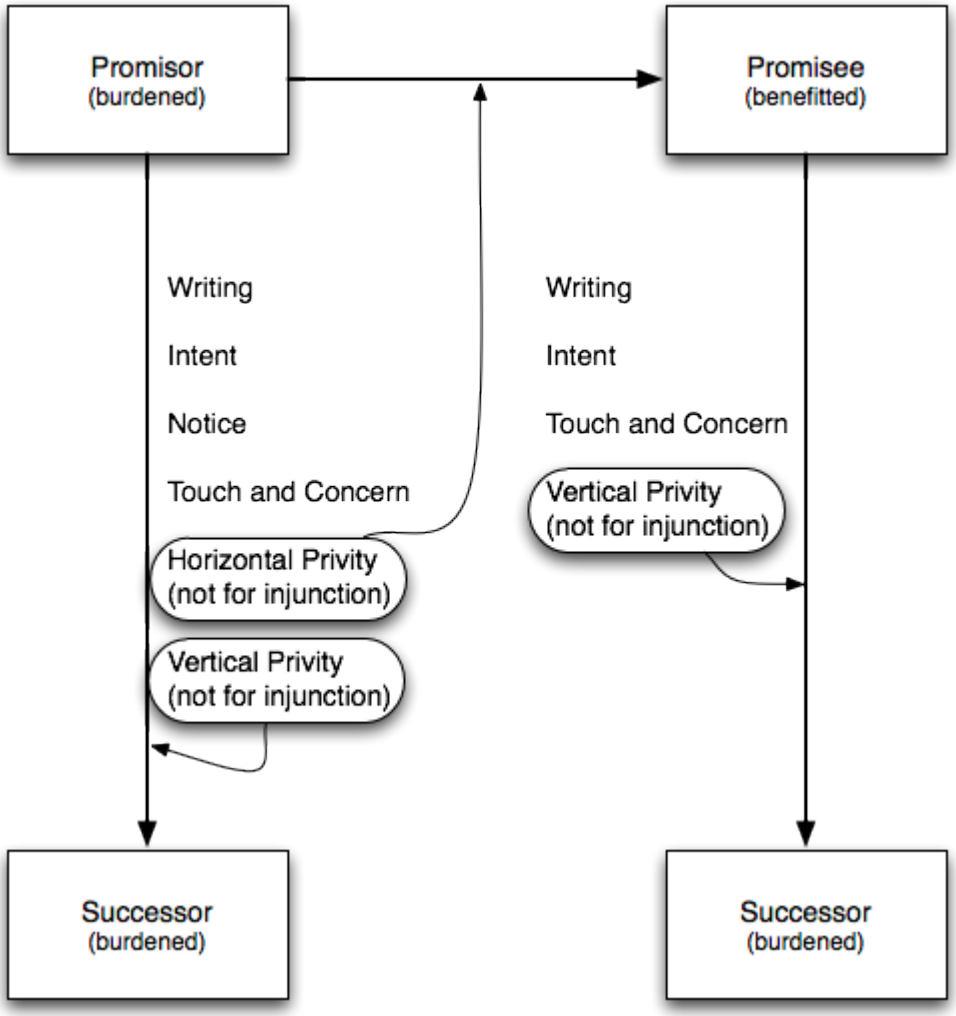
First, under an older rule, courts will examine a covenant to see if provides *physical* benefits to the dominant holding and imposes *physical* burdens on the servient holding. This creates problem cases where it seems as though the obligations ought to run, and yet the physical nature of the covenant is difficult to discern. For example, a covenant to host a billboard on one's land physically touches and concerns the burdened land but has no physical impact on any benefitted land. The obligation to pay money to keep up a communal gym or golf course does not seem to burden physically the land of the owner who is required to pay money.

Second, courts may ask whether the covenant between the parties benefits and burdens them "as landowners" rather than as individuals. This probably gets at whether the covenant provides benefits and imposes burdens that are *location-specific*, that are tied to the parties' ownership of particular land, rather than burdens and benefits that would be unaffected if the parties lived elsewhere. Ask yourself whether the benefits of a covenant to an owner are greater because of where that owner lives. Similarly are the burdens related to ownership of land?

The Third Restatement and some courts would jettison the touch and concern requirement altogether in an effort to modernize the law of covenants. Instead, the analysis would focus on whether the covenant is unconscionable, a violation of public policy, and otherwise reasonable. When examining this approach, it is critical to remember that whether we think the contract between the original parties is violative of some important policies is a substantively different question from whether we think that contract should automatically bind successive landowners. We will discuss further, below, the difference between these questions.

Summary

Running of covenants is best appreciated in chart-form.



6.1. Formation

6.1.1. Written Covenants and Running with the Land

Davidson Bros., Inc. v. D. Katz & Sons, Inc.,

121 N.J. 196 (1990)

Sheppard A. Guryan argued the cause for appellant (Lasser, Hochman, Marcus, Guryan and Kuskin, attorneys; Bruce H. Snyder, on the brief).

Arthur L. Phillips argued the cause for respondent D. Katz & Sons, Inc., a New Jersey Corporation.

Linda K. Anderson, Assistant City Attorney, argued the cause for respondent City of New Brunswick, a Municipal Corporation (William J. Hamilton, Jr., City Attorney, attorney).

Mary M. Cheh argued the cause for respondent C-Town, a Division of Krasdale Foods, Inc., a New York Corporation (George J. Otlowski, Jr., attorney).

Robert J. Lecky argued the cause for respondent New Brunswick Housing Authority, a Body Corporate and Political (Stamberger & Lecky, attorneys).

The opinion of the Court was delivered by Garibaldi, J.

This case presents two issues. The first is whether a restrictive covenant in a deed, providing that the property shall not be used as a supermarket or grocery store, is enforceable against the original covenantor's successor, a subsequent purchaser with actual notice of the covenant. The second is whether an alleged rent-free lease of lands by a public entity to a private corporation for use as a supermarket constitutes a gift of public property in violation of the New Jersey Constitution of 1947, article eight, section three, paragraphs two and three.

I

The facts are not in dispute. Prior to September 1980 plaintiff, Davidson Bros., Inc., along with Irisondra, Inc., a related corporation, owned certain premises located at 263-271 George Street and 30 Morris Street in New Brunswick (the "George Street" property). Plaintiff operated a supermarket on that property for approximately seven to eight months. The store operated at a loss allegedly because of competing business from plaintiff's other store, located two miles away (the "Elizabeth Street" property). Consequently, plaintiff and Irisondra conveyed, by separate deeds, the George Street property to defendant D. Katz & Sons, Inc., with a restrictive covenant not to operate a supermarket on the premises. Specifically, each deed contained the following covenant:

> The lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however designated, for a period of forty (40) years from the date of this deed. This restriction shall be a covenant attached to and running with the lands.

The deeds were duly recorded in Middlesex County Clerk's office on September 10, 1980. According to plaintiff's complaint, its operation of both stores resulted in losses in both stores. Plaintiff alleges that after the closure of the George Street store, its Elizabeth Street store increased in sales by twenty percent and became profitable. Plaintiff held a leasehold interest in the Elizabeth Street property, which commenced in 1978 for a period of twenty years, plus two renewal terms of five years.

According to defendants New Brunswick Housing Authority (the "Authority") and City of New Brunswick (the "City"), the closure of the George Street store did not benefit the residents of downtown New Brunswick. Defendants allege that many of the residents who lived two blocks away from the George Street store in multi-family and senior-citizen housing units were forced to take public transportation and taxis to the Elizabeth Street store because there were no other markets in downtown New Brunswick, save for two high-priced convenience stores.

The residents requested the aid of the City and the Authority in attracting a new food retailer to this urban-renewal area. For six years, those efforts were unsuccessful. Finally, in 1986, an executive of C-Town, a division of a supermarket chain, approached representatives of New Brunswick about securing financial help from the City to build a supermarket.

Despite its actual notice of the covenant the Authority, on October 23, 1986, purchased the George Street property from Katz for $450,000, and agreed to lease from Katz at an annual net rent of $19,800.00, the adjacent land at 263-265 George Street for use as a parking lot. The Authority invited proposals for the lease of the property to use as a supermarket. C-Town was the only party to submit a proposal at a public auction. The proposal provided for an aggregate rent of one dollar per year during the five-year lease term with an agreement to make $10,000 in improvements to the exterior of the building and land. The Authority accepted the proposal in 1987. All the defendants in this case had actual notice of the restrictions contained in the deed and of plaintiff's intent to enforce the same. Not only were the deeds recorded but the contract of sale between Katz and the Housing Authority specifically referred to the restrictive covenant and the pending action.

Plaintiff filed this action in the Chancery Division against defendants D. Katz & Sons, Inc., the City of New Brunswick, and C-Town. The first count of the complaint requested a declaratory judgment that the noncompe-

tition covenant was binding on all subsequent owners of the George Street property. The second count requested an injunction against defendant City of New Brunswick from leasing the George Street property on any basis that would constitute a gift to a private party in violation of the state constitution. Both counts sought compensatory and punitive damages. That complaint was then amended to include defendant the New Brunswick Housing Authority.

[The trial court denied plaintiff's motion for summary judgment, and the Appellate Division affirmed.]

II

A. Genesis and Development of Covenants Regarding the Use of Property

Covenants regarding property uses have historical roots in the courts of both law and equity. The English common-law courts first dealt with the issue in *Spencer's Case*, 5 *Co.* 16a, 77 *Eng.Rep.* 72 (Q.B. 1583). The court established two criteria for the enforcement of covenants against successors. First, the original covenanting parties must intend that the covenant run with the land. Second, the covenant must "touch and concern" the land. *Id.* at 16b, 77 *Eng.Rep.* at 74. The court explained the concept of "touch and concern" in this manner:

> But although the covenant be for him [an original party to the promise] and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch and concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assignees to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, and in no manner touches or concerns the thing that was demised, or that is assigned over, and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger. [*Ibid.*]

The English common-law courts also developed additional requirements of horizontal privity (succession of estate), vertical privity (a landlord-tenant relationship), and that the covenant have "proper form," in order for the covenant to run with the land. C. Clark, *Real Covenants and Other Interests Which Run With the Land* 94, 95 (2d ed. 1947) (*Real Covenants*). Those technical requirements made it difficult, if not impossible, to protect property through the creation of real covenants. Commentary, "Real Covenants in Restraint of Trade – When Do They Run With the Land?," 20 *Ala.L.Rev.* 114, 115 (1967).

To mitigate and to eliminate many of the formalities and privity rules formulated by the common-law courts, the English chancery courts in *Tulk v. Moxhay*, 2 *Phil.* 774, 41 *Eng.Rep.* 1143 (Ch. 1848), created the doctrine of equitable servitudes. In *Tulk*, land was conveyed subject to an agreement that it would be kept open and maintained for park use. A subsequent grantee, with notice of the restriction, acquired the park. The court held that it would be unfair for the original covenantor to rid himself of the burden to maintain the park by simply selling the land. In enjoining the new owner from violating the agreement, the court stated:

> It is said that, the covenant being one which does not run with the land, this court cannot enforce it, but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.
>
> [*Id.* at 777-78, 41 *Eng.Rep.* 1144].

The court thus enforced the covenant on the basis that the successor had purchased the property with notice of the restriction. Adequate notice obliterated any express requirement of "touch and concern." Reichman, "Toward a Unified Concept of Servitudes," 55 *S.Cal.L.Rev.* 1177, 1225 (1982); French, "Toward a Modern Law of Servitudes: Reweaving Ancient Strands," 55 *S.Cal.L.Rev.* 1261, 1276-77 (1982). *But see* Burger, "A Policy Analysis of Promises Respecting the Use of Land," 55 *Minn.L.Rev.* 167, 217 (1970) (focusing on language in *Tulk* that refers to "use of land" and "attached to property" as implied recognition of "touch and concern" rule).

Some early commentators theorized that the omission of the technical elements of property law such as the "touch and concern" requirement indicated that *Tulk* was based on a contractual as opposed to a property theory. C. Clark, *supra, Real Covenants*, at 171-72 nn. 3 and 4; 3 H. Tiffany, *Real Property* § 861, at 489 (3d ed. 1939); Ames, "Specific Performance For and Against Strangers to Contract," 17 *Harv.L.Rev.* 174, 177-79 (1904); Stone, "The Equitable Rights and Liabilities of Strangers to the Contract," 18 *Colum.L.Rev.* 291, 294-95 (1918). Others contend that "touch and concern" is always, at the very least, an implicit element in any analysis regarding enforcement of covenants because "any restrictive easement necessitates some relation between the restriction and the land itself." McLoone, "Equitable Servitudes – A Recent Case and Its Implications for the Enforcement of Covenants Not to Compete," 9 *Ariz.L.Rev.* 441, 444, 447 n. 5 (1968). Still others explain the "touch and concern" omission on the theory that equitable servitudes usually involve negative covenants or promises on how the land should not be used. Thus, because those covenants typically do touch and concern the land, the equity courts did not feel the necessity to state "touch and concern" as a separate requirement. Berger, "Integration of the Law of Easements, Real Covenants and Equitable Servitudes," 43 *Wash. & Lee L.Rev.*, 337, 362 (1986). Whatever the explanation, the law of equitable servitudes did generally continue to diminish or omit the "touch and concern" requirement.

B. New Jersey's treatment of noncompetitive covenants restraining the use of property

Our inquiry of New Jersey law on restrictive property use covenants commences with a re-examination of the rule set forth in *Brewer v. Marshall & Cheeseman, supra*, 19 *N.J. Eq.* at 537, that a covenant will not run with the land unless it affects the physical use of the land. Hence, the burden side of a noncompetition covenant is personal to the covenantor and is, therefore, not enforceable against a purchaser. In *Brewer v. Marshall & Cheeseman*, the court objected to all noncompetition covenants on the basis of public policy and refused to consider them in the context of the doctrine of equitable servitudes. Similarly, in *National Union Bank at Dover v. Segur*, 39 *N.J.L.* 173 (Sup.Ct. 1877), the court held that only the benefit of a noncompetition covenant would run with the land, but the burden would be personal to the covenantor. *See* 5 R. Powell, *supra*, § 675[3] at 60-109. Because the burden of a noncompetition covenant is deemed to be personal in these cases, enforcement would be possible only against the original covenantor. As soon as the covenantor sold the property, the burden would cease to exist.

Brewer and *National Union Bank* have been subsequently interpreted as embodying the "unnecessarily strict" position that "while the benefit of [a noncompetition covenant] will run with the land, the burden of the covenant is necessarily personal to the covenantor." 5 *Powell, supra*, § 675[3] at 60-109. This blanket prohibition of noncompetition covenants has been ignored in more recent decisions that have allowed the burden of a noncompetition covenant to run, *see Renee Cleaners Inc. v. Good Deal Supermarkets of N.J.*, 89 *N.J. Super.* 186, 214 *A.*2d 437 (App.Div. 1965) (enforcing at law covenant not to lease property for dry-cleaning business as against subsequent purchaser of land); *Alexander's v. Arnold Constable Corp.*, 105 *N.J. Super.* 14, 28, 250 *A.*2d 792 (Ch. 1969) (enforcing promise entered into by prior holders of land not to operate department store as against current landowner). Nonetheless, *Brewer* may still retain some vitality, as evidenced by the trial court's reliance on it in this case.

The *per se* prohibition that noncompetition covenants regarding the use of property do not run with the land is not supported by modern real-covenant law, and indeed, appears to have support only in the *Restatement of Property* section on the running of real covenants, § 537 comment f. 5 *Powell, supra*, at § 675[3] at 60-109. Specifically, that approach is rejected in the *Restatement's* section on equitable servitudes, see *Restatement of Property*,

§ 539 comment k (1944); *see also Whitinsville Plaza, Inc. v. Kotseas*, 378 *Mass.* 85, 95-96, 390 *N.E.*2d 243, 249 (1979) (overruling similarly strict approach inasmuch as it was "anachronistic" compared to modern judicial analysis of noncompetition covenants, which focuses on effects of covenant).

Commentators also consider the *Brewer* rule an anachronism and in need of change, as do we. 5 *Powell, supra*, ¶ 678 at 192. Accordingly, to the extent that *Brewer* holds that a noncompetition covenant will not run with the land, it is overruled.

Plaintiff also argues that the "touch and concern" test likewise should be eliminated in determining the enforceability of fully negotiated contracts, in favor of a simpler "reasonableness" standard that has been adopted in most jurisdictions. That argument has some support from commentators, see, *e.g.*, Epstein, "Notice and Freedom of Contract in the Law of Servitudes," 55 *S.Cal.L.Rev.* 1353, 1359-61 (1982) (contending that "touch and concern" complicates the basic analysis and limits the effectiveness of law of servitudes), including a reporter for the *Restatement (Third) of Property*, see French, "Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification," 73 *Cornell L.Rev.* 928, 939 (1988) (arguing that "touch and concern" rule should be completely eliminated and that the law should instead directly tackle the "running" issue on public-policy grounds).

New Jersey courts, however, continue to focus on the "touch and concern" requirement as the pivotal inquiry in ascertaining whether a covenant runs with the land. Under New Jersey law, a covenant that "exercise[s] [a] direct influence on the occupation, use or enjoyment of the premises" satisfies the "touch and concern" rule. *Caullett v. Stanley Stilwell & Sons, Inc.*, 67 *N.J. Super.* 111, 116, 170 *A.*2d 52 (App.Div. 1961). The covenant must touch and concern both the burdened and the benefitted property in order to run with the land. *Ibid; Hayes v. Waverly & Passaic R.R.*, 51 *N.J. Eq.* 3, 27 *A.* 648 (Ch. 1893). Because the law frowns on the placing of restrictions on the freedom of alienation of land, New Jersey courts will enforce a covenant only if it produces a countervailing benefit to justify the burden. *Restatement of Property* § 543, comment c (1944); Reichman, *supra*, 55 S.Cal.L.Rev. at 1229.

Unlike New Jersey, which has continued to rely on the "touch and concern" requirement, most other jurisdictions have omitted "touch and concern" from their analysis and have focused instead on whether the covenant is reasonable. [A long list of citations is omitted.]

Even the majority of courts that have retained the "touch and concern" test have found that noncompetition covenants meet the test's requirements. *See, e.g., Dick v. Sears-Roebuck & Co.*, 115 *Conn.* 122, 160 *A.* 432 (1932) (holding "touch and concern" element satisfied where noncompetition covenants restrained "use to which the land may be put in the future as well as in the present, and which might very likely affect its value"); *Singer v. Wong*, 35 *Conn. Supp.* 640, 404 *A.*2d 124 (1978) (restrictive covenant in deed providing that premises not be used as shopping center "touched and concerned" land because it materially affected value of land) [other cases omitted].

The "touch and concern" test has, thus, ceased to be, in most jurisdictions, intricate and confounding. Courts have decided as an initial matter that covenants not to compete do touch and concern the land. The courts then have examined explicitly the more important question of whether covenants are reasonable enough to warrant enforcement. The time has come to cut the gordian knot that binds this state's jurisprudence regarding covenants running with the land. Rigid adherence to the "touch and concern" test as a means of determining the enforceability of a restrictive covenant is not warranted. Reasonableness, not esoteric concepts of property law, should be the guiding inquiry into the validity of covenants at law. We do not abandon the "touch and concern" test, but rather hold that the test is but one of the factors a court should consider in determining the reasonableness of the covenant.

A "reasonableness" test allows a court to consider the enforceability of a covenant in view of the realities of today's commercial world and not in the light of outmoded theories developed in a vastly different commercial environment. Originally strict adherence to "touch and concern" rule in the old English common-law cases and in *Brewer*, was to effectuate the then pervasive public policy of restricting many, if not all, encumbrances of the land.

Courts today recognize that it is not unreasonable for parties in commercial-property transactions to protect themselves from competition by executing noncompetition covenants. Businesspersons, either as lessees or purchasers may be hesitant to invest substantial sums if they have no minimal protection from a competitor starting a business in the near vicinity. Hence, rather than limiting trade, in some instances, restrictive covenants may increase business activity.

We recognize that "reasonableness" is necessarily a fact sensitive issue involving an inquiry into present business conditions and other factors specific to the covenant at issue. Nonetheless, as do most of the jurisdictions, we find that it is a better test for governing commercial transactions than are obscure anachronisms that have little meaning in today's commercial world. The pivotal inquiry, therefore, becomes what factors should a court consider in determining whether such a covenant is "reasonable" and hence enforceable. We conclude that the following factors should be considered:

> 1. The intention of the parties when the covenant was executed, and whether the parties had a viable purpose which did not at the time interfere with existing commercial laws, such as antitrust laws, or public policy.
> 1. Whether the covenant had an impact on the considerations exchanged when the covenant was originally executed. This may provide a measure of the value to the parties of the covenant at the time.
> 1. Whether the covenant clearly and expressly sets forth the restrictions.
> 1. Whether the covenant was in writing, recorded, and if so, whether the subsequent grantee had actual notice of the covenant.
> 1. Whether the covenant is reasonable concerning area, time or duration. Covenants that extend for perpetuity or beyond the terms of a lease may often be unreasonable. *Alexander's v. Arnold Constable*, 105 *N.J. Super.* 14, 27, 250 *A.*2d 792 (Ch.Div. 1969); *Cragmere Holding Corp. v. Socony Mobile Oil Co.*, 65 *N.J. Super.* 322, 167 *A.*2d 825 (App.Div. 1961).
> 1. Whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenantor. This may be the case in areas where there is limited space available to conduct certain business activities and a covenant not to compete burdens all or most available locales to prevent them from competing in such an activity. *Doo v. Packwood*, 265 *Cal. App.*2d 752, 71 *Cal. Rptr.* 477 (1968); *Kettle River R. v. Eastern Ry. Co.*, 41 *Minn.* 461, 43 *N.W.* 469 (1889).
> 1. Whether the covenant interferes with the public interest. *Natural Prods. Co. v. Dolese & Shepard Co.*, 309 *Ill.* 230, 140 *N.E.* 840 (1923).
> 1. Whether, even if the covenant was reasonable at the time it was executed, "changed circumstances" now make the covenant unreasonable. *Welitoff v. Kohl*, 105 *N.J. Eq.* 181, 147 *A.* 390 (1929).

In applying the "reasonableness" factors, trial courts may find useful the analogous standards we have adopted in determining the validity of employee covenants not to compete after termination of employment. Although enforcement of such a covenant is somewhat restricted because of countervailing policy considerations, we generally enforce an employee non-competition covenant as reasonable if it "simply protects the legitimate interests of the employer imposes no undue hardship on the employee, and is not injurious to the public." *Solari Indus. v. Malady*, 55 *N.J.* 571, 576, 264 *A.*2d 53 (1970). We also held in *Solari* that if such a covenant is found to be overbroad, it may be partially enforced to the extent reasonable under the circumstances. *Id.* at 585, 264 *A.*2d 53. That approach to

the enforcement of restrictive covenants in deeds offers a mechanism for recognizing and balancing the legitimate concerns of the grantor, the successors in interest, and the public.

The concurrence maintains that the initial validity of the covenant is a question of contract law while its subsequent enforceability is one of property law. *Post* at 221, 579 *A.*2d at 300. The result is that the concurrence uses reasonableness factors in construing the validity of the covenant between the original covenantors, but as to successors-in-interest, claims to adhere strictly to a "touch and concern" test. *Post* at 222, 579 *A.*2d at 301. Such strict adherence to a "touch and concern" analysis turns a blind eye to whether a covenant has become unreasonable over time. Indeed many past illogical and contorted applications of the "touch and concern" rules have resulted because courts have been pressed to twist the rules of "touch and concern" in order to achieve a result that comports with public policy and a free market. Most jurisdictions acknowledge the reasonableness factors that affect enforcement of a covenant concerning successors-in-interest, instead of engaging in the subterfuge of twisting the touch and concern test to meet the required result. New Jersey should not remain part of the small minority of States that cling to an anachronistic rule of law. *Supra* at 210, 579 *A.*2d at 295.

There is insufficient evidence in this record to determine whether the covenant is reasonable. Nevertheless, we think it instructive to comment briefly on the application of the "reasonableness" factors to this covenant. We consider first the intent of the parties when the covenant was executed. It is undisputed that when plaintiff conveyed the property to Katz, it intended that the George Street store would not be used as a supermarket or grocery store for a period of forty years to protect his existing business at the Elizabeth Street store from competition. Plaintiff alleges that the purchase price negotiated between it and Katz took into account the value of the restrictive covenant and that Katz paid less for the property because of the restriction. There is no evidence, however, of the purchase price. It is also undisputed that the covenant was expressly set forth in a recorded deed, that the Authority took title to the premises with actual notice of the restrictive covenant, and, indeed, that all the defendants, including C-Town, had actual notice of the covenant.

The parties do not specifically contest the reasonableness of either the duration or area of the covenant. Aspects of the "touch and concern" test also remain useful in evaluating the reasonableness of a covenant, insofar as it aids the courts in differentiating between promises that were intended to bind only the individual parties to a land conveyance and promises affecting the use and value of the land that was intended to be passed on to subsequent parties. Covenants not to compete typically do touch and concern the land. In noncompetition cases, the "burden" factor of the "touch and concern" test is easily satisfied regardless of the definition chosen because the covenant restricts the actual use of the land. *Berger, supra*, 52 *Wash.L.Rev.* at 872. The Appellate Division properly concluded that the George Street store was burdened. However, we disagree with the Appellate Division's conclusion that in view of the covenant's speculative impact, the covenant did not provide a sufficient "benefit" to the Elizabeth Street property because it burdened only a small portion (George Street store) of the "market circle" (less than one-half acre in a market circle of 2000 acres).

The size of the burdened property relative to the market area is not a probative measure of whether the Elizabeth store was benefitted. Presumably, the use of the Elizabeth Street store as a supermarket would be enhanced if competition were lessened in its market area. If plaintiff's allegations that the profits of the Elizabeth Street store increased after the sale of the George Street store are true, this would be evidence that a benefit was "conveyed" on the Elizabeth Street store. Likewise, information that the area was so densely populated, that the George Street property was the only unique property available for a supermarket, would show that the Elizabeth Street store property was benefitted by the covenant. In this connection the C-Town executive in his deposition noted that the George Street store location "businesswise was promising because there's no other store in town." Such evidence, however, also should be considered in determining the "reasonableness" of the area covered by the covenant and whether the covenant unduly restrained trade.

Defendants' primary contention is that due to the circumstances of the neighborhood and more particularly the circumstances of the people of the neighborhood, plaintiff's covenant interferes with the public's interest. Whether that claim is essentially that the community has changed since the covenant was enacted or that the circumstances were such that when the covenant was enacted, it interfered with the public interest, we are unable to ascertain from the record. "Public interest" and "changed circumstances" arguments are extremely fact-sensitive. The only evidence that addresses those issues, the three affidavits of Mr. Keefe, Mr. Nero and Ms. Scott, are insufficient to support any finding with respect to those arguments.

The fact-sensitive nature of a "reasonableness" analysis make resolution of this dispute through summary judgment inappropriate. We therefore remand the case to the trial court for a thorough analysis of the "reasonableness" factors delineated herein.

The trial court must first determine whether the covenant was reasonable at the time it was enacted. If it was reasonable then, but now adversely affects commercial development and the public welfare of the people of New Brunswick, the trial court may consider whether allowing damages for breach of the covenant is an appropriate remedy. C-Town could then continue to operate but Davidson would get damages for the value of his covenant. On the limited record before us, however, it is impossible to make a determination concerning either reasonableness of the covenant or whether damages, injunctive relief, or any relief is appropriate.

In sum, we reject the trial court's conclusion because it depends largely on the continued vitality of *Brewer*, which we hereby overrule. *Supra* at 201-202, 579 *A.*2d at 290-291. Likewise, we reject the Appellate Division's reliance on the "touch and concern" test. Instead, the proper test to determine the enforceability of a restricted noncompetition covenant in a commercial land transaction is a test of "reasonableness," an approach adopted by a majority of the jurisdictions.

III

The other issue before us concerns whether the lease granted by the Housing Authority to C-Town constitutes an impermissible gift of public property in violation of the State Constitution.

… .

We remand to the trial court to determine whether the purchase, lease, and operation of the supermarket constituted a public purpose, and, if so, whether the Housing Authority used justifiable means to attract a supermarket to the area of downtown New Brunswick.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

Pollock, J., concurring.

The Court reverses the Appellate Division's affirmance of the Chancery Division's grant of summary judgment invalidating the restrictive covenant and remands the matter to the Chancery Division for a plenary hearing. Although I concur in the judgment of remand, I believe it should be on different terms.

My basic difference with the majority is that I believe the critical consideration in determining the validity of this covenant is whether it is reasonable as to scope and duration, a point that has never been at issue in this case. Nor has there ever been any question whether the original parties to the covenant, Davidson Bros., Inc. (Davidson), and D. Katz & Sons, Inc. (Katz) intended that the covenant should run with the land. Likewise, the New Brunswick Housing Authority (the Authority) and C-Town have never disputed that they did not have actual notice of the covenant or that there was privity between them and Katz. Finally, the defendants have not contended that the covenant constitutes an unreasonable restraint on trade or that it has an otherwise unlawful purpose, such as invidious discrimination. Davidson, moreover, makes the uncontradicted assertion that the covenant is a burden to the George Street property and benefits the Elizabeth Street property. Hence, the covenant satisfies the requirement that it touch and concern the benefitted and burdened properties.

The fundamental flaw in the majority's analysis is in positing that an otherwise-valid covenant can become invalid not because it results in an unreasonable restraint on trade, but because invalidation facilitates a goal that the majority deems worthy. Considerations such as "changed circumstances" and "the public interest," when they do not constitute such a restraint, should not affect the enforceability of a covenant. Instead, they should relate to whether the appropriate method of enforcement is an injunction or damages. A court should not declare a non-competition covenant invalid merely because enforcement would lead to a result with which the court disagrees. This leads me to conclude that the only issue on remand should be whether the appropriate remedy is damages or an injunction.

Enforcement of the restriction by an injunction will deprive the downtown residents of the convenience of shopping at the George Street property. Refusal to enforce the covenant, on the other hand, will deprive Davidson of the benefit of its covenant. Thus, the case presents a tension between two worthy objectives: the continued operation of the supermarket for the benefit of needy citizens, and the enforcement of the covenant. An award of damages to Davidson rather than the grant of an injunction would permit the realization of both objectives.

-I-

I begin by questioning the majority's formulation and application of a reasonableness test for determining whether the covenant runs with the land. The law has long distinguished between the validity of a covenant between original-contracting parties from the enforceability of a covenant against the covenantor's successor-in-interest. Initial validity is a question of contract law; enforceability against subsequent parties is one of property law. *Caullett v. Stanley Stilwell & Sons*, 67 *N.J. Super.* 111, 116, 170 *A.*2d 52 (App.Div. 1961); R. Cunningham, W. Stoebuck, and D. Whitman, *The Law of Property* 467 (1984) (Cunningham). That distinction need not foreclose a subsequent owner of the burdened property from challenging the validity of the contract between the original parties. The distinction, however, sharpens the analysis of the effect of the covenant.

In this case, the basic issue is enforceability of the covenant against the Authority and C-Town, successors in interest to Katz. Thus, the only relevant consideration is whether the covenant "touches and concerns" the benefitted and burdened properties. For the Chancery Division, the critical issue was "whether the restriction burdens the land in the hands of the Authority." As the majority points out, "[i]n contrast to the trial court's decision, the Appellate Division's rationale was premised on the failure of the benefit of the covenant to run, not of the burden." *Ante* at 202, 579 *A.*2d at 291. The majority correctly disagrees with the Appellate Division's rationale, properly observing that a covenant can provide a benefit even without burdening most of the properties in the relevant market area. *Ante* at 214, 579 *A.*2d at 297. Concerning the running of the burden on the George Street property, the majority views *Brewer v. Marshall & Cheeseman*, 19 *N.J. Eq.* 537 (E. & A. 1868), as an anachronism. It properly overrules the holding of *Brewer* "that a noncompetition covenant will not run with the land * * *." *Ante* at 207, 579 *A.*2d at 293. Continuing, the majority observes that in most jurisdictions the "'touch and concern' test has * * * ceased to be * * * intricate and confounding," and that "[c]ourts have decided as an initial matter that covenants not to compete do touch and concern the land." *Ante* at 209, 579 *A.*2d at 294. Instead of concluding its analysis, the majority adds: "We do not abandon the 'touch and concern' test, but rather hold that the test is but one of the factors a court should consider in determining the reasonableness of the covenant." *Ante* at 210, 579 *A.*2d at 295.

The Court can decide the present case without introducing a new test. On the present record, no question exists about the running of the benefit of the covenant. First, the party seeking to enforce the covenant is Davidson, the original leaseholder, not a successor in interest, of the Elizabeth Street property. Second, as the language of the covenant indicates, the original contracting parties, Davidson and Katz, indicated that the covenant would run with the land. Third, Davidson makes the uncontradicted assertions that both stores were unprofitable before the sale, that the Elizabeth Street store after the sale of the George Street property enjoyed a twenty-per-cent sales increase, and that the reopening of the George Street property caused it to suffer a loss of income. Finally, as the majority

recognizes, the lower courts erred in concluding that the covenant did not "touch and concern" the burdened and benefitted properties. *Ante* at 213, 579 *A.*2d at 296.

It is virtually inconceivable that the covenant does not benefit the Elizabeth Street property. New Jersey courts have declared variously that the benefit "must exercise direct influence upon the occupation, use or enjoyment of the premises," *Caullett, supra*, 67 *N.J. Super.* at 116, 170 *A.*2d 52, and that the covenant must confer "a direct benefit on the owner of land by reason of his ownership," *National Union Bank at Dover v. Segur*, 39 *N.J.L.* 173, 186 (Sup.Ct. 1877). Scholars have written that a covenant's benefit touches and concerns land if it renders the owner's interest in the land more valuable, Bigelow, *The Content of Covenants in Leases*, 12 *Mich.L.Rev.* 639, 645 (1914), or if "the parties as laymen and not as lawyers" would naturally view the covenant as one that aids "the promisee as landowner," C. Clark, *Real Covenants and Other Interests Which Run with the Land* 99 (2d ed. 1947) (Clark); *see also* 5 R. Powell & P. Rohan, *Powell on Real Property* ¶ 673[2][a] (1990) (Powell) (inclining towards Clark's view). Like most courts, leading scholars, Powell, *supra*, § 675[3]; Cunningham, *supra*, at 474-75; and Clark, *supra*, at 106, believe that under the "touch and concern" test, the benefit of non-competition covenants should run with the land.

The conclusion that this covenant "touches and concerns" the land should end the inquiry about enforceability against the Authority and C-Town. The majority, however, holds that the "touch and concern" test is "but one of the factors a court should consider in determining the reasonableness of the covenant." *Ante* at 210, 579 *A.*2d at 295. The majority's inquiry about reasonableness, however, confuses the issue of validity of the original contract between Davidson and Katz with enforceability against the subsequent owner, the Authority. This confusion of validity with enforceability threatens to add uncertainty to an already troubled area of the law. As explained by one leading authority, "[t]he judicial reaction to this confusion [in the law of covenants and equitable servitudes] has often been to state the law so as to achieve the desired result in a particular case. Obviously, this has caused frequent misstatements of the law, which has deepened the overall confusion." Powell, *supra*, ¶ 670[2].

The majority inaccurately asserts, *ante* at 208, 579 *A.*2d at 294, that most jurisdictions "have focused on whether the covenant is reasonable enough to warrant enforcement." Not one case cited by the majority has concluded that a covenant that is reasonable against the original covenantor would be unreasonable against the covenantor's successor who takes with notice. For example, in *Hercules Powder Co. v. Continental Can Co.*, 196 *Va.* 935, 945, 86 *S.E.*2d 128, 133 (1955), only after first concluding that the restriction was reasonable did the court consider "whether it is enforceable by Continental Can, an assignee of the original covenantee, against Hercules, an assignee of the original covenantor." In determining that Hercules was subject to the restriction, the court considered only whether it purchased the land with notice of the restriction. *Id.* at 946-48, 86 *S.E.*2d at 134-35. Similarly, in *Quadro Stations v. Gilley*, 7 *N.C. App.* 227, 234, 172 *S.E.*2d 237, 242 (1970), the court first concluded that the restriction was valid, and then held that it was enforceable against defendants, successors in interest to the original covenanting parties. Nothing in the opinion implies that a restriction that was reasonable between the original parties would be unenforceable against a purchaser of the burdened property who bought with notice. *Doo v. Packwood*, 265 *Cal. App.*2d 752, 756, 71 *Cal. Rptr.* 477, 481 (1968), is likewise unavailing to the majority. There, when purchasing a lot on which Doo had operated a grocery store, Packwood agreed to a noncompetition covenant. After concluding that the covenant was reasonable as between the original parties, the court found that it would be binding on a future purchaser with notice. *Ibid.* In effect, future purchasers would be bound so long as Doo continued to operate a competitive grocery store. *Ibid.* To conclude, the cited cases hold that a reasonable noncompetition covenant binding on the original covenantor likewise binds a subsequent purchaser with notice. Hence, the majority misperceives the focus of the out-of-state cases. The result is that the majority's reasonableness test introduces unnecessary uncertainty in the analysis of covenants running with the land.

As troublesome as uncertainty is in other areas of the law, it is particularly vexatious in the law of real property. The need for certainty in conveyancing, like that in estate planning, is necessary for people to structure their

affairs. Covenants that run with the land can affect the value of real property not only at the time of sale, but for many years thereafter. Consequently, vendors and purchasers, as well as their successors, need to know whether a covenant will run with the land. The majority acknowledges that noncompetition covenants play a positive role in commercial development. *Ante* at 210, 579 *A.*2d at 295. Notwithstanding that acknowledgement, the majority's reasonableness test generates confusion that threatens the ability of commercial parties and their lawyers to determine the validity of such covenants. This, in turn, impairs the utility of noncompetition covenants in real estate transactions.

As between the vendor and purchaser, a noncompetition covenant generally should be treated as valid if it is reasonable in scope and duration, *Irving Inv. Corp. v. Gordon*, 3 *N.J.* 217, 221, 69 *A.*2d 725 (1949); *Heuer v. Rubin*, 1 *N.J.* 251, 256-57, 62 *A.*2d 812 (1949); *Scherman v. Stern*, 93 *N.J. Eq.* 626, 630, 117 *A.* 631 (E. & A. 1922), and neither an unreasonable restraint on trade nor otherwise contrary to public policy. A covenant would contravene public policy if, for example, its purpose were to secure a monopoly, *Quadro Stations, supra*, 7 *N.C. App.* at 235, 172 *S.E.*2d at 242; *Hercules Powder Co., supra*, 196 *Va.* at 944-45, 86 *S.E.*2d at 132-33, or to carry out an illegal object, such as invidious discrimination, *see, e.g., N.J.S.A.* 46:3-23 (declaring restrictive covenants in real estate transactions void if based on race, creed, color, national origin, ancestry, marital status, or sex).

Applying those principles to the validity of the agreement between Davidson and Katz, I find this covenant enforceable against defendants. The majority acknowledges that "[t]he parties do not specifically contest the reasonableness of either the duration or the area of the covenant." *Ante* at 213, 579 *A.*2d at 296. I agree. The covenant is limited to one parcel, the George Street property. Defendants do not assert that Davidson has restricted or even owns other property in New Brunswick. Furthermore, they do not allege that other property is not available for a supermarket. In brief, the Authority has not alleged that at the time of the sale from Davidson to Katz, or even at present, the George Street property was the only possible site in New Brunswick for a supermarket. Consequently, the covenant may not be construed to give rise to a monopoly. In all of New Brunswick it restricts a solitary one-half acre tract from use for a single purpose. Indeed, the record demonstrates that the Authority explored other options, including expansion of a food cooperative and increasing the product lines at nearby convenience stores. Nothing in the record supports the conclusion that the covenant might be unreasonable respecting space.

Nor does anything indicate that the forty-year length of the restriction between Davidson and Katz is unreasonable in time. As we have stated, "where the space contained in the covenant is reasonable and proper there need be no limitation as to time." *Rubin, supra*, 1 *N.J.* at 256-57, 62 *A.*2d 812. That statement echoes the words "certainly it is no objection to an agreement not to compete with a mercantile business that the restraint is unlimited in point of time when [as here] it is reasonably limited in point of space." *Stern, supra*, 93 *N.J. Eq.* at 630, 117 *A.* 631. To sustain the subject covenant we need not go so far as to say that a covenant could never be unreasonably long. In an appropriate case, a court, drawing on the analogy to restrictive covenants in employment contracts, might reform a covenant so that it lasts only for a reasonable time. *Solari Indus. v. Malady*, 55 *N.J.* 571, 264 *A.*2d 53 (1970). This is not such a case.

Here, Davidson holds a lease on the Elizabeth Street property for a term of twenty years, with two renewable five-year terms. Those lease terms are substantially, if not precisely, coextensive with the term of the covenant. If, on remand, the Chancery Division should find that the additional ten-year period is not enforceable by Davidson, it should also find that the restriction is valid for the thirty-year period during which Davidson's lease may run. In sum, I believe that the covenant is reasonable at least for the term of Davidson's lease.

To the extent that noncompetition covenants in real estate transactions are deemed valid if reasonable in scope and duration, they are more readily upheld than similar covenants arising out of employment contracts. *Solari Indus., supra*, 55 *N.J.* at 576, 264 *A.*2d 53. In this regard, Williston points out that "[r]estriction upon the use of real property is considered less likely to affect the public interest adversely than restraint of the activities of

individual parties and accordingly, such covenants are usually held not contrary to public policy." 14 *Williston on Contracts* § 1642 (3d ed. 1972) (Williston). Nothing in the record supports the conclusion that when made or at present the subject covenant was an unreasonable restraint on trade or otherwise contrary to public policy.

Certain of the factors identified by the majority must be present for a covenant to run apart from the considerations of reasonableness. Such factors are the intent of the parties that the covenant run, clarity of the express restrictions, whether the covenant was in writing, and whether it was recorded. *Caullett, supra*, 67 *N.J. Super.* at 116, 170 *A.*2d 52; *Petersen v. Beekmere*, 117 *N.J. Super.* 155, 166-67, 283 *A.*2d 911 (Ch.Div. 1971); Clark, *supra*, at 94; Cunningham, *supra*, at 470. As previously indicated, all those factors are present in this case. If they had not been present, the covenant would have been unenforceable without reference to a reasonableness test. Duplicating those factors in such a test is counterproductive.

The majority's three remaining factors also pose troubling problems. Without citing any authority, the majority invites review of "[w]hether the covenant had an impact on the considerations exchanged when the covenant was originally executed." *Ante* at 210, 579 *A.*2d at 295. As the majority acknowledges, however, Davidson has made the uncontradicted assertion "that the purchase price negotiated between it and Katz took into account the value of the restrictive covenant and that Katz paid less for the property because of the restriction." *Ante* at 213, 579 *A.*2d at 296.

In contract matters, courts ordinarily concern themselves with the existence, not the adequacy, of consideration. *Kampf v. Franklin Life Ins. Co.*, 33 *N.J.* 36, 43, 161 *A.*2d 717 (1960). Because a noncompetition covenant in a commercial-real-estate sale involves the sale of property in exchange for the payment of the purchase price and the noncompetition covenant, it would be difficult to argue that the covenant was not supported by consideration. In fact, the majority does not cite to a single case in which a noncompetition covenant in a real-estate transaction has been declared invalid for lack of consideration.

Recognizing that the covenant should run is consistent with the intent of the contracting parties and reflects the economic consequences of their transaction. As Chief Justice Beasley wrote in *National Union Bank at Dover, supra*, 39 *N.J.L.* at 187, "[s]ince these parties most manifestly have thought that the stipulation in question gave additional value to the property, why, and on what ground, should the court declare that such was not the case?" *See DeGray v. Monmouth Beach Club House Co.*, 50 *N.J. Eq.* 329, 333, 24 *A.* 388 (Ch. 1892) ("The equity thus enforced arises from the inference that the covenant has, to a material extent, entered into the consideration of the purchase, and that it would be unjust to the original grantor to permit the covenant to be violated."); *Tulk v. Moxhay*, 2 *Phil.* 774, 777-78, 41 *Eng.Rep.* 1143, 1144 (1848) ("Of course, the price would be affected by the covenant and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.").

The majority's other two factors are "whether the covenant interferes with the public interest," and "whether, even if the covenant was reasonable at the time it was executed, 'changed circumstances' now make the covenant unreasonable." *Ante* at 212, 579 *A.*2d at 295. In this regard, the majority adds that

> [t]he trial court must first determine whether the covenant was reasonable at the time it was enacted. If it was reasonable then, but now adversely affects commercial development and the public welfare of the people of New Brunswick, the trial court may consider whether allowing damages is an appropriate remedy. C-Town could continue to operate but Davidson would get damages for the value of his [sic] covenant. On the limited record before us, however, it is impossible to make a determination as to the reasonableness of the covenant or whether damages, injunctive relief, or any relief is appropriate. [*Ante* at 215, 579 *A.*2d at 297.]

Implicit in the statement is the notion that a court might declare a covenant invalid even if it is reasonable in scope and duration, does not have a pernicious objective, and creates neither a monopoly nor an unreasonable restraint of trade. In brief, merely because it does not like a covenant, a court may find it invalid. This implication infects the usefulness of such covenants and represents an unwarranted intrusion of the judiciary in private transactions. The statement also points up the problem of blurring the contractual and property aspects of the covenant. *Supra* at 221-222, 579 *A.*2d at 300-301. Fairly read, the factors are not relevant to the determination of enforceability, as the Court initially indicated, but to the determination whether the appropriate relief is the award of damages or an injunction. See *Welitoff v. Kohl*, 105 *N.J. Eq.* 181, 189, 147 *A.* 390 (E. & A. 1929).

The decided cases suggest that changed circumstances justify the refusal to enforce an otherwise-enforceable covenant only when the change defeats the covenant's purpose. Thus, in *Doo, supra*, 265 *Cal. App.*2d at 756, 71 *Cal. Rptr.* at 481, a claim of changed circumstances could not defeat a restrictive covenant against a grocery store as long as the benefitted party continued to operate a competitive store on another property. Analogous New Jersey cases imply a similar conclusion. In *Weinstein v. Swartz*, 3 *N.J.* 80, 89, 68 *A.*2d 865 (1949), when business development elsewhere did not affect the residential character of the neighborhood in which the burdened property was located, the Court recognized the continuing validity of restrictions limiting the use of the property to a single-family residence. Similarly, in *Leasehold Estates v. Fulbro Holding Co.*, 47 *N.J. Super.* 534, 565, 136 *A.*2d 423 (App.Div. 1957), the court refused to enforce a 103-year-old covenant limiting the use of the front of an alley to barns and stables because enforcement would not provide the "contemplated benefit to the covenantee."

Perhaps the majority's opinion is best read as holding that Davidson is entitled to damages but not an injunction if the covenant was reasonable when formed, but now adversely affects the public welfare of the people of New Brunswick. *See Gilpin v. Jacob Ellis Realties*, 47 *N.J. Super.* 26, 31-34, 135 *A.*2d 204 (App.Div. 1957). Such a holding would ensure that Davidson will not be "left without any redress; * * * [it will be] given what plaintiffs are given in many types of cases – relief measured, so far as the court reasonably may do so, in damages." *Id.* at 34, 135 *A.*2d 204.

Nothing in the record provides any basis for finding that in the six years that elapsed between 1980, when Davidson sold to Katz, and 1986, when Katz sold to the Authority, circumstances changed so much that they render the covenant unenforceable. The record is devoid of any showing that anything has happened since 1980 that has deprived the Elizabeth Street store of the covenant's benefit. Notions of "changed circumstances" and the "public interest" thinly veil the Authority's attempt to avoid compensating Davidson for the cost of the lost benefit of an otherwise-enforceable covenant. I am left to wonder whether the majority would so readily condone the Authority's taking of Davidson's property if the interest taken were one in fee simple and not a restrictive covenant. It is wrong to take Davidson's covenant without compensation just as it would be wrong to take its fee interest without paying for it. Shopkeepers in malls throughout the state will be astonished to learn that noncompetition covenants that they have so carefully negotiated in their leases are subject to invalidation because they run counter to a court's perception of "changed circumstances" and the "public interest."

-II-

For me the critical issue is whether the appropriate remedy for enforcing the covenant is damages or an injunction. Ordinarily, as between competing land users, the more efficient remedy for breach of a covenant is an injunction. R. Posner, *Economic Analysis of Law* 62 (1986) (Posner); R. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 *S.Cal.L.Rev.* 1353-67 (1962); Calabresi and Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv.L.Rev.* 1089, 1118 (1972) (Calabresi and Melamed). *But see* Posner, *supra*, at 59; Calabresi and Melamed, *supra*, at 119 (discussing situations in which damages are a more efficient remedy than an injunction). If Katz still owned the George Street property, the efficient remedy, therefore, would be an injunction. The Authority, which took title with knowledge of the covenant, is in no better position than Katz

insofar as the binding effect of the covenant is concerned. Although an injunction might be the most efficient form of relief, it would however deprive the residents of access to the George Street store.

The economic efficiency of an injunction, although persuasive, is not dispositive. The right rule of law is not necessarily the one that is most efficient. *Saint Barnabas Medical Center v. Essex County*, 111 *N.J.* 67, 88, 543 *A.*2d 34 (1988) (Pollock, J., concurring); *see also* R. Coase, *The Problem of Social Cost*, 3 *J. Law & Econ.* 1, 19 (1960). In other cases, New Jersey courts have allowed cost considerations other than efficiency to affect the award of a remedy.

For example, in *Gilpin, supra*, 47 *N.J. Super.* 26, 135 *A.*2d 204, the court refused to approve an injunction, but upheld an award of damages to the victim of a breach of a covenant. The property right at issue was a covenant restricting the building of any structure more than fifteen feet tall within four feet of one of the parties' common boundaries. Defendant, a builder, was the successor to the land of the original covenantor. Plaintiff succeeded to ownership of the land originally benefitted by the covenant. Defendant and plaintiff were neighboring landowners. Defendant breached the covenant. Remodeling the structure would have cost defendant $11,500. The trial court had found that the breach harmed plaintiff to the extent of $1,000 in damages. Invoking the "doctrine of relative hardship," the Appellate Division held that the differences in these two figures were "so grossly disproportionate in amount as to justify the denial of the mandatory injunction." 47 *N.J. Super.* at 35-36, 135 *A.*2d 204. At the same time, the Appellate Division upheld the $1,000-damages award to plaintiff. *Id.* at 36, 135 *A.*2d 204. Thus, the court concluded that the appropriate remedy for enforcing the covenant was an award of damages, not an injunction.

Injunctions, moreover, are ordinarily issued in the discretion of the court. *Id.* at 29, 135 *A.*2d 204. Hence, "[t]he court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties." *Sears, Roebuck & Co. v. Camp*, 124 *N.J. Eq.* 403, 412, 1 *A.*2d 425 (E. & A. 1938) (quoting Pomeroy, *Equity Jurisprudence* § 109 (5th ed. 1941)). In the exercise of its discretion, a court may deny injunctive relief when damages provide an available adequate remedy at law. *See Board of Educ., Borough of Union Beach v. N.J.E.A.*, 53 *N.J.* 29, 43, 247 *A.*2d 867 (1968).

In the past, however, an injunction in cases involving real covenants and equitable servitudes "was granted almost as a matter of course upon a breach of the covenant. The amount of damages, and even the fact that the plaintiff has sustained *any* pecuniary damages, [was] wholly immaterial." J.N. Pomeroy, *Equity Jurisprudence*, § 1342 (5th ed. 1941). The roots of that tradition are buried deep in the English common law and are not suited for modern American commercial practices. In brief, the unswerving preference for injunctive relief over damages is an anachronism.

At English common law, as between grantors and grantees, covenants running with the land violated the public policy against encumbrances. *See* Powell, *supra*, § 670 n. 27 (citing *Keppell v. Bailey*, 39 *Eng.Rep.* 1042 (Ch. 1834)). The policy becomes understandable on realizing that England originally did not provide a system for recording encumbrances, such as restrictive covenants. *See* Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 *Minn.L.Rev.* 167, 186 (1970). Without a recording system, a subsequent grantee might not receive actual or constructive notice of such a covenant. As the Court points out, "[a]dequate notice obliterated any express requirement of 'touch and concern.'" *Ante* at 204, 579 *A.*2d at 292.

For centuries, New Jersey has provided a means for recording restrictive covenants. Hence, the policy considerations that counselled against enforcement of restrictive covenants at English common law do not apply in this state. In the absence of an adequate remedy at law, moreover, the English equity courts filled the gap by providing equitable relief, such as an injunction. *Tulk, supra*, 2 *Phil.* 774, 41 *Eng.Rep.* 1143 (discussed by the majority, *ante* at 204, 579 *A.*2d at 292.) In this state, unlike in England, covenants between grantor and grantee are readily enforceable. *Roehrs v. Lees*, 178 *N.J. Super.* 399, 429 *A.*2d 388 (App.Div. 1981) (covenant between neighboring property owners arising from a grantor-grantee relationship between original covenanting parties enforceable; matter remanded to trial court to determine whether damages or injunction was appropriate); *Gilpin, supra*, 47 *N.J. Super.*

at 29, 135 *A.*2d 204. Hence, the need for injunctive relief, as distinguished from damages, is less compelling in New Jersey than at English common law, where damages were not always available. I would rely on the rule that a court should not grant an equitable remedy when damages are adequate. *N.J.E.A., supra*, 53 *N.J.* at 43, 247 *A.*2d 867.

Here, moreover, the Authority holds a trump card not available to all other property owners burdened by restrictive covenants – the power to condemn. By recourse to that power, the Authority can vitiate the injunction by condemning the covenant and compensating Davidson for its lost benefit. That power does not alter the premise that an injunction is generally the most efficient form of relief. *See* Calabresi and Melamed, *supra*, at 1118; Posner, *supra*, at 62. It merely emphasizes that the Authority through condemnation can effectively transform injunctive relief into a damages award. Arguably, the most efficient result is to enforce the covenant against the Authority and then remit it to its power of condemnation. This result would recognize the continuing validity of the covenant, compensate Davidson for its benefit, and permit the needy citizens of New Brunswick to enjoy convenient shopping.

Forcing the Authority to institute eminent-domain proceedings conceivably would waste judicial resources and impose undue costs on the parties. A more appropriate result is to award damages to Davidson for breach of the covenant. That would be true, I believe, even against a subsequent grantee that does not possess the power to condemn.

Money damages would compensate Davidson for the wrong done by the opening of the George Street supermarket. Davidson would be "given what plaintiffs are given in many types of cases – relief measured, so far as the court reasonably may do so, in damages." *Gilpin, supra*, 47 *N.J. Super.* at 34, 135 *A.*2d 204. The award of money damages, rather than an injunction, might be the more appropriate form of relief for several reasons. First, a damages award is "particularly applicable to a case, such as this, wherein we are dealing with two commercial properties * * *." *Id.* at 35, 135 *A.*2d 204. Second, the award of damages in a single proceeding would provide more efficient justice than an injunction in the present case, with a condemnation suit to follow. Davidson would be compensated for the loss of the covenant and the needy residents would enjoy more convenient shopping. That solution is both efficient and just.

I can appreciate why New Brunswick residents want a supermarket and why the Authority would come to their aid. Supermarkets may be essential for the salvation of inner cities and their residents. The Authority's motives, however noble, should not vitiate Davidson's right to compensation. The fair result, it seems to me, is for the Authority to compensate Davidson in damages for the breach of its otherwise valid and enforceable covenant.

PROBLEMS

There is a group of neighbors who wish to contract to prevent commercial development of any of their lands.

1. How might they do this to ensure the agreement runs with their lands?
1. What is the minimum they need to do in order to create agreements enforceable against successors?
1. Give an example of a successor who would not be in strict vertical privity with his or her predecessor.
1. What needs to be shown for a successor to sue an original contracting party who develops commercially?

Answers

1. How might they do this to ensure the agreement runs with their lands?

The answer needs to include something ensuring horizontal privity. Full credit if you say they need to enter a strawman transaction with a lawyer and record the agreement. 1/2 credit if you just list the elements for the burden to run with some explanation but without highlighting what exactly they need to do to achieve horizontal privity (h.priv., v. priv., writing, intent, notice, touch and concern).

2. What is the minimum they need to do in order to create agreements enforceable against successors?

They just need to put it in writing and record or otherwise provide for notice. The key here is that they don't need to achieve horizontal privity to create an enforceable equitable servitude (injunction suit).

3. Give an example of a successor who would not be in strict vertical privity with his or her predecessor.

The tenant of a landlord. Any example where the predecessor retains an interest will work. (Life Tenant with a reversion in the grantor rather than a remainder interest in someone else.)

4. What needs to be shown for a successor to sue an original contracting party who develops commercially?

Only that the benefit runs: Writing, intent, touch and concern. The point is that you don't have to show that the burden runs – i.e., no need for notice. If you mention vertical privity, that's fine, but it's generally not needed to sue for an injunction.

6.1.2. Implied Covenants

Sanborn v. McLean,

206 N.W. 496 (Mich. 1925).

Clark, Emmons, Bryant & Klein, of Detroit, for appellants.

Warren, Cady, Hill & Hamblen, of Detroit, for appellees.

Wiest, J.

Defendant Christina McLean owns the west 35 feet of lot 86 of Green Lawn subdivision, at the northeast corner of Collingwood avenue and Second boulevard, in the city of Detroit, upon which there is a dwelling house, occupied by herself and her husband, defendant John A. McLean. The house fronts Collingwood avenue. At the rear of the lot is an alley. Mrs. McLean derived title from her husband, and, in the course of the opinion, we will speak of both as defendants. Mr. and Mrs. McLean started to erect a gasoline filling station at the rear end of their lot, and they and their contractor, William S. Weir, were enjoined by decree from doing so and bring the issues before us by appeal. Mr. Weir will not be further mentioned in the opinion.

Collingwood avenue is a high grade residence street between Woodward avenue and Hamilton boulevard, with single, double, and apartment houses, and plaintiffs, who are owners of land adjoining and in the vicinity of defendants' land, and who trace title, as do defendants, to the proprietors of the subdivision, claim that the proposed gasoline station will be a nuisance per se, is in violation of the general plan fixed for use of all lots on the street for residence purposes only, as evidenced by restrictions upon 53 of the 91 lots fronting on Collingwood avenue, and that defendants' lot is subject to a reciprocal negative easement barring a use so detrimental to the enjoyment and value of its neighbors. Defendants insist that no restrictions appear in their chain of title and they purchased without notice of any reciprocal negative easement, and deny that a gasoline station is a nuisance per se. We find no occasion to pass upon the question of nuisance, as the case can be decided under the rule of reciprocal negative easement.

This subdivision was planned strictly for residence purposes, except lots fronting Woodward avenue and Hamilton boulevard. The 91 lots on Collingwood avenue were platted in 1891, designed for and each one sold solely for residence purposes, and residences have been erected upon all of the lots. Is defendants' lot subject to a recip-

rocal negative easement? If the owner of two or more lots, so situated as to bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual, and, during the period of restraint, the owner of the lot or lots retained can do nothing forbidden to the owner of the lot sold. For want of a better descriptive term this is styled a reciprocal negative easement. It runs with the land sold by virtue of express fastening and abides with the land retained until loosened by expiration of its period of service or by events working its destruction. It is not personal to owners, but operative upon use of the land by any owner having actual or constructive notice thereof. It is an easement passing its benefits and carrying its obligations to all purchasers of land, subject to its affirmative or negative mandates. It originates for mutual benefit and exists with vigor sufficient to work its ends. It must start with a common owner. Reciprocal negative easements are never retroactive; the very nature of their origin forbids. They arise, if at all, out of a benefit accorded land retained, by restrictions upon neighboring land sold by a common owner. Such a scheme of restriction must start with a common owner; it cannot arise and fasten upon one lot by reason of other lot owners conforming to a general plan. If a reciprocal negative easement attached to defendants' lot, it was fastened thereto while in the hands of the common owner of it and neighboring lots by way of sale of other lots with restrictions beneficial at that time to it. This leads to inquiry as to what lots, if any, were sold with restrictions by the common owner before the sale of defendants' lot. While the proofs cover another avenue, we need consider sales only on Collingwood.

December 28, 1892, Robert J. and Joseph R. McLaughlin, who were then evidently owners of the lots on Collingwood avenue, deeded lots 37 to 41 and 58 to 62, inclusive, with the following restrictions:

> No residence shall be erected upon said premises which shall cost less than $2,500, and nothing but residences shall be erected upon said premises. Said residences shall front on Helene (now Collingwood) avenue and be placed no nearer than 20 feet from the front street line.

July 24, 1893, the McLaughlins conveyed lots 17 to 21 and 78 to 82, both inclusive, and lot 98 with the same restrictions. Such restrictions were imposed for the benefit of the lands held by the grantors to carry out the scheme of a residential district, and a restrictive negative easement attached to the lots retained, and title to lot 86 was then in the McLaughlins. Defendants' title, through mesne conveyances, runs back to a deed by the McLaughlins dated September 7, 1893, without restrictions mentioned therein. Subsequent deeds to other lots were executed by the McLaughlins, some with restrictions and some without. Previous to September 7, 1893, a reciprocal negative easement had attached to lot 86 by acts of the owners, as before mentioned, and such easement is still attached and may now be enforced by plaintiffs, provided defendants, at the time of their purchase, had knowledge, actual or constructive, thereof. The plaintiffs run back with their title, as do defendants, to a common owner. This common owner, as before stated, by restrictions upon lots sold, had burdened all the lots retained with reciprocal restrictions. Defendants' lot and plaintiff Sanborn's lot, next thereto, were held by such common owner, burdened with a reciprocal negative easement, and, when later sold to separate parties, remained burdened therewith, and right to demand observance thereof passed to each purchaser with notice of the easement. The restrictions were upon defendants' lot while it was in the hands of the common owners, and abstract of title to defendants' lot showed the common owners, and the record showed deeds of lots in the plat restricted to perfect and carry out the general plan and resulting in a reciprocal negative easement upon defendants' lot and all lots within its scope, and defendants and their predecessors in title were bound by constructive notice under our recording acts. The original plan was repeatedly declared in subsequent sales of lots by restrictions in the deeds, and, while some lots sold were not so restricted, the purchasers thereof, in every instance, observed the general plan and purpose of the restrictions in building residences. For upward of 30 years the united efforts of all persons interested have carried out the

common purpose of making and keeping all the lots strictly for residences, and defendants are the first to depart therefrom.

When Mr. McLean purchased on contract in 1910 or 1911, there was a partly built dwelling house on lot 86, which he completed and now occupies. He had an abstract of title which he examined and claims he was told by the grantor that the lot was unrestricted. Considering the character of use made of all the lots open to a view of Mr. McLean when he purchased, we think, he was put thereby to inquiry, beyond asking his grantor, whether there were restrictions. He had an abstract showing the subdivision and that lot 86 had 97 companions. He could not avoid noticing the strictly uniform residence character given the lots by the expensive dwellings thereon, and the least inquiry would have quickly developed the fact that lot 86 was subjected to a reciprocal negative easement, and he could finish his house, and, like the others, enjoy the benefits of the easement. We do not say Mr. McLean should have asked his neighbors about restrictions, but we do say that with the notice he had from a view of the premises on the street, clearly indicating the residences were built and the lots occupied in strict accordance with a general plan, he was put to inquiry, and, had he inquired, he would have found of record the reason for such general conformation, and the benefits thereof serving the owners of lot 86 and the obligations running with such service and available to adjacent lot owners to prevent a departure from the general plan by an owner of lot 86.

While no case appears to be on all fours with the one at bar, the principles we have stated, and the conclusions announced, are supported by *Allen v. City of Detroit*, 167 Mich. 464, 133 N. W. 317, 36 L. R. A. (N. S.) 890; *McQuade v. Wilcox*, 215 Mich. 302, 183 N. W. 771, 16 A. L. R. 997; *French v. White Star Refining Co.*, 229 Mich. 474, 201 N. W. 444; *Silberman v. Uhrlaub*, 116 App. Div. 869, 102 N. Y. S. 299; *Boyden v. Roberts*, 131 Wis. 659, 111 N. W. 701; *Howland v. Andrus*, 80 N. J. Eq. 276, 83 A. 982.

We notice the decree in the circuit directed that the work done on the building be torn down. If the portion of the building constructed can be utilized for any purpose within the restrictions, it need not be destroyed.

With this modification, the decree in the circuit is affirmed, with costs to plaintiffs.

Citizens for Covenant Compliance v. Anderson,

12 Cal.4th 345 (1995)

Wilson, Sonsini, Goodrich & Rosati and Debra Summers for Plaintiffs and Appellants.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Jan S. Stevens, Assistant Attorney General, Jamee Jordan Patterson, Deputy Attorney General, William M. Pfeiffer, Steven A. Sokol, Sonia M. Younglove, Miller, Starr & Regalia, Harry D. Miller, Rutan & Tucker and Anne Nelson Lanphar as Amici Curiae on behalf of Plaintiffs and Appellants.

Roger Bernhardt, Cooley, Godward, Castro, Huddleson & Tatum, Kenneth J. Adelson, Benjamin K. Riley and Yvonne Gonzalez Rogers for Defendants and Appellants.

Stephen Cavellini as Amicus Curiae on behalf of Defendants and Appellants.

Arabian, J.

The Andersons want to plant and harvest grapes, operate a winery, and keep llamas on their property in Woodside. Some neighbors object, and claim such activities are prohibited by covenants, conditions and restrictions (CC&R's) that limit the Andersons' property, and theirs, to residential use. The Andersons counter, thus far successfully, that the CC&R's are not enforceable because they are not mentioned in any deed to their property. The dispute is now before us.

Its resolution requires us to penetrate a legal thicket entangled by the ancient doctrines of convenants that run with the land and equitable servitudes. The task is not easy. "The law of easements, real covenants, and equitable

servitudes is the most complex and archaic body of American property law remaining in the twentieth century." (French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands* (1982) 55 So.Cal.L.Rev. 1261.) Another commentator uses stronger language: "The law in this area is an unspeakable quagmire. The intrepid soul who ventures into this formidable wilderness never emerges unscarred. Some, the smarter ones, quickly turn back to take up something easier like the income taxation of trusts and estates. Others, having lost their way, plunge on and after weeks of effort emerge not far from where they began, clearly the worse for wear. On looking back they see the trail they thought they broke obscured with foul smelling waters and noxious weeds. Few willingly take up the challenge again." (Rabin, Fundamentals of Modern Real Property Law (1974) p. 489.)

It is, however, necessary to take up the challenge. *In vino veritas.* Although the relevant doctrines go back centuries, they are more vital than ever today as California becomes increasingly crowded and people live in closer proximity to one another. Planned communities have developed to regulate the relationships between neighbors so all may enjoy the reasonable use of their property. Mutual restrictions on the use of property that are binding upon, and enforceable by, all units in a development are becoming ever more common and desirable. We recently confronted the question of what restrictions may reasonably be imposed in a condominium setting. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361 [33 Cal. Rptr.2d 63, 878 P.2d 1275].) This case addresses an earlier step in the process, considering how a general plan of restrictions is created in the first place.

The CC&R's of this case were recorded before any of the properties they purport to govern were sold, thus giving all buyers constructive notice of their existence. They state they are to bind and benefit each parcel of property as part of a planned community. Nevertheless, the Court of Appeal held they are not enforceable because they were not also mentioned in a deed or other document when the property was sold. We disagree, and adopt the following rule: if a declaration establishing a common plan for the ownership of property in a subdivision and containing restrictions upon the use of the property as part of the common plan is recorded before the execution of the contract of sale, describes the property it is to govern, and states that it is to bind all purchasers and their successors, subsequent purchasers who have constructive notice of the recorded declaration are deemed to intend and agree to be bound by, and to accept the benefits of, the common plan; the restrictions, therefore, are not unenforceable merely because they are not *additionally* cited in a deed or other document at the time of the sale.

We therefore reverse the judgment of the Court of Appeal.

I. THE FACTS

Defendants Jared A. and Anne Anderson (the Andersons) own two adjacent parcels of property in Woodside that were part of separate subdivisions developed at different times.

One parcel was part of Skywood Acres, created in the 1950's when Joseph and Claire Stadler subdivided land into some 60 residential building lots. On June 5, 1958, an instrument entitled "Declarations Imposing Covenants Restrictions and Agreements Affecting ... Skywood Acres," executed by the Stadlers, was recorded in San Mateo County. It states that the Stadlers owned the property, the map of which had previously been recorded, and expresses their "desire to establish a general plan for the improvement and development of said property and to subject said property to the following conditions, restrictions, covenants and reservations upon and subject to which all of said property shall be held, improved and conveyed...." Numerous restrictions follow, the first of which is that each lot "shall be used for residential purposes only." The instrument provides that "Dogs, cats, hares, fowls and fish may be kept as household pets provided they are not kept, bred or raised for commercial purposes or in unreasonable number," and allows keeping horses on specified lots under certain conditions. It also states, "All these conditions and restrictions shall run with the land and shall be binding upon all parties and all persons claiming under them...." It further provides that, as to the Stadlers and "their grantees and successors in interest of any lot or lots" in the subdivision, the conditions are to be "covenants running with the land" enforceable by "the Subdividers, grantees or assigns, or by such owners or successors in interest."

The portion of Skywood Acres involved here was sold on October 14, 1958, and, after intermediate conveyances, was eventually acquired by the Andersons. Neither the original grant deed nor any other deed in the chain of title leading to the Andersons refers to the recorded restrictions. The Andersons' title insurance report, however, identifies the Skywood Acres CC&R's.[1]

The second parcel was part of the Friars subdivision, comprised of four lots. On January 24, 1977, the Town of Woodside adopted a resolution approving the parcel map for the subdivision upon certain conditions, including that the developer submit to the town attorney for approval "the convenants, conditions and restrictions applicable to this land division." On May 10, 1977, a "Declaration Imposing Covenants, Restrictions, Easements and Agreements," executed by the owner, was recorded.

This declaration describes the property in the subdivision and states that the owner desired and intended "to subject [the property] to certain conditions, covenants and charges between them and all subsequent purchasers…." It declares that the property "shall be conveyed subject to the conditions, convenants and charges" set forth, including that the property is to be used solely for single family residences, and specifically "exclude[s] every form of business, commercial, manufacturing, or storage enterprises or activity…." Keeping animals other than household pets and horses is prohibited. The restrictions "are declared to constitute mutual equitable convenants and servitudes for the protection and benefit of each property in the said subdivision," and "are to run with the land." Moreover, "Each grantee of a conveyance or purchaser under a Contract or Agreement of Sale by accepting a Deed or a Contract of Sale or Agreement of purchase, accepts the same subject to any of the covenants, restrictions, easements and agreements set forth in this Declaration and agrees to be bound by the same." The owner of any of the parcels may enforce the restrictions.

The portion of the Friars subdivision involved here was sold two days after the CC&R's were recorded, and eventually was acquired by the Andersons at a foreclosure sale. The original deed refers to the parcel map, but not to the CC&R's. No other deed in the Andersons' chain of title refers to them. The title insurance report for this lot, purchased by the original buyers, identifies the Friars CC&R's.

The parties agree that both subdivisions were "developed from a general plan of uniform development." Both sets of CC&R's contain provisions regarding possible modification and termination of the restrictions. The record does not indicate whether any other deed to property in either subdivision mentions the CC&R's.

After purchasing the two parcels of property, the Andersons entered into a limited partnership agreement with a company located in the Island of Guernsey in the United Kingdom to operate a winery under the name Chaine d'Or Vineyards. They have obtained permits from the Town of Woodside to grow grapes and produce wine on their property, subject to specified conditions. In addition, the Andersons have admitted to keeping seven llamas on the property as pets.

The plaintiffs, an unincorporated association named Citizens for Covenant Compliance and individual landowners representing both subdivisions (hereafter, collectively, Citizens), filed this action against the Andersons to enforce both the Skywood Acres and the Friars CC&R's, which, they claim, prohibit the wine business and the keeping of llamas. The superior court found the CC&R's unenforceable, and judgment was eventually entered for the Andersons. Citizens appealed.

The Court of Appeal affirmed. For "several reasons," it determined that the CC&R's are not covenants running with the land. It also found they are not enforceable as equitable servitudes because no deed or other written instrument exchanged between a buyer and a seller refers to the CC&R's. For this reason, the court concluded, no parcel in either subdivision was "conveyed pursuant to an express, written, agreement that it was conveyed subject to a general plan of restrictions. Absent that, it is irrelevant that the Andersons may have had actual notice of the CC&R's."

We granted Citizens' petition for review.

II. DISCUSSION

A. Background

1. Covenants and Equitable Servitudes

Modern subdivisions are often built according to a general plan containing restrictions that each owner must abide by for the benefit of all. "Ordinarily, a general plan of restriction is recorded by the subdivider grantor for the purpose of insuring the uniform and orderly development and use of the entire tract by all of the original purchasers as well as their successors in interest. The restrictions are imposed upon each parcel within the tract. These subdivision restrictions are used to limit the type of buildings that can be constructed upon the property or the type of activity permitted on the property, prohibiting such things as commercial use or development within the tract, limiting the height of buildings, imposing setback restrictions, protecting views, or imposing similar restrictions." (*Sain v. Silvestre* (1978) 78 Cal. App.3d 461, 466 [144 Cal. Rptr. 478], and quoted in *Fig Garden Park etc. Assn. v. Assemi Corp.* (1991) 233 Cal. App.3d 1704, 1707-1708 [285 Cal. Rptr. 303], fns. omitted.)

The CC&R's of this case contain such restrictions. The Andersons contend, however, that they never took effect because they were not referenced in any deed to their property. Citizens contends they are enforceable as either (1) covenants that run with the land, or (2) equitable servitudes, two doctrines of distinct lineage. The dual nature of the argument has substantially complicated the question. Indeed, the differing history, uncertain mutual interplay, and varying technical requirements of these doctrines help explain why the law in the area is "an unspeakable quagmire." (Rabin, Fundamentals of Modern Real Property Law, *supra*, p. 489.) One author states that the distinction between the doctrines "can best be understood as an archaic survivor of the former separation of the courts of law and equity. Each type of court developed its own set of requirements for covenants to run with the land.... Unfortunately, the modern union of law and equity has not yet produced a unified law of covenants." (5 Powell on Real Property (1995) Covenants as to Use, § 670[2], p. 60-12, fns. omitted.) A detailed review of the history and elements of these doctrines is unnecessary but, given modern confusion and, among legal scholars at least, interest regarding the degree to which the doctrines remain separate, a brief overview is appropriate.

The first doctrine to develop was that of real covenants or, as generally stated in California, covenants that run with the land, which dates back at least to *Spencer's Case* (1583 Q.B.) 77 Eng.Rep. 72. (See 5 Powell on Real Property, *supra*, Convenants as to Use, § 670[2], p. 60-12.) A covenant is said to run with the land if it binds not only the person who entered into it, but also later owners and assigns who did not personally enter into it. (Civ. Code, § 1460;[2] *Scaringe* v. *J.C.C. Enterprises, Inc.* (1988) 205 Cal. App.3d 1536, 1543 [253 Cal. Rptr. 344].) In California, only covenants specified by statute run with the land (§ 1461), primarily those described in sections 1462 and 1468. However, prior to the amendments of section 1468 in 1968 and 1969, these sections were written and interpreted very narrowly. Under section 1462, a convenant that *benefits* the property may run with the land, but not one that *burdens* the property. Section 1468, as originally enacted in 1905, only applied to a covenant "made by the owner of land with the owner of other land," and not to a covenant between a grantor and a grantee. (*Marra v. Aetna Construction Co.* (1940) 15 Cal.2d 375, 377-378 [101 P.2d 490]; see generally, 4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, §§ 490-491, pp. 667-669.) Because the convenants in this case are between grantor and grantee and burden the property as well as benefit it, they would not qualify as covenants that run with the land under these provisions.

Beginning with the 1848 English decision of *Tulk* v. *Moxhay* (1848 Ch.) 41 Eng.Rep. 1143, courts of equity sometimes enforced covenants that, for one reason or another, did not run with the land in law, and the separate doctrine of equitable servitudes arose. (See 5 Powell on Real Property, *supra*, Convenants as to Use, § 670[2], pp. 60-7 to 60-9.) California adopted this doctrine, and it accumulated its own body of rules. (E.g., *Werner v. Graham*

(1919) 181 Cal. 174 [183 P. 945].) Because of the statutory limitations on covenants running with the land, at least before section 1468 was amended, California courts have "[t]raditionally" analyzed CC&R's under the doctrine of equitable servitudes. (*Scaringe v. J.C.C. Enterprises, Inc., supra*, 205 Cal. App.3d at p. 1544; see also *Richardson v. Callahan* (1931) 213 Cal. 683, 686 [3 P.2d 927].)

In 1968 and again in 1969, section 1468 was amended to make covenants that run with the land analytically closer to equitable servitudes. Today, that statute applies to covenants between a grantor and grantee as well as between separate landowners. (*Scaringe v. J.C.C. Enterprises, Inc., supra*, 205 Cal. App.3d at pp. 1543-1544.)[3] Covenants governed by the amended statute might run with the land even if they formerly would not. (*Id.* at p. 1544.) The amendments have been held to apply only to covenants postdating their enactment. (*Oceanside Community Assn. v. Oceanside Land Co.* (1983) 147 Cal. App.3d 166, 174, fn. 4 [195 Cal. Rptr. 14]; *Taormina Theosophical Community, Inc. v. Silver* (1983) 140 Cal. App.3d 964, 972, fn. 3 [190 Cal. Rptr. 38].) Thus, they would apply to the 1977 Friars subdivision but not to the earlier Skywood Acres; no matter how the current issue is decided, the CC&R's of the latter would remain enforceable, if at all, only as equitable servitudes.

Commentators have argued that covenants that run with the land and equitable servitudes should be, or possibly have been, merged into a single doctrine. (French, *Design Proposal for the New Restatement of the Law of Property – Servitudes* (1988) 21 U.C. Davis L.Rev. 1213, 1223 ["The conceptual identity between real covenants and equitable servitudes, and the courts' practical fusion of the two has been recognized for at least a quarter of a century."]; Reichman, *Toward a Unified Concept of Servitudes* (1982) 55 So.Cal.L.Rev. 1177, 1186, 1230; Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?* (1970) 21 Hastings L.J. 1319.) Whether the amendments to section 1468 have accomplished this fusion in California is beyond the scope of the narrow issue before us. (But see *Soman Properties, Inc. v. Rikuo Corp.* (1994) 24 Cal. App.4th 471, 484 [29 Cal. Rptr.2d 427]; Note, *Covenants and Equitable Servitudes in California* (1978) 29 Hastings L.J. 545, 587-588.) Neither the previous statutes nor the current statutes answer this question, which involves how a covenant is created. But we see no difference regarding this issue between convenants that run with the land and equitable servitudes; the rule we adopt applies equally to both.

… .

B. Analysis

Two factual circumstances, and the interplay between them, are of paramount importance. First, the CC&R's were recorded before any of the property was sold, thus giving the Andersons notice of their existence. Second, no written document executed at the time of any of the conveyances of the Andersons' properties refers to the CC&R's.

Properly stated, the issue here is not whether the restrictions run with the land, and thus bind successors as well as the original grantees, but *whether they ever took effect in the first place* so as to bind even the original grantees. Specifically, the issue is whether a purchaser is bound by previously recorded CC&R's even though none of the written documents executed at the time of the conveyance refer to them. This involves the question whether there is sufficient expression of *intent* on the purchaser's part to enter into the convenants. Although notice is relevant to our resolution of the issue, it is not the issue itself.

1. California Cases

In the 1919 decision of *Werner v. Graham, supra*, 181 Cal. 174 (*Werner*), a developer subdivided a tract and recorded a map of the tract. "This map showed no building lines or anything else to indicate any purpose of restricting in any way the manner in which the different lots might be built upon or otherwise improved or the uses to which they might be put." (*Id.* at p. 177.) He then sold the lots. The early deeds contained "restrictive provisions, which, while differing slightly in some instances, dependent upon the location of the particular lot … are yet so

uniform and consistent in character as to indicate unmistakably that [the developer] had in mind a general and common plan which he was following." (*Ibid.*) The developer told the purchasers "that he was exacting the same restrictive provisions from all purchasers." (*Id.* at p. 179.) He later quitclaimed the property eventually purchased by the plaintiff. The deed to this property contained no restrictions. The issue was whether the restrictions placed in the deeds to the other property were also binding on the plaintiff.

The developer in *Riley, supra*, 17 Cal.3d 500, sold the property in dispute by a deed that contained no restrictions. "[A]t the time of the conveyance there was no document of record purporting to restrict the use of" the property. (*Id.* at p. 504.) Nine months after the conveyance, the developer recorded a document purporting to impose uniform restrictions on a number of lots, including the one in dispute. The issue was whether these restrictions applied to the lot sold earlier.

In both *Werner, supra*, 181 Cal. 174, and *Riley, supra*, 17 Cal.3d 500, we held the property was not bound by the restrictions. It is readily apparent that both are factually distinguishable from this case. In *Werner*, there was no recorded document imposing uniform restrictions on the entire subdivision, only individual deeds imposing restrictions on specific parcels. In *Riley*, the restrictions were recorded *after* the conveyance at issue. Nevertheless, the Andersons cite some of the language of these decisions as aiding their position.

In *Werner, supra*, 181 Cal. at pages 181-182, we noted that the restrictions in the earlier deeds did not state that the land was part of a larger tract, that the restrictions were intended to benefit other land, or that the benefit was to pass to other land. "Servitudes running with the land in favor of one parcel and against another cannot be created in any such uncertain and indefinite fashion. It is true, the nature of the restrictions is such that, when considered in connection with the fact that [the developer] still retained the greater portion of the tract, it is not improbable that he exacted them for the benefit of the portion so retained. *But the grantee's intent in this respect is necessary, as well as the grantor's*, and the deed, which constitutes the final and exclusive memorial of their joint intent, has not a word to that effect, nor anything whatever which can be seized upon and given construction as an expression of such intent. *If such was their intent, it has not been expressed.*" (*Id.* at p. 182, italics added.)

It made no difference in *Werner* that the developer "in all his deeds exacted similar restrictions and clearly had in mind a uniform plan of restrictions which he intended to impose, and actually did impose, upon all the lots in the tract as he sold them." (*Werner, supra*, 181 Cal. at p. 183.) We recognized that if the deeds contain "appropriate language imposing restrictions on each parcel as part of a general plan of restrictions common to all the parcels and designed for their mutual benefit, mutual equitable servitudes are thereby created in favor of each parcel as against all the others." (*Ibid.*) These mutual servitudes "spring into existence as between the first parcel conveyed and the balance of the parcels at the time of the first conveyance." (*Ibid.*) But, we stated, the "crux of the present case" was that "here there is no language in the instruments between the parties, that is, the deeds, which refers to a common plan of restrictions or which expresses or in any way indicates any agreement between grantor and grantee that the lot conveyed is taken subject to any such plan." (*Id.* at p. 184.)

We went on to explain the significance of these facts. "The intent of the common grantor – the original owner – is clear enough. He had a general plan of restrictions in mind. *But it is not his intent that governs.* It is the *joint* intent of himself and his grantees, and as between him and each of his grantees the instrument or instruments between them, in this case the deed, constitute the final and exclusive memorial of such intent. It is also apparent that each deed must be construed as of the time it is given.... Nor does it make any difference that ... [the developer] gave each grantee to understand, and each grantee did understand, that the restrictions were exacted as part of a general scheme. Such understanding was not incorporated in the deeds, and as we have said, the deeds in this case constitute the final and exclusive memorials of the understandings between the parties. Any understanding not incorporated in them is wholly immaterial in the absence of a reformation. [Citations.] This whole discussion may in fact be summed up in the simple statement that *if the parties desire to create mutual rights in real property of the*

character of those claimed here they must say so, and must say it in the only place where it can be given legal effect, namely, in the written instruments exchanged between them which constitute the final expression of their understanding." (*Werner, supra*, 181 Cal. at pp. 184-185, italics added.)

In *Riley, supra*, 17 Cal.3d 500, we relied on *Werner, supra*, 181 Cal. 174, in finding the later recorded restrictions not enforceable. We stressed the key fact distinguishing that case from this – that the restrictions of *Riley* were recorded *after* the conveyance – and stated that "quite apart from the rule of *Werner v. Graham*, it is manifest that acknowledgment and recordation of a declaration of restrictions by the grantor after the conveyance to plaintiffs cannot affect property in which the grantor no longer has any interest." (*Riley, supra*, 17 Cal.3d at p. 507.) We rejected the claim that parol evidence may be admitted to show that the parties in fact intended the property to be subject to restrictions like those later recorded, finding that the covenants must be in writing to be effective. "Every material term of an agreement within the statute of frauds must be reduced to writing. No essential element of a writing so required can be supplied by parol evidence." (*Id.* at p. 509.) A contrary rule, we said, "'"would make important questions of the title to real estate largely dependent upon the uncertain recollection and testimony of interested witnesses. The rule of the *Werner* case is supported by every consideration of sound public policy which has led to the enactment and enforcement of statutes of frauds in every English-speaking commonwealth."'" (*Id.* at p. 510, quoting *McBride v. Freeman* (1923) 191 Cal. 152, 160 [215 P. 678].) Therefore, there "'"should be some *written* evidence"'" indicating what property was affected by the restrictions. (17 Cal.3d at p. 510, quoting *Wing v. Forest Lawn Cemetery Assn.* (1940) 15 Cal.2d 472, 480 [101 P.2d 1099, 130 A.L.R. 120], italics added in *Riley.*) "'"As a matter of policy, the understanding of the parties should be definite and clear, and should not be left to mere conjecture."'" (*Ibid.*)

We also emphasized the importance of recording the restrictions. "'[T]he recording statutes operate to protect the expectations of the grantee and secure to him the full benefit of the exchange for which he bargained. [Citations.] Where, however, mutually enforceable equitable servitudes are sought to be created outside the recording statutes, the vindication of the expectations of the original grantee, and for that matter succeeding grantees, is hostage not only to the good faith of the grantor but, even assuming good faith, to the vagaries of proof by extrinsic evidence of actual notice on the part of grantees…. The uncertainty thus introduced into subdivision development would in many cases circumvent any plan for the orderly and harmonious development of such properties and result in a crazy-quilt pattern of uses frustrating the bargained-for expectations of lot owners in the tract.'" (*Riley, supra*, 17 Cal.3d at pp. 511-512.)

In dicta, we also stated that *Murry v. Lovell* (1955) 132 Cal. App.2d 30 [281 P.2d 316], "a leading authority in the *Werner* line, makes clear that even if the restrictions here in question had been recorded prior to the issuance of plaintiffs' deed, no equitable servitude would have been created absent the inclusion of such restrictions, by recitation or incorporation, in the deed. Compare *Martin v. Holm* (1925) 197 Cal. 733 [242 P. 718], wherein the deed to defendants contained no restrictions but they took with record notice of a prior deed establishing reciprocal servitudes binding upon their grantor." (*Riley, supra*, 17 Cal.3d at p. 507, fn. 4; see also *id.* at p. 512.)

In both *Werner, supra*, 181 Cal. 174, and *Riley, supra*, 17 Cal.3d 500, there was no prior recorded document providing a common plan and stating that the restrictions were to apply to every parcel. The only documents in existence from which the mutual intent and agreement of the parties could be discerned were the deeds themselves, which were silent. No decision by this court invalidating restrictions involves a written plan, like that here, that was applicable to an entire tract and was recorded before conveyancing. However, some intermediate appellate decisions have concluded that for recorded uniform restrictions to take effect, they must at least be referenced in a deed or other instrument at the time of an actual conveyance. (*Stell v. Jay Hales Development Co.* (1992) 11 Cal. App.4th 1214, 1229-1230 [15 Cal. Rptr.2d 220]; *Scaringe v. J.C.C. Enterprises, Inc., supra*, 205 Cal. App.3d at pp.

1545-1547; *Trahms v. Starrett* (1973) 34 Cal. App.3d 766, 770-772 [110 Cal. Rptr. 239]; *Anderson v. Pacific Avenue Inv. Co.* (1962) 201 Cal. App.2d 260, 262-264 [19 Cal. Rptr. 829]; *Murry v. Lovell, supra*, 132 Cal. App.2d 30.)

… .

2. The Current Uncertainties

The Andersons argue that the CC&R's never took effect because they were not mentioned in the deeds to their properties. Under this interpretation, if the developer of a subdivision records a uniform plan of restrictions intended to bind and benefit every parcel alike, implementation of the plan depends upon the vagaries of the actual deeds, and whether they contain at least a ritualistic reference to restrictions of record. When, as may often be the case, some deeds refer to the restrictions, and others do not, the enforceability of the restrictions can hinge upon the sequence of the conveyances, and can vary depending upon what property owner seeks to enforce them and against which property.

For example, if the deed to the first conveyance refers to the restrictions, they might be effective at least as between that property and later properties, even if the later deeds *do not* refer to them. "From the recordation of the first deed which effectively imposes restrictions on the land conveyed and that retained by the common grantor, the restrictions are binding upon all subsequent grantees of parcels so affected who take with notice thereof notwithstanding that similar clauses have been omitted from their deeds." (*Riley, supra*, 17 Cal.3d at p. 507; see also *Greater Middleton Assn. v. Holmes Lumber Co.* (1990) 222 Cal. App.3d 980, 990-991 [271 Cal. Rptr. 917].) Moreover, under this view, even if a deed fully and expressly incorporates the CC&R's, they would not be enforceable as to an earlier sale that did not contain such a reference. "But a grantee possessed of a dominant interest could not enforce the restrictions as to lots that were deeded without restriction … prior to the execution of the grantee's deed." (*Trahms v. Starrett, supra*, 34 Cal. App.3d at p. 771.) Thus, the rights and duties of a later purchaser as against earlier ones would not depend on any document executed at the time of the later sale, but solely on the language of *earlier* sales of *separate* parcels.

The results can be byzantine. One commentator has reviewed some of the possibilities: "If the subdivider fails to insert the agreement in the first deed but remembers to insert it in the fifth deed, for example, the equitable servitude springs into existence from deed five onwards. The restrictions do not apply to the first four lots because the subdivider no longer has any interest in those lots and cannot place a restriction on them in favor of the rest of the tract. If the subdivider inserts the agreement in deeds five and six and then fails again to put them in seven and eight, the courts have held that lot owners five and six can enforce the restrictions against seven and eight, but seven and eight cannot enforce them against each other. When the subdivider put the agreement in the deeds to lots five and six, he agreed to burden the rest of the unsold subdivision. When he sold lots seven and eight, the burden of his agreement passed as an incident to lots seven and eight in favor of lots five and six. There was no agreement between lot owner seven and the subdivider that the subdivider burden the rest of his tract in favor of lot seven. Thus when the subdivider conveyed lot eight, there was no burden to pass incident to the land in favor of lot seven. Lot seven can enforce the restrictions against lots five and six, however, because just as the burden of the agreement between the subdivider and five and six passed as an incident to lot seven, so should the benefit of that agreement pass. The subdivider had the benefit of enforcing the restrictions against five and six, and that benefit passes to seven.

"If the subdivider resumes placing the agreements in the deeds to lots nine and ten, lot owners seven and eight cannot enforce the restrictions against nine and ten, and similarly nine and ten cannot enforce them against seven and eight. When the subdivider conveyed nine and ten, he no longer had any interest in seven and eight. He could neither impose a restriction on them in favor of anyone else nor confer a benefit on them." (Note, *Covenants and Equitable Servitudes in California, supra*, 29 Hastings L.J. at pp. 569-570, fns. omitted.)[4]

As the author plaintively asks, this analysis "may be logical, but is it equitable?" (Note, *Covenants and Equitable Servitudes in California, supra*, 29 Hastings L.J. at p. 570.) And, to ask an even more pertinent question, is it what *anyone* intended? Would anyone really intend a subdivision where the order in which property is sold determines what restrictions are enforceable, where some landowners are not bound by restrictions of record and cannot enforce them against anyone, where some owners can enforce them against some property but not others and not against each other, and where some landowners are bound by the restrictions as against some owners but not against others who would be powerless to enforce them?

This situation dramatically complicates title searches. Instead of simply searching for restrictions of record in order to know exactly what is being purchased, a prospective buyer must search the chain of title of all previously sold property in the tract. If the deed to the property in question refers to the restrictions, the search would have to determine which of the earlier deeds, if any, contain a similar reference, for the restrictions would be enforceable only against those and later parcels, and not against earlier parcels whose deeds did not refer to the restrictions. If the deed does not refer to the restrictions, the buyer would nevertheless have to conduct the same search, for any earlier sold property that *does* refer to them would have a mutual servitude against the later property whether or not the later deed mentioned it.

Moreover, it is not certain exactly what the law is on this subject. "'When a declaration of restrictions is recorded which describes multiple lots in a subdivision, it is not clear whether the restrictions are enforceable against each lot in the subdivision merely by reference to the restrictions in the first deed to the first lot (the "first deed only" theory), or whether it is necessary that the restrictions be referred to in the first deed to each of the lots (the "all first deeds" theory).'" (*Soman Properties, Inc. v. Rikuo Corp., supra*, 24 Cal. App.4th at p. 485, quoting 7 Miller & Starr, Current Law of Cal. Real Estate (2d ed. 1990) Covenants and Restrictions, § 22.8, pp. 549-550.) It would appear that the "first deed only" theory is currently ascendant, but the "all first deeds" theory finds support in the cases. (E.g., *Wing v. Forest Lawn Cemetery Assn., supra*, 15 Cal.2d at pp. 482-483; *Terry v. James* (1977) 72 Cal. App.3d 438, 444 [140 Cal. Rptr. 201].)

In short, the current state of the law creates the very "crazy-quilt pattern of uses" that we warned against in *Riley, supra*, 17 Cal.3d at page 512. Moreover, the quilt might have a shifting pattern depending upon whether the court follows the "first deed only" theory or the "all first deeds" theory.[5]

3. The Solution

These uncertainties can be eliminated by adopting the rule stated at the outset. In essence, if the restrictions are recorded before the sale, the later purchaser is deemed to agree to them. The purchase of property knowing of the restrictions evinces the buyer's intent to accept their burdens and benefits. Thus, the mutual servitudes are created at the time of the conveyance even if there is no additional reference to them in the deed. This rule has many advantages.

The first advantage is simplicity itself. One document, recorded for all purchasers to review, would establish the rules for all parcels, not many documents that may or may not be mutually consistent. There would be no bewildering mosaic of enforceability and nonenforceability. "The rules of law about covenants running with the land are so complex that only a very few specialists understand them. Sometimes complexity in the law is necessary. In this particular case, it is not. If the cases in this area were solved by reference to the underlying policies instead of by reference to outworn precedent, the rules would be reasonably simple to state and the results more consonant with a sound system of private land use control." (Berger, *A Policy Analysis of Promises Respecting the Use of Land* (1971) 55 Minn. L.Rev. 167, 234; see also Reichman, *Toward a Unified Concept of Servitudes, supra*, 55 So.Cal.L.Rev. at pp. 1259-1260.)

A rule allowing the uniform implementation of a general plan from the outset of the development would be good policy, which no doubt helps explain the modern trend in the cases of accepting as sufficient the slightest reference in the deeds to restrictions of record. Although servitudes go far back into history, "Private land use arrangements are increasingly common and useful in the modern world." (French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, supra*, 55 So.Cal.L.Rev. at p. 1318.) "In modern times, covenants are most often used in situations where they effectively regulate land uses, such as subdivisions, in the same manner as zoning laws. In these circumstances, running covenants generally enhance alienability, and therefore many authorities feel that they should be encouraged." (5 Powell on Real Property, *supra*, Covenants as to Use, § 673[1], p. 60-46, fn. omitted; see also Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?, supra*, 21 Hastings L.J. at p. 1323.) "No longer is there any reason to believe that the average American buying into a residential development would 'protest vigorously against being compelled to perform promises he has never made.' [Fn., citing 'Restatement of Property, Intro. Note at 3156 (1944).'] Since financial viability of the community depends on continued covenant compliance by all, the average buyer is more likely to protest if others in the development are permitted to escape performance of the covenants made by their predecessors." (French, *Design Proposal for the New Restatement of the Law of Property – Servitudes, supra*, 21 U.C. Davis L.Rev. at p. 1217.)

Having a single set of recorded restrictions that apply to the entire subdivision would also no doubt fulfill the intent, expectations, and wishes of the parties and community as a whole. "One of the prime policy components of the law of equitable servitudes and real covenants is that of meeting the reasonable expectations of the parties and of the community." (French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, supra*, 55 So.Cal.L.Rev. at p. 1282, fn. 113.) A buyer need only know of the single document, not study the current labyrinthine system and try to predict how a later court would apply it to the contemplated purchase. The rule would also better enable the community to protect its interests. Here, for example, Woodside's approval of the Friars subdivision was conditioned on the town attorney's review of the CC&R's. Thus the community was able to exercise oversight as to the original recorded declaration. But it is unrealistic to expect such oversight of all subsequent individual deeds. The community should be able to expect that restrictions it requires as a condition of approving the subdivision will take effect, and not run the risk that they will fall victim to careless deed drafting.

By requiring recordation before execution of the contract of sale, the rule would also be fair. All buyers could easily know exactly what they were purchasing. (See *Riley, supra*, 17 Cal.3d at p. 512.) Title searches would be easier, requiring only a search of restrictions of record, not of all deeds to all properties in the subdivision. "The danger that subsequent purchasers might not be aware of restrictions in prior deeds, where the developer neglects to incorporate similar restrictions in later deeds, and where the obligation of the title searcher extends only to instruments in the direct chain of title, can be easily avoided by insistence that the developer follow a simple procedure. Where a tract index is in effect, a plan of the proposed development should be recorded against the entire tract, which would give notice to all purchasers by placing the restriction in the direct chain of title to each lot in the tract." (Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?, supra*, 21 Hastings L.J. at p. 1341, fn. omitted.) "The burden should be upon the developer to insert the covenant into the record in a way that it can be easily found. Recording a declaration of covenants covering the entire area or filing a map which referred to the covenants would be sufficient." (Berger, *A Policy Analysis of Promises Respecting the Use of Land, supra*, 55 Minn. L.Rev. at p. 202.) When a developer does follow this simple procedure, it should suffice; future buyers should be deemed to agree to the restrictions.

The rule is consistent with the rationale of the prior cases, and would undermine no legal or policy concerns expressed in those cases. The theoretical underpinning of the rule requiring the restrictions to be stated in the deeds is that a developer cannot unilaterally make an agreement. It takes two parties – in this case the seller and the buyer – to agree. Merely recording the restrictions does not create mutual servitudes. Rather, they "spring into

existence" only upon an actual conveyance. (*Werner, supra*, 181 Cal. at p. 183; see also Rest.3d Property, Servitudes (Tent. Draft No. 1, Apr. 5, 1989) § 2.1, com. c., p. 7 ["Recording a declaration or plat setting out servitudes does not, by itself, create servitudes. So long as all the property covered by the declaration is in a single ownership, no servitude can arise. Only when the developer conveys a parcel subject to the declaration do the servitudes become effective."].) We agree with all this. The servitudes are not effective, that is, they do not "spring into existence," until an actual conveyance subject to them is made. The developer could modify or rescind any recorded restrictions before the first sale.

Some of the prior cases, however, simply assumed that the deeds must *expressly* refer to the restrictions to evidence the purchaser's intent and agreement. On the contrary, it is reasonable to conclude that property conveyed after the restrictions are recorded is subject to those restrictions even without further mention in the deed. "The issue in these cases is the intent of the grantors and grantees at the time of the conveyance." (*Fig Garden Park etc. Assn. v. Assemi Corp., supra*, 233 Cal. App.3d at p. 1709.) This intent can be inferred from the recorded uniform plan. It is express on the part of the seller, implied on the part of the purchaser. The law may readily conclude that a purchaser who has constructive notice, and therefore knowledge, of the restrictions, takes the property with the understanding that it, as well as all other lots in the tract, is subject to the restrictions, and intends and agrees to accept their burdens and benefits, even if there is no additional documentation evidencing the intent at the time of the conveyance. "If future takers purchase a piece of property with notice of a restriction made by a predecessor, then, in the absence of duress or fraud, they may ordinarily be thought to have bargained for the property with the restriction in mind, and to have shown themselves willing to abide by it." (Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman* (1982) 55 So.Cal.L.Rev. 1403, 1405.)

… .

The rule is consistent with the rationale that a covenant requires an agreement between buyer and seller, and not a unilateral action by the developer. We merely reject the unexamined assumption that the intent of the purchaser, and therefore the agreement itself, must be expressed in the deed rather than be implied from the purchase with knowledge of the recorded restrictions. Moreover, as discussed above, the current law is unclear, and at best gives rise to a confusing pattern of enforceability and nonenforceability that no one could have intended. Replacing chaos with certainty need not be reserved for the future only. In *Willard v. First Church of Christ, Scientist* (1972) 7 Cal.3d 473 [102 Cal. Rptr. 739, 498 P.2d 987], we overruled an old common law of property rule that had outlived its usefulness. "Willard contends that the old rule should nevertheless be applied in this case … because grantees and title insurers have relied upon it. He has not, however, presented any evidence to support this contention, and it is clear that the facts of this case do not demonstrate reliance on the old rule." (*Id.* at pp. 478-479, fn. omitted.)

The same is true here. Given current uncertainty in the cases, it would be unreasonable to conclude that the Andersons, or others, have bought property believing that restrictions of record were enforceable as to prior purchasers of property in the same subdivision whose deeds referenced the restrictions, no matter how vaguely, but not otherwise. Rather, the opposite is far more likely, that homeowners buy property in the expectation and intent that recorded mutual restrictions apply uniformly throughout the subdivision.

The rule is not inconsistent with the statutes regarding covenants that run with the land. Neither the current statutes nor the predecessor version of section 1468 directly answers the narrow question here of how a covenant is created. Although the Skywood Acres CC&R's are not enforceable as covenants under section 1462 and former section 1468, this is not because they were inadequately created but because they burden the property as well as benefit it (§ 1462), and are between a grantor and a grantee (§ 1468).

For these reasons, we see no reason to deviate from the general rule that our decisions operate retrospectively.[6]

4. Resolution of this Case

The CC&R's of this case were recorded before any of the parcels were sold, thus providing constructive notice to subsequent purchasers; they state an intent to establish a general plan for the subdivisions binding on all purchasers and their successors; and they describe the property they are to govern. Therefore, applying the rule to this case, the fact that the individual deeds do not reference them is not fatal to their enforceability. The superior court erred in finding otherwise, and in granting summary judgment for the Andersons... . .

---

1. The Skywood Acres declaration refers to "covenants, restrictions and agreements," rather than covenants, conditions, and restrictions, or CC&R's. Nevertheless, for the sake of simplicity and clarity, we will refer to both declarations of restrictions of this case as CC&R's, in accordance with common usage. (See, e.g., *Nahrstedt v. Lakeside Village Condominium Assn., supra*, 8 Cal.4th at p. 369.)↩

1. All further statutory references are to the Civil Code unless otherwise indicated.↩

1. Section 1468 now provides in pertinent part: "Each covenant, made by an owner of land with the owner of other land or made by a grantor of land with the grantee of land conveyed, or made by the grantee of land conveyed with the grantor thereof, to do or refrain from doing some act on his own land, which doing or refraining is expressed to be for the benefit of the land of the covenantee, runs with both the land owned by or granted to the covenantor and the land owned by or granted to the covenantee and shall ... benefit or be binding upon each successive owner, during his ownership, of any portion of such land affected thereby and upon each person having any interest therein derived through any owner thereof where all of the following requirements are met:"(a) The land of the covenantor which is to be affected by such covenants, and the land of covenantee to be benefited, are particularly described in the instrument containing such covenants;"(b) Such successive owners of the land are in such instrument expressed to be bound thereby for the benefit of the land owned by, granted by, or granted to the covenantee;

"(c) Each such act relates to the use, repair, maintenance or improvement of, or payment of taxes and assessments on, such land or some part thereof ...;
"(d) The instrument containing such covenants is recorded in the office of the recorder of each county in which such land or some part thereof is situated."
↩

1. This hypothetical does not directly apply here, for none of the deeds to the Andersons' properties refers to the CC&R's. However, these possibilities are inherent in some of the Court of Appeal decisions. Similar questions could arise even regarding these subdivisions if some other deed in either subdivision does contain a reference, and someone else tries to enforce the CC&R's because of this reference.↩

1. Amicus curiae California Association of Realtors argues in support of Citizens that, in practice, title searches generally do not encompass first deeds of other properties in the tract, and that the deeds are signed only by the seller and delivered to the buyer weeks *after* close of escrow, thus making them doubtful evidence of the actual intent of the parties. These assertions, if correct, would support our holding. However, the record does not demonstrate these facts, and we therefore do not rely on them in reaching our conclusion.↩

1. The dissent criticizes the court in this regard, but would apparently apply its own rule retroactively. Exactly what that rule would be is never stated, but presumably it would at least prohibit the longstanding practice of recording CC&R's for a subdivision before the sale of the first parcel; and abrogate the "first deed only" theory whereby, if the first deed refers to the restrictions, they apply against a later deed even if that deed omits the restrictions. (See *ante*, pp. 360-361, 362.)We also do not suggest that the method used to create the CC&R's of this case is the only valid way to do so.↩

6.2. Changed Conditions

Vernon Township Volunteer Fire Department, Inc. v. Connor,

855 A.2d 873 (Pa. 2004)

Keith Adam Button, Conneaut Lake, for William E. Connor, Philadelphia, et al.

Debra Higgins Posego, Harry Faber White, Meadville, for Vernon Township Volunteer Fire Department, Inc.

Before Cappy, C.J., Castille, Nigro, Newman, Saylor, Eakin, Bear, JJ.

Justice Newman

In a document dated May 15, 1946 entitled "Restrictions" (Agreement), all of the property owners of the Culbertson Subdivision signed a restrictive covenant[1] prohibiting the sale of alcoholic beverages on their land.[2] The Agreement provides in relevant part that:

> [I]n consideration of the premises and intending to be legally bound hereby, we, the undersigned owners of the legal and/or equitable title of certain lots, pieces or parcels of land situate, lying and being in Vernon Township, Crawford County, Pennsylvania ... do hereby mutually covenant and agree with each other that from and after the date hereof, no vinous, spirituous, malt or brewed liquors, or any admixture thereof, shall be sold, or kept for sale, on any of said lots, pieces or parcels of land, or on any part thereof, or in any building, or any part thereof, now or hereafter erected thereon.
>
> This agreement shall be binding upon our respective heirs, executors, administrators, successors, assigns, lessees, tenants and the occupiers of any of said lots, pieces or parcels of land, and is hereby specifically declared to be a covenant running with the lots, pieces or parcels of land held by the respective signers thereof, or in which we, or any of us, have an interest.

(Reproduced Record (R.R.) at 365a) (emphasis added). The intent of the original signatories, as set forth in the Agreement, is "to protect each for himself and for the common advantage of all, our health, peace, safety and welfare and that of our successors in title...." *Id.* The Agreement was duly recorded in Crawford County Agreement Book 26, page 9, on June 10, 1946.

On July 3, 1997, the Fire Department purchased a 3.25-acre parcel of land within the Culbertson Subdivision for the purpose of building a new truck room and social hall that would sell alcohol to its patrons.[3] This newly acquired parcel is located approximately 2,000 feet from the Fire Department's existing truck room and social hall in Vernon Township. At the time of purchase, the Fire Department did not have actual notice of the restrictive covenant banning the sale of alcoholic beverages on the land. However, the Fire Department did have constructive notice of the restrictive covenant from a title search that its attorney conducted.[4] Nevertheless, the alcohol restriction was not brought to the attention of the Fire Department until November of 1999, well after it had already commenced building the new social hall.[5]

At the time that the Agreement was executed, the Culbertson Subdivision was bounded on the north by the Viscose Corporation, which operated a large manufacturing plant. The Viscose Corporation operated twenty-four hours a day and employed more than 2,500 people. Currently, the former site of the Viscose Corporation is now

the Crawford County Industrial Park, which houses a variety of small commercial businesses and offices.[6] The remainder of the restricted tract is bounded by wooded land to the northwest, the Cussewago Creek to the south and west, and the City of Meadville to the east.

Presently, there are no establishments within the Culbertson Subdivision that possess liquor licenses. The closest alcohol-serving establishment is the Fire Department's current social hall, which is located in Vernon Township, approximately one-half mile from the restricted lots. In addition, there are two bars located within two miles of the restricted tract. One bar is situated approximately one and one-half miles away in Vernon Township, and the other is approximately two miles away in the City of Meadville.

Upon learning of the restrictive covenant, the Fire Department stopped construction of the new social hall and sought to have all of the property owners within the restricted tract sign a Limited Release of Restrictions.[7] The owners of sixty-eight of the seventy-seven parcels within the Culbertson Subdivision signed the Limited Release of Restrictions and agreed to waive enforcement of the restrictive covenant as to the 3.25-acre parcel purchased by the Fire Department. The owners of three parcels neither signed the release nor sought to enforce the restrictive covenant.[8] The remaining six parcel owners, now Appellants in this matter, refused to sign the Limited Release of Restrictions. As a result, the Fire Department brought the instant action at law seeking to quiet title to its parcel. In particular, the Fire Department sought to have the restrictive covenant prohibiting the sale of alcoholic beverages invalidated because changed conditions in the immediate neighborhood effectively rendered the restriction obsolete.

On August 29, 2001, following a bench trial, which included a tour of the Culbertson Subdivision and surrounding neighborhood, the trial court granted Judgment in favor of Appellants. The trial court determined that the restrictive covenant prohibiting the sale of alcoholic beverages was valid and enforceable. [On appeal], the Superior Court concluded that the restrictive covenant, dating back to 1946, was a nullity and, accordingly, reversed the Judgment entered by the trial court in favor of Appellants… . .

… .

In reviewing the ruling of the trial court in an action to quiet title, an appellate court's review is limited to determining whether the findings of fact are supported by competent evidence, whether an error of law has been committed, and whether there has been a manifest abuse of discretion. Similarly, in a declaratory judgment action, an appellate court is limited to determining whether the trial court committed a clear abuse of discretion or an error of law. An appellate court may not substitute its judgment for that of the trial court if the determination of the trial court is supported by competent evidence. *Id.*

As a general matter, restrictive covenants on the use of land interfere with an owner's free use and enjoyment of real property and, therefore, are not favored by the law.[9] *Mishkin v. Temple Beth El of Lancaster*, 429 Pa. 73, 239 A.2d 800, 803 (1968). Because land use restrictions are not favored in the law, they are to be strictly construed, and "nothing will be deemed a violation of such a restriction that is not in plain disregard of its express words…." *Jones*, 120 A.2d at 537. Although the law may disfavor restrictions on an owner's free use and enjoyment of real property, restrictive covenants are legally enforceable. *See Schulman v. Serrill*, 432 Pa. 206, 246 A.2d 643, 647 (1968); *Todd v. Sablosky*, 339 Pa. 504, 15 A.2d 677, 679 (1940).

A landowner may limit his or her private use and enjoyment of real property by contract or agreement. *Lustig v. Facciolo*, 410 Pa. 107, 188 A.2d 741, 743 (1963). It is a fundamental rule of contract interpretation that the intention of the parties at the time of contract governs and that such intent must be ascertained from the entire instrument. *Heidt v. Aughenbaugh Coal Co.*, 406 Pa. 188, 176 A.2d 400, 401 (1962). This same principle of contract law is equally applicable to the interpretation of restrictive covenants. *McCandless v. Burn*, 377 Pa. 18, 104 A.2d 123, 126 (1954).

In order to ascertain the intentions of the parties, restrictive covenants must be construed in light of: (1) their language; (2) the nature of their subject matter; (3) the apparent object or purpose of the parties; and (4) the circumstances or conditions surrounding their execution. *Snyder v. Plankenhorn*, 398 Pa. 540, 159 A.2d 209, 210 (1960); *Baederwood, Inc. v. Moyer*, 370 Pa. 35, 87 A.2d 246, 248 (1952). Typically, we will enforce a restriction if a party's actions are in clear defiance of the provisions imposed by the covenant. *Ratkovich v. Randell Homes, Inc.*, 403 Pa. 63, 169 A.2d 65, 68 (1961); *Siciliano v. Misler*, 399 Pa. 406, 160 A.2d 422, 424 (1960). Moreover, we will enforce a restrictive covenant where it is established that the restriction is still of substantial value to the owners of the restricted tract. *Schulman*, 246 A.2d at 647.

As an initial matter, we note that a property owner has the duty to become aware of recorded restrictions in the chain of title and will be bound to such restrictions even absent actual notice. *See Finley v. Glenn*, 303 Pa. 131, 154 A. 299, 301 (1931) (noting "grantee is chargeable with notice of everything affecting his title which could be discovered by an examination of the records or other [documentary evidence] of title of his grantor"). Instantly, it is undisputed that at the time of purchase, the Fire Department had notice of the restrictive covenant. The covenant was duly recorded in Crawford County Agreement Book 26, page 9, on June 10, 1946, and easily accessible via title search. The Fire Department clearly had constructive notice of the restrictive covenant; therefore, it cannot now avoid the consequences of such restriction because of its own lack of due diligence. This being the case, the restriction is enforceable unless the Fire Department can establish that the restrictive covenant has been discharged.

In order to discharge the covenant, the burden of proof is on the Fire Department to show that the original purpose of the restriction has been materially altered or destroyed by changed conditions, and that a substantial benefit no longer extends to Appellants by enforcement of the restriction. *Daniels v. Notor*, 389 Pa. 510, 133 A.2d 520, 523 (1957); *Henry v. Eves*, 306 Pa. 250, 159 A. 857, 859 (1932). As a general rule, a restrictive covenant may be discharged if there has been acquiescence in its breach by others, or an abandonment of the restriction. *Kajowski v. Null*, 405 Pa. 589, 177 A.2d 101, 106 (1962). In addition, changes in the character of a neighborhood may result in the discharge of a restrictive covenant. *Deitch v. Bier*, 460 Pa. 394, 333 A.2d 784, 785 (1975). Where changed or altered conditions in a neighborhood render the strict adherence to the terms of a restrictive covenant useless to the dominant lots, we will refrain from enforcing such restrictions. *Daniels*, 133 A.2d at 523; *Henry*, 159 A. at 859. This is based on the general rule that "land shall not be burdened with permanent or long-continued restrictions which have ceased to be of any advantage…." *Daniels*, 133 A.2d at 524-25; *Katzman v. Anderson*, 359 Pa. 280, 59 A.2d 85, 87 (1948). In considering changed conditions in a neighborhood, the word "neighborhood" is a relative term, and only the immediate, and not the remote, neighborhood should be measured. *Daniels*, 133 A.2d at 523.

When deciding whether the character of the immediate neighborhood has changed to warrant non-enforcement of a restriction, a court must consider adjoining tracts, as well as the restricted tract. *See Deitch*, 333 A.2d at 785. In *Deitch*, this Court determined that the trial court erred by failing to consider and assess changes on a tract of land adjacent to the restricted tract. *Id.* The Court remanded the matter so that the trial court could consider the changes to an adjoining tract of land and evaluate their effect on the enforceability of the restrictive covenant. *Id.* In reaching this decision, we recognized that while changes in the immediate neighborhood do not automatically invalidate a restrictive covenant, such changes are material and relevant in determining whether a restrictive covenant should be enforced. *Id.*

In the matter *sub judice*, the Superior Court held "that the trial court erred when it only considered the restricted tract as [Appellants'] immediate neighborhood." Superior Court Memorandum Opinion, December 23, 2002, at 8. However, in reaching its decision, the trial court specifically evaluated the significance of other liquor-serving establishments located outside of the restricted tract. Unlike *Deitch*, the trial court considered and assessed changes on the land adjacent to the Culbertson Subdivision, and, therefore, did not limit its analysis to the restricted lots. Specifically, the trial court noted:

> Plaintiff presented evidence that two bars were now located within the neighborhood. One is to the East on Lincoln Avenue, at least a mile away, in the city of Meadville, and the other is the current Fire Department social hall, about a half a mile away, across the Creek and up a wooded hill. Neither is in the immediate neighborhood of the restricted lots. Accordingly, there is no change in the neighborhood making the restriction obsolete.

Trial Court Opinion, August 29, 2001, at 6. In holding otherwise, the Superior Court effectively substituted its own judgment for that of the trial court.[10]

As such, the relevant inquiry concerning changes to the immediate neighborhood is whether such changes alter or eliminate the benefit that the restriction was intended to achieve. In determining whether changed circumstances rendered enforcement of the present alcohol restriction useless, we find guidance in *Benner v. Tacony Athletic Association*, 328 Pa. 577, 196 A. 390 (1938). In *Benner*, property owners sought to enjoin several liquor-serving establishments from selling alcohol in violation of a restrictive covenant contained in their deeds. *Id.* at 391. Initially, the Court noted that where all of the deeds in the tract contained a restrictive covenant barring the sale of liquor, such a restriction was enforceable. *Id.* at 392. The alcohol-serving establishments, however, challenged the restrictive covenant, arguing that neighborhood conditions had changed to the extent that the restriction should not be enforced. *Id.* Nonetheless, the Court explained that "while it is true that some of the tract has become commercial or industrial in character, the larger part remains almost exclusively residential." *Id.* The Court noted that "the fact that commercial establishments have crept in here and there does not impair the utility of the restriction against the sale of beer or liquor; that restriction, to the residents of the neighborhood, has a desirability and an object unaffected by the encroachments of business."[11] *Id.* In upholding the enforceability of the restrictive covenant, the Court stated that "[i]t is only when violations are permitted to such an extent as to indicate that the entire restrictive plan has been abandoned that objection to further violations is barred." *Id.* at 393.

Contrary to the argument of the Fire Department and the holding of the Superior Court, the existence of three other liquor-serving establishments located outside of the Culbertson Subdivision does not warrant a finding of changed circumstances to invalidate the restrictive covenant.[12] Similar to *Benner*, the changes in the immediate neighborhood did not affect the benefit conferred upon Appellants by the alcohol restriction. These changes, which involved the introduction of establishments serving alcohol in the immediate neighborhood, but outside of the restricted tract, did not impair the utility of the covenant to the residents of the Culbertson Subdivision. Moreover, changes in the commercial nature of the immediate neighborhood, namely, the closing of the nearby Viscose Corporation, did nothing to impair the significance of the alcohol restriction. As *Benner* recognized, changed conditions outside of the restricted tract do not necessarily impair the value of an alcohol restriction to the residents of the restricted tract. The stated purpose of the restrictive covenant was to protect the "health, peace, safety and welfare" of the occupants of the land by preventing the sale of alcoholic beverages within the tract.[13] The original signatories clearly intended to protect themselves and their heirs from the vices of alcohol consumption by restricting the sale of alcohol within the Culbertson Subdivision. As the trial court noted, "[i]f people are not drinking at establishments in the neighborhood, they are not exhibiting objectionable behavior which accompanies overdrinking, like public drunkenness and driving under the influence." Trial Court Opinion, 8/29/01, at 7. Thus, Appellants will continue to benefit from the restriction as long as alcohol is not sold within the restricted tract.[14]

In determining that the restrictive covenant no longer had substantial value to Appellants, the Superior Court found it significant that a majority of the property owners within the restricted tract agreed to release the alcohol restriction. Moreover, the Superior Court noted that Appellants testified that they did not rely upon the restrictive

covenant when purchasing their property. However, the restriction clearly benefits Appellants by hindering the nuisances that inherently result from the sale and consumption of alcoholic beverages. Furthermore, the factual record reflects that alcoholic beverages have never been sold within the restricted tract since the covenant was signed in 1946. As in *Benner*, the trial court had competent evidence before it to conclude that the entire restrictive plan had not been abandoned and that the alcohol restriction still had significant value to Appellants. Accordingly, the Superior Court erred by substituting its factual determinations for those of the trial court.

Because the alleged changed conditions in the immediate neighborhood did not affect the benefits conferred by the restrictive covenant, the Superior Court erred by refusing to enforce the alcohol restriction. The presence of several other liquor-serving establishments in the immediate neighborhood, but outside the restricted tract, did not render the restrictive covenant a nullity. The trial court properly concluded that Appellants would "realize substantial benefit from the enforcement of this restriction" and that the "restriction has not been rendered obsolete by changes in the neighborhood." Trial Court Opinion, August 29, 2001, at 8. The findings of the trial court were supported by competent evidence of record, and, accordingly, the Superior Court erred in determining otherwise.

… .

In accordance with the foregoing discussion, we reverse the Order of the Superior Court reversing the Judgment entered by the trial court. On direct appeal, the Superior Court found it unnecessary to consider the Fire Department's third issue concerning the applicability of the principles of estoppel, laches, and waiver to this matter. The Fire Department properly raised and preserved this issue on direct appeal. However, the Superior Court declined to address this issue because it reversed based upon the Fire Department's first two claims of error. Having concluded that the Superior Court erred in its disposition of the Fire Department's first two issues, we remand the matter to the Superior Court with instructions for it to consider the Fire Department's single, unaddressed issue concerning the applicability of the equitable principles of estoppel, laches, and waiver to the instant matter.

Justice Castille, Dissenting.

I agree with the Superior Court that the character of the neighborhood surrounding appellees' tracts has been altered to the extent that the restrictive covenant has been rendered a nullity and would, therefore, affirm its judgment. Accordingly, I respectfully dissent.

As the Majority notes, it has long been the law in Pennsylvania that a restrictive covenant can be discharged where the original purpose of the covenant is materially altered or destroyed by changed conditions and there is no longer a substantial benefit to be derived from the restriction. *Daniels v. Notor*, 389 Pa. 510, 133 A.2d 520 (1957); *Henry v. Eves*, 306 Pa. 250, 159 A. 857 (1932). When determining whether conditions have changed to such an extent as to invalidate the restriction, courts must look to the immediate neighborhood, which includes adjoining tracts of land. *Id. See also Deitch v. Bier*, 460 Pa. 394, 333 A.2d 784 (1975).

The Majority, like the trial court, focuses on the fact that there are presently no establishments with liquor licenses within the specific confines of the Culbertson Subdivision and dismisses the presence in the immediately adjoining neighborhood of two bars and the Fire Department's existing social hall, which is located a mere 2,000 feet from the parcel on which the Fire Department seeks to build its new truck room and social hall. The Majority concedes that these three alcohol-serving establishments are located within the immediate neighborhood of the Culbertson Subdivision, "but outside of the restricted tract," then concludes that these three establishments do not impair the utility of the restriction to the owners of the restricted properties. Op. at 882. In one breath, the Majority states that it must consider not only the restricted tract but also the surrounding neighborhood and notes that three other alcohol-serving establishments exist in the immediate neighborhood. Then, in the next breath, the Majority essentially determines that the presence of those other establishments is irrelevant to its inquiry because the only relevant area is the Culbertson Subdivision itself.

The Superior Court, on the other hand, set forth the same legal principles and applied them in a more straightforward fashion. That court found that the trial court record did not support a finding that the Culbertson Subdivision owners experienced none of the effects of alcohol sales, given that the record established the presence of three alcohol-serving establishments located within two miles of the subdivision. Thus, the Superior Court held that the immediate neighborhood had changed with the introduction of the three establishments, and that the trial court erred in restricting consideration of the immediate neighborhood to the restricted tracts. This finding, in my view, establishes the first prong of the test for discharging a restrictive covenant, i.e., that the original purpose is materially altered by changed conditions.

Moving to the second prong, the Superior Court held that the restriction no longer possessed significant value to the subdivision owners based upon the fact that 68 of the 77 owners agreed to execute a release of the covenant, that three additional owners chose not to defend themselves in this action, and that all of the appellees who refused to sign the release testified and admitted that they had not relied upon the covenant when purchasing their properties. I would find that the Superior Court properly concluded that this record evidence establishes that the covenant lacks significant value to the owners of the restricted tracts.

Because restrictive covenants interfere with property owners' free use and enjoyment of their property, such covenants are not favored by courts. *Mishkin v. Temple Beth El of Lancaster*, 429 Pa. 73, 239 A.2d 800 (1968). Thus, in an appropriate case, our courts will invalidate restrictive covenants that have outlived their usefulness, which is what I believe the record demonstrates has occurred in this case. I agree with the Superior Court that the existence of three alcohol-serving establishments in close proximity to the Culbertson Subdivision constitutes a material alteration or change of the original purpose of the restrictive covenant. That 71 of the 77 purportedly affected owners find no value to the covenant and the other six did not rely upon the covenant in purchasing their properties is a clear signal that the covenant lacks significant value to the subdivision owners at this time. Anachronisms need not persist for their own sake. Accordingly, I would affirm the Superior Court's decision discharging the restrictive covenant in this case.

Justice Saylor, Dissenting.

I agree with the majority's assessment, in footnote [ten] of its opinion, that the Superior Court, having discerned an error in the trial court's approach to delineating the boundaries of the immediate neighborhood for purposes of determining the obsolescence of the covenant at issue,[15] should have remanded to the common pleas court. In my view, aside from the requirement that adjoining tracts must be considered, evaluation of what constitutes the relevant immediate (as opposed to remote) neighborhood is a uniquely factual determination that is interdependent with the assessment of impact and the continued viability of restrictions in light of changed circumstances.[16] It appearing, at least to me, that the majority and dissenting opinions here can be read as also embodying fact finding from the appellate vantage, I believe that the remand approach is best.

---

1. A restrictive covenant is defined as "[a] private agreement, [usually] in a deed or lease, that restricts the use or occupancy of real property, [especially] by specifying lot sizes, building lines, architectural styles, and the uses to which the property may be put." Black's Law Dictionary 371 (7th ed.1999).↩

1. The caption of the Agreement granted that the Restrictions passed from Helen L. Reitze, et al., as grantor, to Mrs. Mary Campfield, as grantee.↩

1. The social hall is not open to the general public and limits the sale of alcohol to only club members. According to the Fire Department, the social hall is the "economic engine" that funds the operations of the Fire

Department. The Fire Department insists that it is not self-sustaining without the critical funds it raises through the sale of alcohol and small games of chance at the social hall.↩

1. Appellants also had constructive notice of the planned social hall by way of public notice of a variance hearing and posting on the property regarding the Fire Department's liquor license transfer.↩

1. By the time that the Fire Department halted construction of the new social hall, it had already invested approximately $790,000.00 in the project.↩

1. None of the businesses or offices currently in the industrial park operate twenty-four hours a day; the majority operates only during daylight hours.↩

1. The Limited Release of Restrictions, dated February 21, 2000, provides in relevant part:[T]he following owners of certain lots or parcels of land hereinafter mentioned in Vernon Township, Crawford County, Pennsylvania and for the mutual considerations contained hereafter and for the sum of $1.00 … do hereby release, abandon and extinguish any and all restrictions contained in [the Agreement] insofar as said restrictions relate to property known as lots 1, 33, 34, and A of the Culbertson Subdivision, which lots are collectively owned by the Vernon Township Fire Department by deed dated July 3, 1997….(R.R. at 31a).

↩

1. The owners of these three parcels chose not to defend the action to quiet title. Accordingly, the trial court found these parcels subject to a default judgment, rendering the restrictive covenant abandoned and extinguished.↩

1. Restrictive covenants are divided into two general categories: (1) building restrictions; and (2) use restrictions. *Jones v. Park Lane for Convalescents, Inc.*, 384 Pa. 268, 120 A.2d 535, 538 (1956). Building restrictions "are concerned with the physical aspect or external appearance of the buildings…." *Id.* Meanwhile, use restrictions involve "the purposes for which the buildings are used, the nature of their occupancy, and the operations conducted therein…." *Id.*↩

1. As we have emphasized, changed conditions within an immediate neighborhood, as a matter of law, do not invalidate a restrictive covenant. Here, we have concluded that the trial court properly considered changed conditions to the immediate neighborhood in validating the alcohol restriction. If the Superior Court presumed that the trial court erred in failing to consider changed conditions beyond the restricted tract, but within the immediate neighborhood, it should have refrained from outright reversing the Judgment of the trial court. When faced with similar factual circumstances in *Deitch*, we ordered a remand so that the trial court could properly assess changed conditions outside of the restricted tract, but within the immediate neighborhood. 333 A.2d at 785. Therefore, pursuant to *Deitch*, the proper course of action for the Superior Court would have been to remand the matter so that the trial court could consider the alleged changed conditions beyond the restricted tract.↩

1. The commercial establishments that moved into the neighborhood included a slaughterhouse, a steam laundry, a carpenter shop, and a livery stable. *Benner*, 196 A. at 393.↩

1. In its Opinion and Order, the trial court acknowledged evidence of two liquor-serving establishments within one mile of the restricted tract. *See* Trial Court Opinion, August 29, 2001, at 6. However, in its Memorandum Opinion, the Superior Court recognized four liquor-serving establishments within two miles of the restricted tract. *See* Superior Court Memorandum Opinion, December 23, 2002, at 7-8. Nonetheless, the parties argue, and the record reveals, that three liquor-serving establishments are located within two miles of the restricted tract: including the current Fire Department social hall and two bars.↩

1. At trial, the Fire Department argued that the purpose of the restrictive covenant was to prevent employees at the nearby Viscose Corporation from consuming alcohol within the restricted tract. Nevertheless, such an

argument is mere conjecture, considering the alcohol restriction is devoid of any language indicating an intent to protect the residents of the Culbertson Subdivision from problems associated with the Viscose Corporation.↩

1. As the trial court explained, the covenant is limited to prohibiting the sale of alcohol within the restricted tract. The restriction does not prohibit the serving of alcohol and will not directly eliminate other problems identified by Appellants, such as noise, increased traffic flow, or the glare of headlights shining into households.↩

1. Here, the common pleas court expressly defined the boundaries of the immediate area as according to the "Cussewago Creek and a wooded hill to the south, the wooded Water Company land to the Northwest, the industrial park to the Northeast, and the City of Meadville to the East," which are the boundaries of the subdivision subject to the restrictions. *See* Majority Opinion, at 876 (indicating that, in addition to the northeast boundary with the industrial park, "[t]he remainder of the restricted tract is bounded by wooded land to the northwest, the Cussewago Creek to the south and west, and the City of Meadville to the east"). As the majority notes, this Court in *Deitch v. Bier*, 460 Pa. 394, 333 A.2d 784 (1975), required at least an express consideration of adjoining tracts in the assessment of the impact of changes to an immediate neighborhood. *See id.* at 396-97, 333 A.2d at 785.↩

1. Although I agree with Mr. Justice Castille that the prevailing sympathy in the neighborhood is with the volunteer fire department, the relevant legal analysis, designed to balance the important and vested property interests involved against the policy of affording relief against obsolete restrictions, focuses on value to any beneficiary owner. *See Phillips v. Donaldson*, 269 Pa. 244, 247, 112 A. 236, 238 (1920) ("Nor, under such covenant, is it necessary that the community or the majority of the lot owners whose rights under the covenant are affected should complain … [;] … we should not hesitate to enforce its provisions where one of the dominant owners seeks such enforcement in an unchanged locality.").↩

6.3. Regulation

6.3.1. Restraints on Alienation

Northwest Real Estate Co. v. Serio,

144 A. 245 (Md. 1929).

Wm. M. Maloy and J. A. D. Penniman, both of Baltimore (Maloy, Brady & Yost and Heimiller & Penniman, all of Baltimore, on the brief), for plaintiffs.

Walter C. Mylander, of Baltimore (Nathan Patz, of Baltimore, on the brief), for defendants.

Urner, J.

A deed in fee simple for a lot of ground contained, in addition to various building and use restrictions, a provision that the land should not be subsequently sold or rented, prior to a designated date, without the consent of the grantor. The decisive question in this case is whether the restraint thus sought to be imposed upon the alienation of the property is void as being repugnant to the granted estate.

The covenant to be considered is in the habendum clause of a deed dated August 19, 1927, from the Northwest Real Estate Company to Carl M. Einbrod and wife, conveying a building lot in Ashburton, a suburb of Baltimore city, and is in the following form: "7. And for the purpose of maintaining the property hereby conveyed and the

surrounding property as a desirable high class residential section for themselves their successors, heirs, executors, administrators and assigns that until January 1, 1932, no owner of the land hereby conveyed shall have the right to sell or rent the same without the written consent of the grantor herein which shall have the right to pass upon the character desirability and other qualifications of the proposed purchaser or occupant of the property until January 1, 1932, and the said grantor further agrees that all deeds or leases hereinafter made by it of the remaining unimproved lots on the plat of Ashburton Section 6 heretofore referred to shall contain the same covenant as to the sale or renting of such property."

On March 27, 1928, the grantees contracted in writing to sell the lot to Charles Serio and wife, and, upon payment of the purchase price, to convey the property to them, "by a good and merchantable title,""subject however to the residential restrictions prevailing in Ashburton."The Northwest Real Estate Company declined to give its consent to the sale and transfer for which the contract provided. The purchaser then brought this suit against the vendors and the company to compel the specific performance of the agreement without the consent of the company, on the theory that the quoted covenant is void, or with the judicially enforced consent of the company, if the covenant should be held to be valid, the averment being made in the bill of complaint that the company's refusal to consent was arbitrary and unreasonable. The vendors in their answer stated their willingness to perform the contract of sale, but asserted that a compliance with its terms was not contingent upon the consent of the Northwest Real Estate Company, since the contract provided that the property was to be conveyed subject to the existing "residential restrictions." That position was not tenable, because the right of the vendors to make the sale was involved in the restriction which is the occasion of this suit. In its answer the company admitted and explained its refusal to consent to a sale or transfer of the property to the plaintiffs, and defended the covenant in controversy as a valid and reasonable provision. A demurrer to the bill was embodied in the company's answer, and it in turn was challenged by a demurrer which the plaintiffs filed. After a hearing on the questions thus raised, the demurrer to the bill was overruled, and the demurrer to the answer was sustained, with leave to file an amended answer within five days. The company did not avail itself of that privilege, but appealed from the order overruling its demurrer to the bill of complaint. No appeal bond being filed, the case was brought to a final hearing, which resulted in a decree declaring the disputed covenant to be void, and directing a specific performance of the contract of sale, upon payment of the purchase money, by a conveyance of the property subject to all of the prescribed restrictions except the one declared to be inoperative. From the decree, a further appeal was entered by the Northwest Real Estate Company. The purchaser also appealed upon the theory that such action might be a proper precaution, in view of the pendency of the company's appeal from the decision on the demurrer.

The objections, urged on demurrer, that the bill is multifarious, and that there was a misjoinder of parties, are not sustainable. It was an essential purpose of the specific performance suit to remove the obstacle to the plaintiff's purchase presented by the assertion of a right on the part of the original grantor to prevent subsequent sales and conveyances, by refusal of consent, during the specified period. The fact that relief was sought by the alternative means of the invalidation or the judicial control of the covenanted right did not render the bill multifarious, and the grantor corporation was properly joined as a defendant in a suit by which its interests were thus affected.

The final decree of the circuit court is in accordance with the policy of the law in this state with respect to provisions in restraint of alienation. In *Clark v. Clark*, 99 Md. 356, 58 A. 24, where this court had under construction a will which, after a devise of an absolute estate to the seven children of the testator, provided that the property should not be sold within ten years for partition purposes without their unanimous consent, it was said in the opinion: "This provision of the will if effective would practically amount to a restraint for ten years of all alienation by any child of its share of the estate. We have no difficulty in arriving at the conclusion that this attempted imposition of restrictions upon the method of alienation and enjoyment of the absolute estate given to the testatrix' children was contrary to the policy of the law and therefore inoperative and void. The authorities agree that condi-

tions or limitations in restraint of alienation or essential enjoyment of an estate in fee cannot be validly annexed to the deed or devise by which the estate is created, because they are repugnant to the inherent nature and qualities of the estate granted and tend to public inconvenience. 4 Kent's Com., 143-4; Vin. Ab., p. 103; Gray's Restraints upon Alienation, par. 47 to 54; *Stansbury v. Hubner*, 73 Md. 231 [20 A. 904, 11 L. R. A. 204, 25 Am. St. Rep. 584]; *Warner v. Rice*, 66 Md. 440, [8 A. 84]; *Downes v. Long*, 79 Md. 390 [29 A. 827]; *Blackshere v. Samuel Ready School*, 94 Md. 777 [51 A. 1056]; *Mandelbaum v. McDonnell*, 29 Mich. 78 [18 Am. Rep. 61]; *Potter v. Couch*, 141 U. S. 296 [11 S. Ct. 1005, 35 L. Ed. 721]." The principle of that decision has been applied in later Maryland cases (*Brown v. Hobbs*, 132 Md. 559, 104 A. 283; *Gischell v. Ballman*, 131 Md. 260, 101 A. 698), and it is controlling in the present litigation.

The restriction imposed by the deed of the Northwest Real Estate Company upon sales by its grantees and their successors was clearly repugnant to the fee-simple title which the deed conveyed. Its object was to deprive the grantees, until 1932, of the unrestrained power of alienation incident to the absolute ownership which the granting clause created. In *Clark v. Clark, supra*, the attempted restraint was for a period of ten years, and consisted of a requirement for consent by six other devisees, while here it is for a shorter period, and the consent of a single but corporate grantor is the condition of a transfer. But in each instance the intended interference with the normal alienability of the feesimple estate devised or granted is equally apparent. As stated in Tiffany on the Law of Real Property (2d Ed.) p. 2311: "The fact that a restriction upon the right to alienate a vested estate in fee simple is to endure for a limited time only does not, by the weight of authority, render the restriction valid."In addition to the cases cited by the author in support of that statement are a number collected in a note to *Latimer v. Waddell*, 119 N. C. 370, 26 S. E. 122, as reported in 3 L. R. A. (N. S.) 668.

In *Murray v. Green*, 64 Cal. 367, 28 P. 120, it was said: "It is difficult to conceive of a condition more clearly repugnant to the interest created by a grant of an estate in fee simple than the condition that the grantee shall not alien the same without the consent of the grantor. With such a condition, if valid, annexed to the grant, it 'would be neither a fee simple nor any other estate known to the law.' "

In practical effect the reservation in the deed before us would give the grantor company unqualified control for a term of years over the disposition of the property by sale or lease. The recital that the purpose of the restriction is to maintain "a desirable high class residential section," and to enable the grantor "to pass upon the character desirability and other qualifications of the proposed purchaser or occupant," was evidently designed to explain rather than to limit the reservation of the power to forbid a transfer of the property by the grantees to any purchaser or lessee who failed to conform, in the opinion of the grantor's officers, to those indefinite standards. The existence of such a discretionary control would be plainly incompatible with the freedom of alienation, which is one of the characteristic incidents of a fee-simple title.

In *Jones v. Northwest Real Estate Co.*, 149 Md. 271, 131 A. 446, the court considered a restriction, which is included also in the deed, from the same grantor, involved in this case, that no building should be erected on the property without the grantor's approval in writing, which could rightfully be refused if the proposed structure did not reasonably conform to the general plan of development in the area of which the granted lot formed a part, and it was held that such restrictions did not "interfere with the fee of the land to such an extent as to render them void."

It has been argued that the real object of the clause now under consideration is simply to regulate the use and occupancy of the property described in the deed. But the provision does not thus qualify its effect. It is a prohibition of any sale of the property prior to 1932, without the grantor's consent, and such a restraint on its alienation cannot be reconciled with the right of disposition inherent in the fee-simple estate which has been granted.

Certain motions to dismiss the various appeals will be overruled, as they suggest no sufficient reason why the substantial question in the case should not be determined by this court upon the record now presented.

Order and decree affirmed, with costs to the appellees in the first and third appeals.

Bond, C. J. (dissenting).

The restraint upon alienation included in the deed to Eidenbrood and wife seems clearly enough to be one intended merely to give the developer of a suburban area of land power to control the character of the development for a time long enough to secure a return of his capital outlay, and to give early purchasers of lots and buildings some security in their own outlay. In those objects there is nothing against the public interest. We can hardly hold that the modern method of developing city or suburban areas as single large enterprises is detrimental to the public. On the contrary, it seems to be often the only method by which such areas can be conveniently and economically opened, so that houses may be provided upon convenient terms, with all the neighborhood necessities of streets, sewers, and the like ready at the outset. The venture of capital for this purpose appears to be distinctly a public benefit rather than a detriment, one which it is to the public advantage to encourage and promote rather than to hinder. But we know that there are real, substantial dangers to be feared in such ventures, and that, under the modern conditions of rapid city growth and rapid shifts of city populations, one of the most important risks is probably that which comes from the chance of invasion into the new neighborhood of an element of the population which the people to whom the developer must look for the return of his outlay will regard as out of harmony with them. However fanciful may be the aversions which give rise to it, and however deplorable they may be, to the developer they and their consequences must be as real as destructive physical forces. And, if it is to the public interest that this method of development be encouraged rather than hindered, then practically there must be a public gain in removal or diminution of this deterring danger. And the temporary restraint on alienation which the parties here involved have adopted to that end must, I think, be viewed as in point of fact reasonable, and from the standpoint of the public interest actually desirable. And, if this is true, then I venture to think there is no substantial reason why the law should interfere with it denying the parties the right to agree as they have agreed, or denying their agreement full validity.

The general prohibition of restraints on alienation by vendees has been based on three grounds. One has been that of a supposed contradiction between a grant of complete ownership and any qualification of it. That objection, as has been pointed out (3 Tiffany, Real Property, s 592), is a product of judicial fiat, and one of logicians rather than of practical men. A second, and a more substantial, ground, is that the vendor in a conveyance embodying the restriction, having parted with his ownership, is now without interest in the restriction, and there are no rights protected by it. 3 Tiffany, Real Property, s 392. But that may or may not be true in a particular case, and, however true it may be in a transaction concerning simply one piece of property, such as the law has had to consider almost always in the past, it is very commonly not true in modern conveyances of real property. And it is not true in the present instance. The third, and, according to the weight of authority, the only considerable, ground for the law's interference, is that of public policy, or the public disadvantage in having property withdrawn from commerce and its improvement and development checked. 3 Tiffany, Real Property, s 392. Gray, Restraints on Alienation, s 21. But those detrimental consequences do not exist here. And, if they do not exist, why should the law be taking a stand to resist them, even when by doing so it denies to parties a right to make an agreement which may in fact redound to the public advantage? Public policy, or a policy of the courts looking to the public interest, is a stand with relation to conditions as they exist, and arises from those conditions, or it is without purpose or justification.

Perhaps it is somewhat unusual in the administration of the law with respect to restraints on alienation of real estate to deal with the general prohibition as only an effort to accomplish certain purposes, and to test a particular restriction by those purposes, but it seems nevertheless right to do so. If I am not mistaken, this court has so dealt with a similar restraint in a bequest of personal property; and the rule we are considering is one and the same when applied to conveyances of complete ownership in either personal or real property. Brantly, Personal Property, s 122. In Williams v. Ash, 1 How. 1, 11 L. Ed. 25, in an opinion by Chief Justice Taney, the Supreme Court of the United States upheld a restriction upon a legatee of slaves: "That he shall not carry them out of the State of Mary-

land, or sell them to any one; in either of which events, I will and desire the said negroes shall be free for life."In the opinion, this was distinguished as a conditional limitation of freedom rather than a restraint upon alienation, but it has usually been regarded as no more nor less than a restraint. Gray, Restraints on Alienation, s 28; *Potter v. Couch*, 141 U. S. 296, 316, 317, 11 S. Ct. 1005, 35 L. Ed. 721.In *Steuart v. Williams*, 3 Md. 425, 429, a similar question was presented to this court, and Williams v. Ash was taken as having established the validity of such a clause. And I believe that, if a plain restriction on a legatee's sale of slaves could come before the court to-day, we should agree that the lack of any public interest opposed to it, or rather the desirability of it, would save it from the bar of the general prohibition.

We have seen the absolute common-law prohibition against restraints upon the exercise of a trade adapted to conditions of modern life by measuring particular restraints by the present public interest. 8 Holdsworth, History of English Law, 56-62; 31 Harvard Law Review, 193; *Guerand v. Dandelet*, 32 Md. 561, 566, 3 Am. Rep. 164.The old prohibition of restraints on alienation has itself been adapted to later conditions in part. 3 Holdsworth, 85, 86. Many modern courts have held valid restraints on alienation of real property limited as to time, or as to specified classes of vendees. *Roberts v. Boston*, 5 Cush. (Mass.) 198; *West Chester & P. Ry. Co. v. Miles*, 55 Pa. 209, 93 Am. Dec. 744; P*lessy v. Ferguson*, 163 U. S. 537, 16 S. Ct. 1138, 41 L. Ed. 256.Authorities collected in 38 A. L. R. 1185, note. In Maryland, restrictions upon a vendee's use of property have been upheld, repugnant as these might be, logically, to the grant of an otherwise absolute title. *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 A. 386, 1077, 36 L. R. A. 393.It is true that the allowance of such restrictions is distinguished on the ground that they are embodied only in incidental agreements, and are not qualifications on the estates granted, but, assuming that such a distinction is a substantial one, it remains true that the freedom and power of the vendees in dealing with their property are qualified by them, and they have not been found to conflict with considerations of public policy, and so have not been interfered with.

The view I venture to urge, then, is that the general prohibition of restraints on alienation should be considered as having some relation to the facts to be dealt with, not that the law should be changed, but that there should be a recognition of change in the conditions with which the law has had to deal, and a discriminating pursuit among modern conditions of the one object always sought by the law–the protection of the public interest. And this is not to advocate the abandonment of a general rule, leaving the policy of the courts to be adjusted to each conveyance independently; there may be need of some fixed general standard for what has been termed predictability in the law, and that would necessitate ignoring some possible differences in cases. *Tide Water Canal Co. v. Archer*, 9 Gill & J. 479, 528.But it has seemed to me that, whatever that general standard might be, the restraint adopted in the conveyance now being considered, limited as it is in time, and having a purpose and an effect in which no public disadvantage can in fact be found, need not and should not be included within the general prohibition to forestall a public disadvantage.

Lamar Advertising v. Larry and Vickie Nicholls, L.L.C.,

213 P.3d 641 (Wyo. 2009)

Representing Appellant: Timothy M. Stubson and Orintha E. Karns of Brown, Drew & Massey, LLP, Casper, Wyoming. Argument by Ms. Karns.

Representing Appellee: Frank R. Chapman of Chapman Valdez, Casper, Wyoming.

Kite, Justice.

... . The underlying facts of this case are essentially undisputed. Effective March 1, 1990, Frontier Outdoor Advertising (Frontier) entered into a lease with Cyril Rahonce allowing Frontier to maintain a billboard on Mr. Ra-

honce's property in Rock Springs, Wyoming. The lease provided that the initial term would be fifteen years, with a provision for automatic renewal if neither party gave notice of its intent to terminate thirty days prior to the end of term. In exchange for allowing Frontier to use his property, Mr. Rahonce was to receive an annual payment of $400. The lease provided it was subject to assignment and its terms would apply to the parties' successors. The lease was not recorded.

Over the years, ownership of the property changed several times. In 1993, Mr. Rahonce conveyed the property to High Country Landscaping, and Frontier paid the annual lease payment to the new owner. In 1997, Larry and Vickie Nicholls purchased the property from High Country Landscaping. The disputed property was subsequently transferred to the plaintiff limited liability company, Larry and Vickie Nicholls, LLC. Plains Tire and Battery (Plains Tire) was located adjacent to the disputed property, and Mr. and Mrs. Nicholls owned the company that was the majority shareholder of Plains Tire. Plains Tire used the property for parking.

The lessee also changed after the lease was executed. In 1998, Lamar purchased Frontier and acquired its interest in the lease at issue here. During the time that Nicholls owned the property, Lamar tendered the annual lease payments to Plains Tire and the payments were accepted until 2006.

On July 26, 2005, Nicholls notified Lamar that the lease had expired and would not be renewed. Lamar claimed the lease had renewed automatically because Nicholls did not give notice of its intent to terminate thirty days prior to the end of the first term. Nicholls filed a complaint in the district court, seeking a declaratory judgment that Lamar's lease was not valid and requesting an order quieting title to the disputed property to Nicholls… . . The district court … granted summary judgment to Nicholls on the basis that the lease was void as an unreasonable restraint on alienation. Lamar appealed to this Court.

DISCUSSION

The district court determined that our decision in *Hartnett v. Jones*, 629 P.2d 1357 (Wyo.1981) governed in this case. In *Hartnett*, three parties owned a tract of land and they agreed that each party would have the right to purchase the interests of the others if they decided to sell. This right was described as a "preemptive right," but it also could be termed a right of first refusal. Hartnett sued Jones and Whitlock because his preemptive right was not honored when Whitlock sold his interest to Jones. *Id.* at 1359-60. Jones and Whitlock defended on a number of bases, including arguing that the preemptive right was an unreasonable restraint on alienation. We applied a reasonableness standard to determine whether the preemptive right was an invalid restraint on alienation. The factors we considered were: "(1) the purpose for which the restraint is imposed; (2) the duration of the restraint; and (3) the method of determining the price." We held the restraint was reasonable and did not violate the rule against unreasonable restraints on alienation. *Id.* at 1363.

The district court applied the "reasonableness" test from *Hartnett* and determined the lease at issue in this case was an unreasonable restraint on alienation. It ruled:

> In the current case, the circumstances surrounding the lease reveal an unreasonable restraint on alienation. Because the lease automatically renewed in 2005, due to [Nicholls'] failure to terminate the lease at the end of the term, [Nicholls'] only means of circumventing the lease would be to improve the property by "erecting thereon a permanent industrial[,] commercial or residential building as evidenced by a building permit." According to the Parties' arguments heard by this Court on April 23, 2008 on motions for summary judgment, a Rock Springs City ordinance prevents [Nicholls] from ever obtaining a building permit while [Lamar's] billboard is erected on the property. Though the "purpose for which the restraint is imposed" may be to protect [Lamar's] leasehold interest, the consequence of the restraint inhibits the marketability of the property. The "duration of the restraint" may be only fifteen years under the terms of the lease, but the inability to improve the property due to the presence of [Lamar's] sign is indefinite.

> Finally, the "method of determining price" is fixed by the lease at $400.00 per year. The fixed price leaves little incentive for [Lamar] to accommodate improvements to the property.
>
> In the current case, the benefits of the purpose behind the restraint are few, but the extent that alienability would be hindered is great. This Court finds that the handicap upon the marketability of the property represents an unreasonable restraint on alienation. Consequently, the lease is void.

(citations omitted).

Lamar claims that, although the reasonableness test was appropriate in *Hartnett* because the preemptive right was a direct restraint on alienation, that test should not have been applied to the lease at issue here because it is only an indirect restraint on alienation. According to Lamar, the Restatement of Property directs that servitudes that impose indirect restraints on alienation should not be tested for reasonableness but, instead, should be found invalid only if they lack a rational justification. Lamar maintains that the record clearly establishes a rational justification for the lease.

Restatement (First) of Property § 404 (1944) defines a direct restraint on alienation as:

> (1) A restraint on alienation, as that phrase as used in this Restatement, is an attempt by an otherwise effective conveyance or contract to cause a later conveyance
>
> (a) to be void; or
>
> (b) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey; or
>
> (c) to terminate or subject to termination all or part of the property interest conveyed.

See also, Smith v. Osguthorpe, 58 P.3d 854, 860 (Utah Ct.App.2002). Phrased another way, a "direct restraint on alienation is a provision in a deed, will, contract, or other instrument which, by its express terms, or by implication of fact, purports to prohibit or penalize the exercise of the power of alienation." *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 655 N.W.2d 390, 399 (2003). Direct restraints on alienation include such things as "prohibitions on transfer without the consent of another, prohibitions on transfer to particular persons, requirements of transfer to particular persons, options to purchase land, and rights of first refusal." Restatement (Third) of Property: Servitudes § 3.4 cmt. b (2000).

Restatement (Third) of Property: Servitudes § 3.4 states that the test for determining whether a direct restraint on alienation imposed by a servitude is enforceable is the "reasonableness" test:

> A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint.

Unlike a direct restraint, an indirect restraint does not place express limitations on the owner's right to convey the property. An indirect restraint on alienation "'arises when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability.'" *Smith*, 58 P.3d at 860, quoting *Redd v. Western Savings & Loan Co.*, 646 P.2d 761, 764 (Utah 1982). *See*

also, Spanish Oaks, 655 N.W.2d at 399. Restatement (Third) of Property: Servitudes § 3.5 (2000) pertains to indirect restraints on alienation created by servitudes:

> (1) An otherwise valid servitude is valid even if it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of the property, or by otherwise reducing the value of the property.
>
> (2) A servitude that lacks a rational justification is invalid.

"Section 3.5 drops the requirement that an indirect restraint be reasonable, requiring only a rational justification for the restraint." *Smith*, 58 P.3d at 861,citing Restatement (Third) of Property: Servitudes § 3.5 cmt. a. Comment a of Restatement § 3.5 explains the logic underlying the "rational justification" requirement:

> Many servitudes indirectly affect the alienability of property by limiting the numbers of potential buyers or by reducing the amount the owner might otherwise realize on a sale of the property. If the servitude … is not otherwise invalid …, the fact that the servitude results in some diminution in return to the owner, or some reduction in the potential market for the property, is not sufficient justification for refusing to give effect to the intent of the parties to create the servitude…. The parties are usually in a better position than judges to decide the economic trade-offs that will enable a transaction to go forward and enhance their overall value….
>
> Unlike direct restraints on alienation, which directly interfere with the process of conveying land, and have long been understood and constrained by the common law, indirect restraints may have no overall negative effects on the wealth of a society overall or more narrowly, on the value of its land resources. On the contrary, they may result in an overall increase in wealth. Therefore, this section adopts the position that a servitude is not invalid simply because it reduces the value of a particular piece of land or reduces the amount the owner will realize on sale of the land. Unlike direct restraints, where courts can and should weigh the harm that will be caused by limiting alienation of a particular piece of property against the good that will be accomplished by the restriction, courts should not attempt to weigh the harm caused by an indirect restraint against the overall value of the transaction in which the servitude played a part. There are too many potential variables, and private decision making is more likely than judicial decision making to increase overall wealth and well-being.
>
> The purpose of this section is to reject the rule that a servitude must be reasonable. If the servitude is not otherwise invalid because it is illegal, unconstitutional, or against public policy, it need not be reasonable. The only requirement is that there be a rational justification for creating it as a servitude. The fact that the servitude limits the market for property by limiting its use or reducing its value … is irrelevant in determining its validity, so long as there is some rational justification for creation of the servitude. The fact that there may be a rational justification for the obligation is not sufficient; there must be a rational justification for imposing the obligation as a servitude that runs with the land. If there is no rational justification for the servitude, it should not be enforced because there is no real trade-off for the resulting decrease in the value of the land, and the legal system should not be used to enforce irrational arrangements against unwilling participants.

Nicholls argues that we adopted the reasonableness standard for both direct and indirect restraints in *Hartnett.* We disagree. The preemptive right at issue in *Hartnett* was clearly a direct restraint on alienation. Section 3.4 cmt. b. We did not consider in that case whether the reasonableness test applied to indirect restraints. Although some jurisdictions apply a reasonableness test to both direct and indirect restraints, *see, e.g., Redd*, 646 P.2d at 764; *Peavey v. Reynolds*, 946 So.2d 1125 (Fla.Ct.App.2006), we are not convinced that is the correct approach. As explained in comments a and b to § 3.5, the economic principles that make direct restraints on alienation suspect do not apply in the context of indirect restraints imposed by servitudes, especially in the commercial context. Instead, parties should be free to decide upon their own contractual terms and it is not the role of the courts to second guess their decision making, so long as there is a rational justification for the servitude.

Lamar's lease specifically recognized the possibility that title to the property could be transferred during the lease term by requiring that notice of the change of ownership be given to the lessee and the new owner be informed of the lease. Moreover, as our recitation of the facts makes clear, ownership of the property transferred several times during the lease term. The lease clearly did not amount to a direct restraint on alienation, and Nicholls concedes as much.

Lamar's lease was simply a servitude that had the potential effect of restraining alienation by limiting the value or use of the property. As such, it amounted to an indirect restraint on alienation. The rational justification test set out in § 3.5 for indirect restraints, rather than the reasonableness test, should have been applied to determine whether the lease was invalid. In reviewing a summary judgment, we apply the same analysis as the district court, and, in the interest of judicial economy, we will apply the "rational justification" test to determine whether Lamar's lease is an improper restraint on alienation. *See generally, Wells Fargo Bank Wyoming, N.A. v. Hodder*, 2006 WY 128, ¶ 32, 144 P.3d 401, 412 (Wyo.2006) (applying the correct legal analysis to the facts in the record following a bench trial).

The lease at issue here was commercial in nature. Comment b to § 3.5 states that "[s]ervitudes created in commercial transactions seldom lack rational justification." Lamar's general manager, Dave Butterfield, had worked for Frontier before it was acquired by Lamar and had personal knowledge of the companies' leasing practices and the lease with Mr. Rahonce. Mr. Butterfield explained the rationale for such an approach in leasing billboard sites, including the fifteen year term and the automatic renewal, in his summary judgment affidavit. He averred:

> 4. Lamar typically enters into leases with landowners that call for a fifteen or twenty year time period. Because it usually takes years to re-coup the costs of the initial infrastructure, rental payments, and sign up-keep, Lamar has found only leases of these time periods allow Lamar to remain profitable given the relatively small margins of profit.
>
> 5. The leases Lamar executes typically require the Lessor to provide at least a thirty (30) day and no more than a ninety (90) day notice period prior to automatic roll-over as it takes a significant amount of time to find new locations, execute new leases with the land owners and rent the space.

As recognized by Mr. Butterfield, the lease could be cancelled without penalty if the lessor gave notice thirty days prior to the end of the lease term that it did not wish to renew the lease. Nicholls presented no evidence refuting Mr. Butterfield's statements, and those statements provide valid business reasons for the lease terms. As a matter of law, Mr. Butterfield's explanation establishes a rational justification for the servitude... . .

Aquarian Foundations, Inc. v. Sholom House, Inc.,

448 So. 2d 1166 (Fla. Dist. Ct. App. 1984).

Gerald E. Rosser, Miami, for appellant.

Gus Efthimiou, Jr., Miami, for appellee.

Before Hendry, Nesbitt, and Daniel S. Pearson, JJ.

Daniel S. Pearson, Judge.

All is not peaceful at the Sholom House Condominium. In disregard of a provision of the declaration of condominium requiring the written consent of the condominium association's board of directors to any sale, lease, assignment or transfer of a unit owner's interest, Bertha Albares, a member of the board of directors, sold her condominium unit to the Aquarian Foundation, Inc. without obtaining such consent. Eschewing its right to ratify the sale, the association, expressly empowered by the declaration to "arbitrarily, capriciously, or unreasonably" withhold its consent, sued to set aside the conveyance, to dispossess Aquarian, and to recover damages under a clause in the declaration which provides that:

> In the event of a violation by the condominium [sic] by the unit owner of any of the covenants, restrictions and limitations, contained in this declaration, then in that event the fee simple title to the condominium parcel shall immediately revert to the association, subject to the association paying to said former unit owner, the fair appraised value thereof, at the time of reversion, to be determined as herein provided.

The trial court, after a non-jury trial, found that Albares had violated the declaration of condominium, thus triggering the reverter clause. Accordingly, it entered a judgment for the association, declaring the conveyance to Aquarian null and void, ejecting Aquarian, and retaining jurisdiction to award damages, attorneys' fees and costs after a determination of the fair appraised value of the property. Aquarian appeals. We reverse.

The issue presented by this appeal is whether the power vested in the association to arbitrarily, capriciously, or unreasonably withhold its consent to transfer[1] constitutes an unreasonable restraint on alienation, notwithstanding the above-quoted reverter clause which mandates that the association compensate the unit owner in the event, in this case, of a transfer of the unit in violation of the consent requirement.

It is well settled that increased controls and limitations upon the rights of unit owners to transfer their property are necessary concomitants of condominium living.[2] *See Hidden Harbour Estates, Inc. v. Norman*, 309 So.2d 180 (Fla. 4th DCA 1975); *Holiday Out in America at St. Lucie, Inc. v. Bowes*, 285 So.2d 63 (Fla. 4th DCA 1973); *Chianese v. Culley*, 397 F.Supp. 1344 (S.D.Fla.1975).

> [I]nherent in the condominium concept is the principle that to promote the health, happiness, and peace of mind of the majority of the unit owners since they are living in such close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.

Hidden Harbour Estates, Inc. v. Norman, 309 So.2d at 181-82.

Accordingly, restrictions on a unit owner's right to transfer his property are recognized as a valid means of insuring the association's ability to control the composition of the condominium as a whole. *See, e.g., Lyons v. King*, 397 So.2d 964 (Fla. 4th DCA 1981); *Coquina Club, Inc. v. Mantz*, 342 So.2d 112 (Fla. 2d DCA 1977); *Seagate Condominium Association, Inc. v. Duffy*, 330 So.2d 484 (Fla. 4th DCA 1976); *Kroop v. Caravelle Condominium, Inc.*, 323 So.2d 307 (Fla. 3d DCA 1975); *Holiday Out in America at St. Lucie, Inc. v. Bowes*, 285 So.2d 63; *Chianese v. Culley*, 397 F.Supp. 1344. *See also White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346 (Fla.1980). Indeed, it has been said of a restriction contained in a declaration of condominium that it "may have a certain degree of unreasonableness to it, and yet withstand attack in the courts. If it were otherwise, a unit owner could not rely on the restrictions found in the declaration of condominium, since such restrictions would be in a potential condition of continuous flux."[3] *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d 637, 640 (Fla. 4th DCA 1981). Thus, strict enforcement of the restrictions of an association's private constitution, that is, its declaration of condominium, protects the members' reliance interests in a document which they have knowingly accepted, and accomplishes the desirable goal of "allowing the establishment of, and subsequently protecting the integrity of, diverse types of private residential communities, [thus providing] genuine choice among a range of stable living arrangements." Ellickson, Cities and Homeowners Associations, 130 U.Pa.L.Rev. 1519, 1527 (1982).

However, despite the law's recognition of the particular desirability of restrictions on the right to transfer in the context of condominium living, such restrictions will be invalidated when found to violate some external public policy or constitutional right of the individual. *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d at 639-40. *See Pepe v. Whispering Sands Condominium Association, Inc.*, 351 So.2d 755 (Fla. 2d DCA 1977). Merely because a declaration of condominium is in the nature of a private compact and a restriction contained therein is not subject to the same reasonableness requirement as a restriction contained in a public regulation, *see White Egret Condominium, Inc. v. Franklin*, 379 So.2d 346, 350 (Fla.1980), where the restriction constitutes a restraint on alienation, condominium associations are not immune from the requirement that the restraint be reasonable. Thus, while a condominium association's board of directors has considerable latitude in withholding its consent to a unit owner's transfer, the resulting restraint on alienation must be reasonable. In this manner the balance between the right of the association to maintain its homogeneity and the right of the individual to alienate his property is struck.

The basic premise of the public policy rule against unreasonable restraints on alienation, see 7 Thompson On Real Property, s 3161 (1962); 31 C.J.S. Estates 8(b)(2) (1964), is that free alienability of property fosters economic growth and commercial development. *Davis v. Geyer*, 151 Fla. 362, 9 So.2d 727 (1942); *Seagate Condominium Association, Inc. v. Duffy*, 330 So.2d 484. Because "[t]he validity or invalidity of a restraint depends upon its long-term effect on the improvement and marketability of the property," *Iglehart v. Phillips*, 383 So.2d 610, 614 (Fla.1980), where the restraint, for whatever duration, does not impede the improvement of the property or its marketability, it is not illegal. *Id.* at 615. Accordingly, where a restraint on alienation, no matter how absolute and encompassing, is conditioned upon the restrainer's obligation to purchase the property at the then fair market value, the restraint is valid. *Id.* at 614-15, and cases collected.

The declaration of condominium in the present case permits the association to reject perpetually any unit owner's prospective purchaser for any or no reason. Such a provision, so obviously an absolute restraint on alienation, can be saved from invalidity only if the association has a corresponding obligation to purchase or procure a purchaser for the property from the unit owner at its fair market value. Otherwise stated, if, as here, the association is empowered to act arbitrarily, capriciously, and unreasonably in rejecting a unit owner's prospective purchaser, it must in turn be accountable to the unit owner by offering payment or a substitute market for the property. When this accountability exists, even an absolute and perpetual restraint on the unit owner's ability to select a purchaser is lawful. *See Chianese v. Culley*, 397 F.Supp. 1344 (notwithstanding association's right to approve any transfer

except one to an existing unit owner, requirement that within sixty days association provide another purchaser or approve original purchaser creates a preemptive right in association and saves declaration of condominium from being an unlawful restraint on alienation).[4]

The declaration of condominium involved in the instant case contains no language requiring the association to provide another purchaser, purchase the property from the unit owner, or, failing either of these, approve the proposed transfer. What it does contain is the reverter clause, which the association contends is the functional equivalent of a preemptive right and, as such, makes the restraint on alienation lawful.

In our view, the problem with the association's position is that the reverter clause imposes no obligation upon the association to compensate the unit owner within a reasonable time after the association withholds its consent to transfer, and the clause is not therefore the functional equivalent of a preemptive right. *Cf. Chianese v. Culley*, 397 F.Supp. 1344. Instead, the clause and the association's obligation do not come into effect until a violation of the restriction on an unapproved transfer occurs:

> In the event of a violation by the condominium [sic] by the unit owner of any of the covenants, restrictions and limitations, contained in this declaration, then in that event the fee simple title to the condominium parcel shall immediately revert to the association, subject to the association paying to said former unit owner, the fair appraised value thereof, at the time of reversion, to be determined as herein provided.

The association's accountability to the unit owner is illusory. There is no reasonable likelihood that a potential purchaser, apprised by the condominium documents that the consent of the association is required and that a purchase without consent vitiates the sale, would be willing to acquire the property without the association's consent.[5] Without a sale, there is no violation of the reverter clause. Without a violation of the reverter clause, the association has no obligation to pay the unit owner.

Effectively, then, the power of the association to arbitrarily, capriciously, and unreasonably withhold its consent to transfer prevents the activation of the reverter clause and eliminates the accountability of the association to the unit owner. Therefore, we conclude that the power of the association to arbitrarily, capriciously, and unreasonably withhold its consent to transfer is not saved by the reverter clause from being declared an invalid and unenforceable restraint on alienation. Accordingly, the judgment of the trial court is

Reversed.

---

1. The appellant does not challenge the clause itself as not serving the arguably legitimate purpose of screening out undesirable prospective transferees, as lacking in clarity, or as permitting arbitrary, capricious, or unreasonable action by the directors in contravention of the purpose to be served. The appellant's point on appeal is that the invalidity of the clause lies not in its potential for unfair application, but rather in the fact that it is an unreasonable restraint on alienation.↩

1. The principle that the use of condominium property can be burdened with restrictions has received legislative sanction. Sees 718.104(5), Fla.Stat. (Supp.1982) (providing that a declaration of condominium "may include covenants and restrictions concerning the use, occupancy, and transfer of the units permitted by law with reference to real property.").↩

1. On the other hand, post-formative actions of the association, such as rules promulgated by the board of directors, are subject to a test of reasonableness: that is, the board's actions must be reasonably related to the promotion of the health, happiness and peace of mind of the unit owners. *Hidden Harbour Estates, Inc. v. Basso*,

393 So.2d 637, 640 (Fla. 4th DCA 1981). It has been noted that cases applying this same reasonableness test to a restriction contained in the declaration of condominium, *see, e.g., Seagate Condominium Ass'n, Inc. v. Duffy*, 330 So.2d 484 (Fla. 4th DCA 1976), overlook the fact that a restriction appearing in a declaration of condominium owes its "very strong presumption of validity ... [to] the fact that each individual unit owner purchases his unit knowing of and accepting the restrictions to be imposed." *Hidden Harbour Estates, Inc. v. Basso*, 393 So.2d at 639.↩

1. Similar provisions in *Lyons v. King*, 397 So.2d 964, and *Coquina Club, Inc. v. Mantz*, 342 So.2d 112, presumably would have been held to be lawful restraints on alienation had the question been reached. However, in each of these cases, it was held that the rejection of the prospective purchaser was based on a reasonable and narrow restriction on transfer, enabling the unit owner to alienate the property to others who were not within the restriction. Thus, the preemptive right of the association was not triggered.↩

1. We acknowledge, of course, that in this case a sale to Aquarian Foundation actually occurred. This does not, however, affect our view that such a sale would not ordinarily be expected to occur between parties dealing at arm's length. The record does not reflect the relationship between Albares and Aquarian that may have been responsible for Aquarian acquiring the property. We can conceive of situations where parties could collude to effect a sale so as to create a violation and trigger the reverter clause. But the fact that this sale occurred hardly is evidence that other sales can be reasonably expected to occur.↩

6.3.2. Racist Conditions

Charlotte Park and Recreational Commission v. Barringer,

88 S.E.2d 114 (1955).

T. H. Wyche, Charlotte, and Spottswood W. Robinson, III, Richmond, Va., for Charles W. Leeper, I. P. Farrar, Sadler S. Gladden, Robert H. Greene, James Heath, Henry M. Isley, Russell McLaughlin, Anthony M. Walker, Harold Walker, Edward J. Weddington, James J. Weddington, Willie Lee Weddington, L. A. Warner, G. M. Wilkins, Roy S. Wynn, and Rudolph M. Wyche, Defendants-Appellants.

Cochran, McCleneghan & Miller and F. A. McCleneghan and Lelia M. Alexander, Charlotte, for Osmond L. Barringer, Defendant-Appellee.

John D. Shaw, Charlotte, for Charlotte Park and Recreation Commission, Plaintiff-Appellee.

Parker, Justice.

The decision of the Trial Judge that he had jurisdiction of the property and the parties, and was empowered to enter judgment under the Declaratory Judgments Act is correct.G.S. s 1-253 et seq., *Lide v. Mears,* 231 N.C. 111, 56 S.E.2d 404.

There are no exceptions to the Judge's findings of fact.

We shall discuss first the Barringer Deed, which by reference, as well as all the other deeds mentioned in the statement of facts, is incorporated in the findings of fact, and made a part thereof. The first question presented is: Does the Barringer Deed create a fee determinable on special limitations, as decided by the Trial Judge?

This Court said in *Hall v. Turner*, 110 N.C. 292, 14 S.E. 791:

> Whenever a fee is so qualified as to be made to determine, or liable to be defeated, upon the happening of some contingent event or act, the fee is said to be base, qualified or determinable."

> An estate in fee simple determinable, sometimes referred to as a base or a qualified fee, is created by any limitation which, in an otherwise effective conveyance of land, creates an estate in fee simple and provides that the estate shall automatically expire upon the occurrence of a stated event…. No set formula is necessary for the creation of the limitation, any words expressive of the grantor's intent that the estate shall terminate on the occurrence of the event being sufficient…. So, when land is granted for certain purposes, as for a schoolhouse, a church, a public building, or the like, and it is evidently the grantor's intention that it shall be used for such purposes only, and that, on the cessation of such use, the estate shall end, without any re-entry by the grantor, an estate of the kind now under consideration is created. It is necessary, it has been said, that the event named as terminating the estate be such that it may by possibility never happen at all, since it is an essential characteristic of a fee that it may possibly endure forever.

Tiffany: Law of Real Property, 3rd Ed., Sec. 220.

In *Connecticut Junior Republic Association v. Litchfield*, 119 Conn. 106, 174 A. 304, 307, 95 A.L.R. 56, the real estate was devised by Mary t. Buell to the George Junior Republic Association of New York with a precatory provision that it be used as a home for children. The New York association by deed conveyed this land to plaintiff, "'its successors and assigns, in trust, as long as it may obey the purposes expressed in … the will … and as long as the (grantee) shall continue its existence for the uses and purposes as outlined in the preamble of the constitution of the National Association of Junior Republics, but if at any time it shall fail to so use said property for said purposes … then the property hereby conveyed shall revert to this grantor, or its successors.'" The Supreme Court of Connecticut said: "The effect of the deed was to vest in the plaintiff a determinable fee. Here, as in *First Universalist Society [of North Adams] v. Boland*, 155 Mass. 171, 174, 29 N.E. 524, 15 L.R.A. 231, the terms of the deed 'do not grant an absolute fee, nor an estate or condition, but an estate which is to continue till the happening of a certain event, and then to cease. That event may happen at any time, or it may never happen. Because the estate may last forever, it is a fee. Because it may end on the happening of the event it is what is usually called a determinable or qualified fee." *See, also, City National Bank v. Bridgeport*, 109 Conn. 529, 540, 147 A. 181; *Battistone v. Banulski*, 110 Conn. 267, 147 A. 820.'

In *First Universalist Society of North Adams v. Boland*, 155 Mass. 171, 29 N.E. 524, 15 L.R.A. 231, "the grant of the plaintiff was to have and to hold, etc., 'so long as said real estate shall by said society or its assigns be devoted to the uses, interests, and support of those doctrines of the Christian religion' as specified; 'and when said real estate shall by said society or its assigns be diverted from the uses, interests, and support aforesaid to any other interests, uses, or purposes than as aforesaid, then the title of said society or its assigns in the same shall forever cease, and be forever vested in the following named persons, etc.'" The Supreme Court of Connecticut in Connecticut J*unior Republic Association v. Litchfield, supra*, has quoted the language of this case holding that the grant creates "a determinable or qualified fee." Immediately after the quoted words, the Massachusetts Court used this language: "The grant was not upon a condition subsequent, and no re-entry would be necessary; but by the terms of the grant the estate was to continue so long as the real estate should be devoted to the specified uses, and when it should no longer be so devoted then the estate would cease and determine by its own limitation."

In *Brown v. Independent Baptist Church of Woburn*, 325 Mass. 645, 91 N.E.2d 922, 923, the will of Sarah Converse devised land "to the Independent Baptist Church of Woburn, to be holden and enjoyed by them so long as they shall maintain and promulgate their present religious belief and faith and shall continue a Church; and if the said Church shall be dissolved, or if its religious sentiments shall be changed or abandoned, then my will is that this real estate shall go to my legatees hereinafter named." The Court said: "The parties apparently are in agreement, and the single justice ruled, that the estate of the church in the land was a determinable fee. We concur. (Citing

authorities.) The estate was a fee, since it might last forever, but it was not an absolute fee, since it might (and did) 'automatically expire upon the occurrence of a stated event.'"

In *Smith v. School Dist. No. 6 of Jefferson County, Mo.*, 250 S.W.2d 795, the deed contained this provision: "The said land being hereby conveyed to said school district for the sole and express use and purpose of and for a schoolhouse site and it is hereby expressly understood that whenever said land shall cease to be used and occupied as a site for a schoolhouse and for public school purposes that then this conveyance shall be deemed and considered as forfeited and the said land shall revert to said party of the first part, his heirs and assigns." The Court held that the estate conveyed was a fee simple determinable.

In *Collette v. Town of Charlotte*, 114 Vt. 357, 45 A.2d 203, 204, the deed provided that the land "was 'to be used by said Town for school purposes, but when said Town fails to use it for said school purposes it shall revert to said Scofield (the grantor), his heirs and assigns, but the Town shall have the right to remove all buildings located thereon. The Town shall not have the right to use the premises for other than school purposes.'" The Supreme Court of Vermont in a well-reasoned opinion supported by ample citation of authority said: "It was held in *Fall Creek School Twp. v. Shuman*, 55 Ind.App. 232, 236, 103 N.E. 677, 678, that a conveyance of land 'to be used for school purposes' without further qualification, created a condition subsequent. The same words were used in Scofield's deed to the Town of Charlotte, but they were followed by the provision that 'when said Town fails to use it for said school purposes it shall revert to said Scofield, his heirs or assigns,' clearly indicating the intent of the parties to create a determinable fee, which was, we think, the effect of the deed. *North v. Graham*, 235 Ill. 178, 85 N.E. 267, 18 L.R.A., N.S., 624, 626, 126 Am.St.Rep. 189."

In *Mountain City Missionary Baptist Church v. Wagner*, 193 Tenn. 625, 249 S.W.2d 875, 876, the deed is an ordinary deed conveying certain real estate. After the habendum clause there appears the following language: "But it is distinctly understood that if said property shall cease to be used by the said Missionary Baptist Church (for any reasonable period of time) as a place of worship, that said property shall revert back to the said M. M. Wagner and his heirs free from any encumbrances whatsoever and this conveyance become null and void." The grantor was M. M. Wagner. The Court said: "When we thus read the deed, as a whole, we find that the unmistakable and clear intention of the grantor was to give this property to the church so long as it was used for church purposes and then when not so used the property was to revert to the grantor or his heirs. the estate thus created in this deed is a determinable fee."

In *Magness v. Kerr*, 121 Or. 373, 254 P. 1012, 1013, 51 A.L.R. 1466, the deed contained the following provision, to-wit: "Provided and this deed is made upon this condition, that should said premises at any time cease to be used for cooperative purposes, they shall, upon the refunding of the purchase price and reasonable and equitable arrangement as to the disposition of the improvements, revert to said grantors." The Court held that this was a grant upon express limitation, and the estate will cease upon breach of the condition without any act of the grantor.

For other cases of a determinable fee created under substantially similar language see: *Coffelt v. Decatur School District No. 17*, 212 Ark. 743, 208 S.W.2d 1; *Regular Predestinarian Baptist Church of Pleasant Grove v. Parker*, 373 Ill. 607, 27 N.E.2d 522, 137 A.L.R. 635; *Board of Education for Jefferson County v. Littrell*, 173 Ky. 78, 190 S.W. 465; *Pennsylvania Horticultural Society v. Craig*, 240 Pa. 137, 87 A. 678.

We have held in *Ange v. Ange*, 235 N.C. 506, 71 S.E.2d 19, that the words "for church purposes only" appearing at the conclusion of the habendum clause, where there is no language in the deed providing for a reversion or forfeiture in event the land ceases to be used as church property, does not limit the estate granted. To the same effect: *Shaw University v. Durham Life Ins. Co.*, 230 N.C. 526, 53 S.E.2d 656.

In *Abel v. Girard Trust Co.*, 365 Pa. 34, 73 A.2d 682, 684, there was in the habendum clause of the deed a provision for exclusive use as a public park for the use and benefit of the inhabitants of the Borough of Bangor. The Supreme Court of Pennsylvania said: "An examination of the deed discloses that there is no express provision for

a reversion or forfeiture. the mere expression of purpose will not debase a fee." To the same effect see: *Miller v. Village of Brookville*, 152 Ohio St. 217, 89 N.E.2d 85, 15 A.L.R.2d 967; *Ashuelot Nat. Bank v. Keene*, 74 N.H. 148, 65 A. 826, 9 L.R.A.,N.S., 758.

In North Carolina we recognize the validity of a base, qualified or determinable fee. *Hall v. Turner, supra; Williams v. Blizzard*, 176 N.C. 146, 96 S.E. 957; *Turpin v. Jarrett*, 226 N.C. 135, 37 S.E.2d 124.See also: 19 N.C.L.R. pp. 334-344: in this article a helpful form is suggested to create a fee determinable upon special limitation.

When limitations are relied on to debase a fee they must be created by deed, will, or by some instrument in writing in express terms. *Abel v. Girard Trust Co.*, supra;19 Am.Jur., Estates, Section 32.

In the Barringer Deed in the granting clause the land is conveyed to plaintiff "upon the terms and conditions, and for the uses and purposes, as hereinafter fully set forth." The habendum clause reads, 'to have and to hold the aforesaid tract or parcel of land ... upon the following terms and conditions, and for the following uses and purposes, and none other, to-wit.... The lands hereby conveyed, together with the other tracts of land above referred to (the Shore, Wilson and City of Charlotte lands) "as forming Revolution Park, shall be held, used and maintained by the party of the second part" (the plaintiff here), "...as an integral part of a park, playground and recreational area, to be known as Revolution Park and to be composed of the land hereby conveyed and of the other tracts of land referred to above, said park and/or recreational area to be kept and maintained for the use of, and to be used and enjoyed by persons of the white race only." The other terms and conditions as to the use and maintenance, etc., of the land conveyed are omitted as not material. The pertinent part of the reverter provision of the deed reads: "In the event that the said lands comprising the said Revolution Park area as aforesaid, being all of the lands hereinbefore referred to ... and/or in the event that the said lands and all of them shall not be kept, used and maintained for park, playground and/or recreational purposes, for use by the white race only ... then, and in either one or more of said events, the lands hereby conveyed shall revert in fee simple to the said Osmond L. Barringer, his heirs and assigns," provided, however, that before said lands shall revert to Barringer, and as a condition precedent to the reversion, Barringer, his heirs or assigns, shall pay unto plaintiff or its successors $3,500.

Barringer by clear and express words in his deed limited in the granting clause and in the habcndum clause the estate granted, and in express language provided for a reverter of the estate granted by him, to him or his heirs, in the event of a breach of the expressed limitations. It seems plain that his intention, as expressed in his deed, was that plaintiff should have the land as long as it was not used in breach of the limitations of the grant, and, if such limitations, or any of them, were broken, the estate should automatically revert to the grantor by virtue of the limitations of the deed. In our opinion, Barringer conveyed to plaintiff a fee determinable upon special limitations.

It is a distinct characteristic of a fee determinable upon limitation that the estate automatically reverts at once on the occurrence of the event by which it is limited, by virtue of the limitation in the written instrument creating such fee, and the entire fee automatically ceases and determines by its own limitations. *Collette v. Town of Charlotte, supra*; *First Universalist Society v. Boland, supra*; *Brown v. Independent Baptist Church of Woburn, supra; Copenhaver v. Pendleton*, 155 Va. 463, 155 S.E. 802, 77 A.L.R. 324; Tiffany: Law of Real Property, 3rd Ed., Section 217. No action on the part of the creator of the estate is required, in such event, to terminate the estate. 19 Am.Jur., Estates, Section 29.

According to the deed of gift "Osmond L. Barringer, his heirs and assigns" have a possibility of reverter in the determinable fee he conveyed to plaintiff. It has been held that such possibility of reverter is not void for remoteness, and does not violate the rule against perpetuities. 19 Am.Jur., Estates, Section 31; Tiffany: Law of Real Property, 3rd Ed., Section 314.

The land was Barringer's, and no rights of creditors being involved, and the gift not being induced by fraud or undue influence, he had the right to give it away if he chose, and to convey to plaintiff by deed a fee determinable upon valid limitations, and by such limitations provide that his bounty shall be enjoyed only by those whom he

intended to enjoy it. 24 Am.Jur., Gifts, p. 731; Devlin: The Law of Real Property and Deeds, 3rd Ed., Section 838; 38 C.J.S., Gifts, s 36, p. 816. In *Grossman v. Greenstein*, 161 Md. 71, 155 A. 190, 191, the Court said: "A donor may limit a gift to a particular purpose, and render it so conditioned and dependent upon an expected state of facts that, failing that state of facts, the gift should fail with it." The 15th headnote in *Brahmey v. Rollins*, 87 N.H. 290, 179 A. 186, 187, 119 A.L.R. 8, reads: "Right to alienate is an inherent element of ownership of property which donor may withhold in gift of property." We know of no law that prohibits a white man from conveying a fee determinable upon the limitation that it shall not be used by members of any race except his own, nor of any law that prohibits a negro from conveying a fee determinable upon the limitation that it shall not be used by members of any race, except his own.

If negroes use the Bonnie Brae Golf Course, the determinable fee conveyed to plaintiff by Barringer, and his wife, automatically will cease and terminate by its own limitation expressed in the deed, and the estate granted automatically will revert to Barringer, by virtue of the limitation in the deed, provided he complies with the condition precedent by paying to plaintiff $3,500, as provided in the deed. The operation of this reversion provision is not by any judicial enforcement by the State Courts of North Carolina, and *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, has no application. We do not see how any rights of appellants under the 14th Amendment to the U. S. Constitution, Section 1, or any rights secured to them by Title 42 U.S.C.A. ss 1981, 1983, are violated.

If negroes use Bonnie Brae Golf Course, to hold that the fee does not revert back to Barringer by virtue of the limitation in the deed would be to deprive him of his property without adequate compensation and due process in violation of the rights guaranteed to him by the 5th Amendment to the U. S. Constitution and by Art. 1, Sec. 17 of the N. C. Constitution, and to rewrite his deed by judicial fiat.

The appellants' assignment of error No. 1 to the conclusion of law of the court that the Barringer deed vested a valid determinable fee in plaintiff with the possibility of a reverter, and assignments of error No. 3 and No. 4 to the conclusion of the court that in the event any of the limitations in the Barringer deed are violated, title to the land will immediately revert to Barringer and that the use of Bonnie Brae Golf Course by negroes will cause a reverter of the Barringer deed, are overruled.

The case of *Bernard v. Bowen*, 214 N.C. 121, 198 S.E. 584, is distinguishable. For instance, there is no limitation of the estate conveyed in the granting clause.

Now as to the Abbott Realty Company deed. This deed conveyed as a gift certain lands to plaintiff upon the same terms and conditions, and for the same uses and purposes, and for the white race only, as set forth in the Barringer deed. This deed contains a reverter provision, if there is a violation of certain limitations of the estate conveyed, but the reverter provision does not provide that, if the lands of Revolution Park are used by members of a nonwhite race, the lands conveyed by Abbott Realty Company to plaintiff shall revert to the grantor. In our opinion, the estate conveyed by Abbott Realty Company to plaintiff is a fee determinable upon certain expressed limitations set forth in the deed, with a possibility of reverter to Abbott Realty Company if the limitations expressed in the deed are violated and the reverter provision states that such violations will cause a reverter. That was the conclusion of law of the Trial Judge, and the appellants' assignment of error No. 2 thereto is overruled. However, the reverter provision does not require a reverter to Abbott Realty Company, if the lands of Revolution Park are used by negroes. Therefore, if negroes use Bonnie Brae Golf Course, title to the lands conveyed by Abbott Realty Company to plaintiff will not revert to the grantor. See: *Tucker v. Smit*h, 199 N.C. 502, 154 S.E. 826.

The Trial Judge concluded as a matter of law that if any of the reverter provisions in the Abbott Realty Company deed were violated, title would revert to Abbott Realty Company, and that if negroes use Bonnie Brae Golf Course, title to the land granted by Abbott Realty Company will revert to it. The appellants' assignments of error Nos. 5 and 6 are to this conclusion of law. These assignments of error are sustained to this part of the conclusion,

that if negroes use Bonnie Brae Golf Course, title to the land will revert to Abbott Realty Company: and as to the other part of the conclusion the assignments of error are overruled.

The appellants' assignment of error No. 7 is to this conclusion of law of the Trial Judge, that the deed from the city of Charlotte to plaintiff created a valid determiable fee with the possibility of a reverter, and that as the city of Charlotte has only one municipal golf course, the use of Bonnie Brae Golf Course by negroes will not cause a reversion of title to the property conveyed by the city of Charlotte to plaintiff, for that said reversionary clause in said deed is, under such circumstances void as being in violation of the 14th Amendment to the U. S. Constitution.

From this conclusion of law the city of Charlotte and the plaintiff did not appeal. We do not see in what way appellants have been aggrieved by this conclusion of law, and their assignment of error thereto is overruled.

The appellants also include as part of their assignments of error Nos. 3, 4, 5 and 6 these conclusions of law of the Trial Judge numbered 7 and 8. No. 7, that the plaintiff is the owner in fee simple, free of any conditions, reservations or reverter provisions of the property which was conveyed to it by W. T. Shore and T. C. Wilson. The city of Charlotte has not appealed from this conclusion of law, and we are unable to see how appellants have been harmed, so their assignments of error thereto are overruled. No. 8, that Revolution Park, in which is located Bonnie Brae Golf Course, was created as an integral area of land, comprising the various contiguous tracts conveyed to plaintiff by Barringer, Abbott Realty Company, city of Charlotte, Shore and Wilson, and to permit negroes to use for golf any part of said and will cause the reverter provisions in the Barringer and Abbott Realty Company deeds immediately to become effective, and result in title of the plaintiff terminating, and the property reverting to Barringer and Abbott Realty Company. As to this conclusion of law the assignments of error are sustained as to that part which states that, if negroes use Bonnie Brae Golf Course, the reverter provision in the Abbott Realty Company deed will become effective and title will revert to Abbott Realty Company: as to the other parts the assignments of error are overruled.

Judgment will be entered below in accordance with this opinion.

Modified and affirmed.

Capitol Federal Savings and Loan Association v. Smith,

316 P.2d 252 (Colo. 1957).

Knauss, Justice.

For convenience we shall refer to the parties to this writ of error as they appeared in the trial court, where defendants in error were plaintiffs and plaintiffs in error were defendants.

Two claims were stated in plaintiff's amended complaint, one for a decree quieting title to real property, a second to obtain a declaratory judgment. Plaintiffs alleged that they were the owners of and in possession of certain lots in Block 6 Ashley's Addition to Denver and that on May 9, 1942 certain owners of lots in said Block, including plaintiffs' predecessors in title, entered into an agreement among themselves that the lots owned by them should not be sold or leased to colored persons and providing for forfeiture of any lots or parts of lots sold or leased in violation of the agreement to such of the then owners of other lots in said block who might place notice of their claims of record. Plaintiffs further alleged that they were colored persons of negro extraction and that any interest, or claim of any interest of defendants, under said agreement was without foundation or right and in violation of the Constitution of the United States and that said agreement was a cloud on plaintiffs' title which should be removed. Plaintiffs prayed for a complete adjudication of the rights of all parties to the action. Defendants placed of record in the office of the Clerk and Recorder of the City and County of Denver a Notice of Claim asserting that they were owners of lots in said Block 6 embraced in the agreement above mentioned and asserted title to the property which

is the subject matter of the complaint by virtue of said agreement. By their answer and counterclaim defendants alleged that they were the owners and entitled to the possession of the real estate described in the complaint by virtue of the forfeiture provisions in the above mentioned agreement, and prayed for a complete adjudication of the rights of all parties and a decree quieting their title to the property in question.

All facts were stipulated and trial was to the court.

The trial court entered a decree and Declaratory Judgment pursuant to Rules 105 and 57, R.C.P.Colo. The court found that the plaintiffs were the owners in fee simple of the property described in the complaint and quieted their title thereto free and clear of any right of enforcement or attempted enforcement of the restrictive covenant or the Notice of Claim filed by defendants. The court further adjudged and decreed that the restrictive covenant "may not be enforced by this court as a matter of law, as to enforce same by this court would be a violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, and the enforceability of same is hereby removed as a cloud upon the title of plaintiffs…." From the judgment and decree so entered the defendants bring the case here on writ of error.

The covenant or agreement under consideration was dated May 9, 1942 and the several signatories to the contract agreed for themselves, their heirs and assigns "not to sell or lease the said above described lots and parcels of land owned by them respectively … to any colored person or persons, and covenant and agree not to permit any colored person or persons to occupy said premises during the period from this date to January 1, 1990." It further provided that if any of said property 'shall be conveyed or leased in violation of this agreement' the right, title or interest of the owner so violating the agreement "shall be forfeited to and rest in such of the then owners of all of said lots and parcels of land not included in such conveyance or lease who may assert title thereto by filing for record notice of their claim…."

The agreement also provided for an action to recover damages against any person or persons who violated the restriction, "or such owners may jointly or severally enforce or have their rights hereunder enforced by an action for specific performance, abatement, ejectment, or by injunction or any other proper judicial proceedings, which right shall be in addition to any and all right to the interest so conveyed or leased in violation of this agreement.'"

It is contended by counsel for defendants that the Supreme Court of the United States in *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161, *McGhee v. Sipes*, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 and *Barrows v. Jackson*, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586, did not have before it an agreement "for automatic forfeiture, nor did any of them create a future interest in the land." Counsel assert that they have no quarrel with these decisions stating that the Supreme Court "has been concerned solely with the question of judicial enforcement of restrictive covenants by injunction or by damages."

Covenants such as the one here considered whether denominated "executory interests" or "future interests", as urged by counsel for defendants, cannot change the character of what was here attempted.

Counsel for defendants contend that the agreement in question entered into by the predecessors in interest of plaintiffs and defendants did not create a "private antiracial restrictive covenant." Instead they claim that it created a future interest in the land known as an executory interest. They assert "Such interest vested automatically in the defendants upon the happening of the events specified in the original instrument of grant, and the validity of the vesting did not in any way depend upon judicial action by the courts. The trial court's failure and refusal to recognize the vested interest of the defendants, and its ruling that the defendants have no title or interest in or to the property, deprived the defendants of their property without just compensation and without due process of law." We cannot agree.

In the amended complaint numerous persons, firms and corporations were named as defendants, but in designating the record to be filed in this court only the amended complaint, the answer and counterclaim of the defendants Whitney J. Armelin, Carmelita Armelin and Capitol Federal Savings and Loan Association, together with

plaintiff's reply thereto, the stipulation of facts together with the judgment and decree of the trial court, are specified. The record was amended on motion of Midland Federal Savings and Loan Association to include its answer in which the allegations of the amended complaint were admitted and said association prayed that plaintiffs be awarded the relief demanded in their amended complaint. We are not advised as to pleadings filed by the other defendants, including Robert E. Lee, Public Trustee and the City and County of Denver, who with the Midland Federal Savings and Loan Association are named as defendants in error in the instant case.

We are unable to rid ourselves of a strong impression that this writ of error is being prosecuted in the interest of title examiners, rather than in that of the property owners in Block 6 Ashley's addition to Denver. In the brief of counsel for plaintiffs in error we find this significant language: "Title examiners are in constant apprehension as to whether a title may be passed where these restrictive covenants prevail, and we feel that we should call upon this Honorable Body as to the doubts of this decision."

No matter by what arose terms the covenant under consideration may be classified by staute counsel, it is still a recial restriction in violation of the Fourteenth Amendment to the Federal Constitution. That this is so has been definitely settled by the decisions of the Supreme Court of the United States. High sounding phrases or outmoded common law terms cannot alter the effect of the agreement embraced in the instant case. While the hands may seem to be the hands of Esau to a blind Isaac, the voice is by astute counsel, it is still a racial restriction judicial approval or blessing to a contract such as is here involved.

In *Shelley v. Kraemer, supra* [334 U.S. 1, 68 S.Ct. 845], the Supreme Court of the United States said:

> We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the rece or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares "that all persons, whether colored, or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color." (Emphasis supplied.)

Because the language of the United States Supreme Court suggested that private racially restrictive covenants were not invalid per se, it was believed for some time that an action for damages might lie against one who violated such a covenant. A number of state courts adopted this position, and awarded damages against, those who, contrary to their agreements, had made sales of property to negroes or other persons within the excluded classes. This problem came to the attention of the Supreme Court of the United States in *Barrows v. Jackson*, 346 U.S. 249, 253-254, 258, 259, 73 S.Ct. 1031, 97 L.Ed. 1586, where it was held that although such a grantor's constitutional rights were not violated, nevertheless the commodious protection of the Fourteenth Amendment extended to her and she could not be made to respond in damages for treating her restrictive covenant as a nullity.

Because the United States Supreme Court has extracted any teeth which such a covenant was supposed to have, no rights, duties or obligations can be based thereon.

The judgment is affirmed.

Frantz, J., not participating.

Shelley v. Kraemer,

334 U.S. 1 (1948)

CERTIORARI TO THE SUPREME COURT OF MISSOURI.[1]

George L. Vaughn and Herman Willer argued the cause and filed a brief for petitioners in No. 72. Earl Susman was also of counsel.

Thurgood Marshall and Loren Miller argued the cause for petitioners in No. 87. With them on the brief were Willis M. Graves, Francis Dent, William H. Hastie, Charles H. Houston, George M. Johnson, William R. Ming, Jr., James Nabrit, Jr., Marian Wynn Perry, Spottswood W. Robinson, III, Andrew Weinberger and Ruth Weyand.

By special leave of Court. Solicitor General Perlman argued the cause for the United States, as *amicus curiae*, supporting petitioners. With him on the brief was Attorney General Clark.

Gerald L. Seegers argued the cause for respondents in No. 72. With him on the brief was Walter H. Pollmann. Benjamin F. York was also of counsel.

Henry Gilligan and James A. Crooks argued the cause and filed a brief for respondents in No. 87. Lloyd T. Chockley was also of counsel.

Briefs of *amici curiae* supporting petitioners were filed by Perry W. Howard for the Civil Liberties Department, Grand Lodge of Elks, I.B.P.O.E.W.; Isaac Pacht, Irving Hill and Clore Warne; Robert McC. Marsh and Eugene Blanc, Jr. for the Protestant Council of New York City; Herbert S. Thatcher and Robert A. Wilson for the American Federation of Labor; Julius L. Goldstein for the Non-Sectarian Anti-Nazi League to Champion Human Rights, Inc.; Melville J. France for the General Council of Congregational Christian Churches et al.; Robert W. Kenny, O. John Rogge and Mozart G. Ratner for the National Lawyers Guild; Lee Pressman, Eugene Cotton, Frank Donner, John J. Abt, Leon M. Despres, M.H. Goldstein, Isadore Katz, David Rein, Samuel L. Rothbard, Harry Sacher, William Standard and Lindsay P. Walden for the Congress of Industrial Organizations et al.; Phineas Indritz, Irving R.M. Panzer and Richard A. Solomon for the American Veterans Committee; William Maslow, Shad Polier, Joseph B. Robison, Byron S. Miller and William Strong for the American Jewish Congress; Joseph M. Proskauer and Jacob Grumet for the American Jewish Committee et al.; William Strong for the American Indian Citizens League of California, Inc.; Francis M. Dent, Walter M. Nelson, Eugene H. Buder, Victor B. Harris, Luther Ely Smith and Harold I. Kahen for the American Civil Liberties Union; Earl B. Dickerson, Richard E. Westbrooks and Loring B. Moore for the National Bar Association; Alger Hiss, Joseph M. Proskauer and Victor Elting for the American Association for the United Nations; and Edward C. Park and Frank B. Frederick for the American Unitarian Association.

Briefs of *amici curiae* supporting respondents were filed by Roger J. Whiteford and John J. Wilson for the National Association of Real Estate Boards; Ray C. Eberhard and Elisabeth Eberhard Zeigler for the Arlington Heights Property Owners Association et al.; and Thomas F. Cadwalader and Carlyle Barton for the Mount Royal Protective Association, Inc.

Mr. Chief Justice Vinson delivered the opinion of the Court.

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

> "... the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [*sic*] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and "in the immediate vicinity" of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question.[2] The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri sitting *en banc* reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution.[3] At the time the court rendered its decision, petitioners were occupying the property in question.

The second of the cases under consideration comes to this Court from the Supreme Court of Michigan. The circumstances presented do not differ materially from the Missouri case. In June, 1934, one Ferguson and his wife, who then owned the property located in the city of Detroit which is involved in this case, executed a contract providing in part:

> "This property shall not be used or occupied by any person or persons except those of the Caucasian race.
>
> "It is further agreed that this restriction shall not be effective unless at least eighty percent of the property fronting on both sides of the street in the block where our land is located is subjected to this or a similar restriction."

The agreement provided that the restrictions were to remain in effect until January 1, 1960. The contract was subsequently recorded; and similar agreements were executed with respect to eighty percent of the lots in the block in which the property in question is situated.

By deed dated November 30, 1944. petitioners, who were found by the trial court to be Negroes, acquired title to the property and thereupon entered into its occupancy. On January 30, 1945, respondents, as owners of property subject to the terms of the restrictive agreement, brought suit against petitioners in the Circuit Court of Wayne County. After a hearing, the court entered a decree directing petitioners to move from the property within ninety days. Petitioners were further enjoined and restrained from using or occupying the premises in the future. On appeal, the Supreme Court of Michigan affirmed, deciding adversely to petitioners' contentions that they had been denied rights protected by the Fourteenth Amendment.[4]

Petitioners have placed primary reliance on their contentions, first raised in the state courts that judicial enforcement of the restrictive agreements in these cases has violated rights guaranteed to petitioners by the Fourteenth Amendment of the Federal Constitution and Acts of Congress passed pursuant to that Amendment.[5] Specifically, petitioners urge that they have been denied the equal protection of the laws, deprived of property without due process of law, and have been denied privileges and immunities of citizens of the United States. We pass to a consideration of those issues.

I.

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have involved the enforcement of such agreements. The first of these was the case of *Corrigan v. Buckley*, 271 U.S. 323 (1926). There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here on appeal. It is apparent that that case, which had originated in the federal courts and involved the enforcement of covenants on land located in the District of Columbia, could present no issues under the Fourteenth Amendment; for that Amendment by its terms applies only to the States. Nor was the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment properly before the Court, as the opinion of this Court specifically recognizes.[6] The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that since the inhibitions of the constitutional provisions invoked apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. Accordingly, the appeal was dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity, not of the private agreements as such, but of the judicial enforcement of those agreements.

The second of the cases involving racial restrictive covenants was *Hansberry v. Lee*, 311 U.S. 32 (1940). In that case, petitioners, white property owners, were enjoined by the state courts from violating the terms of a restrictive agreement. The state Supreme Court had held petitioners bound by an earlier judicial determination, in litigation in which petitioners were not parties, upholding the validity of the restrictive agreement, although, in fact, the agreement had not been signed by the number of owners necessary to make it effective under state law. This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process of law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court,

that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. In arriving at its result, this Court did not reach the issues presented by the cases now under consideration.

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the affected property shall be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property … against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race." Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that "This property shall not be used or occupied by any person or persons except those of the Caucasian race."

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that and nothing more."[7]

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.[8] Thus, § 1978 of the Revised Statutes, derived from § 1 of the Civil Rights Act of 1866 which was enacted by Congress while the Fourteenth Amendment was also under consideration,[9] provides:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[10]

This Court has given specific recognition to the same principle. *Buchanan v. Warley*, 245 U.S. 60 (1917).

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of *Buchanan v. Warley, supra*, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated: "The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."[11]

In *Harmon* v. *Tyler*, 273 U.S. 668 (1927), a unanimous court, on the authority of *Buchanan v. Warley, supra*, declared invalid an ordinance which forbade any Negro to establish a home on any property in a white community or any white person to establish a home in a Negro community, "except on the written consent of a majority of the persons of the opposite race inhabiting such community or portion of the City to be affected."

The precise question before this Court in both the *Buchanan* and *Harmon* cases involved the rights of white sellers to dispose of their properties free from restrictions as to potential purchasers based on considerations of race or color. But that such legislation is also offensive to the rights of those desiring to acquire and occupy proper-

ty and barred on grounds of race or color is clear, not only from the language of the opinion in *Buchanan v. Warley, supra*, but from this Court's disposition of the case of *Richmond v. Deans*, 281 U.S. 704 (1930). There, a Negro, barred from the occupancy of certain property by the terms of an ordinance similar to that in the *Buchanan* case, sought injunctive relief in the federal courts to enjoin the enforcement of the ordinance on the grounds that its provisions violated the terms of the Fourteenth Amendment. Such relief was granted, and this Court affirmed, finding the citation of *Buchanan v. Warley, supra*, and *Harmon v. Tyler, supra*, sufficient to support its judgment.[12]

But the present cases, unlike those just discussed, do not involve action by state legislatures or city councils. Here the particular patterns of discrimination and the areas in which the restrictions are to operate, are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so-defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[13]

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated. Cf. *Corrigan v. Buckley, supra*.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action; or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

II.

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court. That principle was given expression in the earliest cases involving the construction of the terms of the Fourteenth Amendment. Thus, in *Virginia* v. *Rives*, 100 U.S. 313, 318 (1880), this Court stated: "It is doubtless true that a State may act through different agencies, — either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another." In *Ex parte Virginia*, 100 U.S. 339, 347 (1880), the Court observed: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." In the *Civil Rights Cases*, 109 U.S. 3, 11, 17 (1883), this Court pointed out that the Amendment makes void "State action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings." Language to like effect is employed no less than eighteen times during the course of that opinion.[14]

Similar expressions, giving specific recognition to the fact that judicial action is to be regarded as action of the State for the purposes of the Fourteenth Amendment, are to be found in numerous cases which have been more recently decided. In *Twining v. New Jersey*, 211 U.S. 78, 90-91 (1908), the Court said: "The judicial act of the highest court of the State, in authoritatively construing and enforcing its laws, is the act of the State." In *Brinkerhoff-Faris*

Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930), the Court, through Mr. Justice Brandeis, stated: "The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government." Further examples of such declarations in the opinions of this Court are not lacking.[15]

One of the earliest applications of the prohibitions contained in the Fourteenth Amendment to action of state judicial officials occurred in cases in which Negroes had been excluded from jury service in criminal prosecutions by reason of their race or color. These cases demonstrate, also, the early recognition by this Court that state action in violation of the Amendment's provisions is equally repugnant to the constitutional commands whether directed by state statute or taken by a judicial official in the absence of statute. Thus, in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court declared invalid a state statute restricting jury service to white persons as amounting to a denial of the equal protection of the laws to the colored defendant in that case. In the same volume of the reports, the Court in *Ex parte Virginia, supra*, held that a similar discrimination imposed by the action of a state judge denied rights protected by the Amendment, despite the fact that the language of the state statute relating to jury service contained no such restrictions.

The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend, has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra.* Cf. *Pennoyer v. Neff*, 95 U.S. 714 (1878).[16]

In numerous cases, this Court has reversed criminal convictions in state courts for failure of those courts to provide the essential ingredients of a fair hearing. Thus it has been held that convictions obtained in state courts under the domination of a mob are void. *Moore v. Dempsey*, 261 U.S. 86 (1923). And see *Frank v. Mangum*, 237 U.S. 309 (1915). Convictions obtained by coerced confessions,[17] by the use of perjured testimony known by the prosecution to be such,[18] or without the effective assistance of counsel,[19] have also been held to be exertions of state authority in conflict with the fundamental rights protected by the Fourteenth Amendment.

But the examples of state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.[20] Thus, in *American Federation of Labor v. Swing*, 312 U.S. 321 (1941), enforcement by state courts of the common-law policy of the State, which resulted in the restraining of peaceful picketing, was held to be state action of the sort prohibited by the Amendment's guaranties of freedom of discussion.[21] In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), a conviction in a state court of the common-law crime of breach of the peace was, under the circumstances of the case, found to be a violation of the Amendment's commands relating to freedom of religion. In *Bridges v. California*, 314 U.S. 252 (1941), enforcement of the state's common-law rule relating to contempts by publication was held to be state action inconsistent with the prohibitions of the Fourteenth Amendment.[22] And cf. *Chicago, Burlington and Quincy R. Co.v. Chicago*, 166 U.S. 226 (1897).

The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is

immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

III.

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States; and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

The enforcement of the restrictive agreements by the state courts in these cases was directed pursuant to the common-law policy of the States as formulated by those courts in earlier decisions.[23] In the Missouri case, enforcement of the covenant was directed in the first instance by the highest court of the State after the trial court had determined the agreement to be invalid for want of the requisite number of signatures. In the Michigan case, the order of enforcement by the trial court was affirmed by the highest state court.[24] The judicial action in each case bears the clear and unmistakable imprimatur of the State. We have noted that previous decisions of this Court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy.[25] Nor is the Amendment ineffective simply because the particular pattern of discrimination, which the State has enforced, was defined initially by the terms of a private agreement. State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the constitutional commands.

We hold that in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color.[26] The Fourteenth Amendment declares "that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color."[27] *Strauder v. West Virginia, supra* at 307. Only recently this Court had occasion to declare that a state law which denied equal enjoyment of property rights to a designated class of citizens of specified race and ancestry, was not a legitimate exercise of the state's police power

but violated the guaranty of the equal protection of the laws. *Oyama v. California*, 332 U.S. 633 (1948). Nor may the discriminations imposed by the state courts in these cases be justified as proper exertions of state police power.[28] Cf. *Buchanan v. Warley, supra.*

Respondents urge, however, that since the state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by such agreements, enforcement of covenants excluding colored persons may not be deemed a denial of equal protection of the laws to the colored persons who are thereby affected.[29] This contention does not bear scrutiny. The parties have directed our attention to no case in which a court, state or federal, has been called upon to enforce a covenant excluding members of the white majority from ownership or occupancy of real property on grounds of race or color. But there are more fundamental considerations. The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.[30] It is, therefore, no answer to these petitioners to say that the courts may also be induced to deny white persons rights of ownership and occupancy on grounds of race or color. Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

Nor do we find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. Cf. *Marsh v. Alabama*, 326 U.S. 501 (1946).

The problem of defining the scope of the restrictions which the Federal Constitution imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider. That problem was foremost in the minds of the framers of the Constitution, and, since that early day, has arisen in a multitude of forms. The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare.

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind.[31] Upon full consideration, we have concluded that in these cases the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Reversed.

Mr. Justice Reed, Mr. Justice Jackson and Mr. Justice Rutledge took no part in the consideration or decision of these cases.

1. Together with No. 87, *McGhee et ux.* v. *Sipes et al.*, on certiorari to the Supreme Court of Michigan.↩

1. The trial court found that title to the property which petitioners Shelley sought to purchase was held by one Bishop, a real estate dealer, who placed the property in the name of Josephine Fitzgerald. Bishop, who acted as agent for petitioners in the purchase, concealed the fact of his ownership.↩

1. *Kraemer* v. *Shelley*, 355 Mo. 814, 198 S.W.2d 679 (1946).↩

1. *Sipes* v. *McGhee*, 316 Mich. 614, 25 N.W.2d 638 (1947).↩

1. The first section of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."↩

1. *Corrigan v. Buckley*, 271 U.S. 323, 330-331 (1926).↩

1. *Buchanan v. Warley*, 245 U.S. 60, 73 (1917).↩

1. *Slaughter-House Cases*, 16 Wall. 36, 70, 81 (1873). See Flack, The Adoption of the Fourteenth Amendment.↩

1. In *Oyama v. California*, 332 U.S. 633, 640 (1948) the section of the Civil Rights Act herein considered is described as the federal statute, "enacted before the Fourteenth Amendment but vindicated by it." The Civil Rights Act of 1866 was reenacted in § 18 of the Act of May 31, 1870, subsequent to the adoption of the Fourteenth Amendment. 16 Stat. 144.↩

1. 14 Stat. 27, 8 U.S.C. § 42.↩

1. *Buchanan v. Warley*, 245 U.S. 60, 79 (1917).↩

1. Courts of Georgia, Maryland, North Carolina, Oklahoma, Texas, and Virginia have also declared similar statutes invalid as being in contravention of the Fourteenth Amendment. *Glover* v. *Atlanta*, 148 Ga. 285, 96 S.E. 562 (1918); *Jackson* v. *State*, 132 Md. 311, 103 A. 910 (1918); *Clinard* v. *Winston-Salem*, 217 N.C. 119, 6 S.E.2d 867 (1940); *Allen* v. *Oklahoma City*, 175 Okla. 421, 52 P.2d 1054 (1936); *Liberty Annex Corp.* v. *Dallas*, 289 S.W. 1067 (Tex. Civ. App. 1927); *Irvine* v. *Clifton Forge*, 124 Va. 781, 97 S.E. 310 (1918).↩

1. And see *United States v. Harris*, 106 U.S. 629 (1883); *United States v. Cruikshank*, 92 U.S. 542 (1876).↩

1. Among the phrases appearing in the opinion are the following: "the operation of State laws, and the action of State officers executive or judicial"; "State laws and State proceedings"; "State law ... or some State action through its officers or agents"; "State laws and acts done under State authority"; "State laws, or State action of some kind"; "such laws as the States may adopt or enforce"; "such acts and proceedings as the States may commit or take"; "State legislation or action"; "State law or State authority."↩

1. *Neal v. Delaware*, 103 U.S. 370, 397 (1881); *Scott v. McNeal*, 154 U.S. 34, 45 (1894); *Chicago, Burlington and Quincy R. Co.* v. Chicago, 166 U.S. 226, 233-235 (1897); *Hovey v. Elliott*, 167 U.S. 409, 417-418 (1897); *Carter v. Texas*, 177 U.S. 442, 447 (1900); *Martin v. Texas*, 200 U.S. 316, 319 (1906); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20, 35-36 (1907); *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U.S. 278, 286-287 (1913); *Prudential Insurance Co. v. Cheek*, 259 U.S. 530, 548 (1922); *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 274 (1927); *Mooney v. Holohan*, 294 U.S. 103, 112-113 (1935); *Hansberry v. Lee*, 311 U.S. 32, 41 (1940).↩

1. And see *Standard Oil Co. v. Missouri*, 224 U.S. 270, 281-282 (1912); *Hansberry v. Lee*, 311 U.S. 32 (1940).↩

1. *Brown v. Mississippi*, 297 U.S. 278 (1936); *Chambers v. Florida*, 309 U.S. 227 (1940); *Ashcraft v. Tennessee*, 322 U.S. 143 (1944); *Lee v. Mississippi*, 332 U.S. 742 (1948).↩

1. See *Mooney v. Holohan*, 294 U.S. 103 (1935); *Pyle v. Kansas*, 317 U.S. 213 (1942).↩

1. *Powell v. Alabama*, 287 U.S. 45 (1932); *Williams v. Kaiser*, 323 U.S. 471 (1945); *Tomkins v. Missouri*, 323 U.S. 485 (1945); *De Meerleer v. Michigan*, 329 U.S. 663 (1947).↩

1. In applying the rule of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), it is clear that the common-law rules enunciated by state courts in judicial opinions are to be regarded as a part of the law of the State.↩
1. And see *Bakery Drivers Local v. Wohl*, 315 U.S. 769 (1942); *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943).↩
1. And see *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947).↩
1. See *Swain v. Maxwell*, 355 Mo. 448, 196 S.W.2d 780 (1946); *Koehler v. Rowland*, 275 Mo. 573, 205 S.W. 217 (1918). See also *Parmalee v. Morris*, 218 Mich. 625, 188 N.W. 330 (1922). Cf. *Porter* v. *Barrett*, 233 Mich. 373, 206 N.W. 532 (1925).↩
1. Cf. *Home Telephone and Telegraph Co. v. Los Angeles*, 227 U.S. 278 (1913); *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20 (1907).↩
1. *Bridges v. California*, 314 U.S. 252 (1941); *American Federation of Labor v. Swing*, 312 U.S. 321 (1941).↩
1. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Truax v. Raich*, 239 U.S. 33 (1915).↩
1. Restrictive agreements of the sort involved in these cases have been used to exclude other than Negroes from the ownership or occupancy of real property. We are informed that such agreements have been directed against Indians, Jews, Chinese, Japanese, Mexicans, Hawaiians, Puerto Ricans, and Filipinos, among others.↩
1. See *Bridges v. California*, 314 U.S. 252, 261 (1941); *Cantwell v. Connecticut*, 310 U.S. 296, 307-308 (1940).↩
1. It should be observed that the restrictions relating to residential occupancy contained in ordinances involved in the *Buchanan, Harmon* and *Deans* cases, cited *supra*, and declared by this Court to be inconsistent with the requirements of the Fourteenth Amendment, applied equally to white persons and Negroes.↩
1. *McCabe v. Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151, 161-162 (1914); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Oyama v. California*, 332 U.S. 633 (1948).↩
1. *Slaughter-House Cases*, 16 Wall. 36, 81 (1873); *Strauder v. West Virginia*, 100 U.S. 303 (1880). See Flack, The Adoption of the Fourteenth Amendment.↩

6.4. Review Problems

REVIEW PROBLEMS

Short Answer

1. Argue that the implied warranty of habitability found in *Javins* should not be extended to cover commercial leases. (Consider why it was created in *Javins*.)
1. Name all of the interests created in the following three grants. Add argument and explanation if needed. (1) "O to A but if A dies while married to a man other than her husband Stan, then to B." (2) "O to A for life, then to B unless B dies before A." (3) "O to A to cultivate the rich and fertile farmland of Blackacre. All my other property and interests not otherwise granted are hereby granted to B."
1. If *Sanborn v. McLean* were controlling, would *Riley v. Bear Creek Planning Committee* necessarily come out differently? Explain.
1. Suppose that the present configuration of Blackacre has sentimental value to the remainderman (R). The life tenant (L), however, wants to remake Blackacre in a way that will increase the fair market value

of both the life tenancy and the remainder. Make two different arguments that a court should not intervene to stop L. What would the *Melms* court do?

1. The dad in the *Bayliss* case argued on remand that he should be responsible only for tuition charged by in-state schools, not private colleges. Dad is wealthy enough to afford private college tuition. Make the argument for the dad, but recognizing and responding to the strongest arguments against him in light of the *Bayliss* decision.

1. A developer, *A*, sells half of a parcel of land to another developer, *B*, which land *B* intends to prepare for operation of a pharmacy. In the deed of sale, which is duly recorded, *A* promises that he and his successors will not operate a pharmacy on the half of the parcel *A* retains. *B* leases to Pharmor, which opens a pharmacy. *A* sells to *C*, which then leases to MaxPharm, which opens a pharmacy. Pharmor sues MaxPharm. Analyze under the common law rules for the running of covenants.

Essay

Anna and Bobby met and fell in love in medical school. Sadly their story does not end well.

A few years into their medical program, they had each become dissatisfied with their training and with the prospects of being physicians. They decided together, over dinner one evening, to change everything. They moved to the great, open country in southwestern Wyotana. Both horse enthusiasts, Anna and Bobby had each dreamed of a life of horse riding and exploring in this last great bit of the wild west.

Bobby was an excellent horse rider, having won various championships in college. The plan was to acquire enough property to operate a stable and run riding lessons for locals and tourists. Bobby still had some savings left, and they used these funds to acquire two parcels of land. Parcel A would be the homesite and featured lands suitable for trail riding. Parcel B would be the site of the stables, the jumping arena, and other trails.

Although the parcels are not that far apart by road, it would be a little unpleasant to ride a horse on the highway from one to the other. Luckily, their neighbor Carl, delighted at seeing a young couple move into the area with the intention of starting a family and not intensively developing the wild country, was happy to help. "Feel free to come across my land," he said. "It's less than 1/4 mile and there's already a trail most of the way. I don't mind." It was perfect, and Anna and Bobby proceeded to build the house and stables on their own over the course of the year.

Things soured several years later. Though their business was going well, and they had been blessed with two heathy children, Bobby fell in love with someone else. Anna found out. People got upset. Bobby moved out. But he continued to operate the business, using the stables and leading trail rides from Parcel B onto Parcel A. When he spoke to Bobby about the situation, Carl learned for the first time that Anna and Bobby had never been married. Furious, he told Bobby that he was a very religious man, that he felt betrayed, and that he would no longer allow use of the trail. Around this same time, and also furious, Anna blocked the trail on Parcel A.

Anna comes to you, a local lawyer, to inquire about suing Bobby and settling their affairs. All the property is in Bobby's name. The kids are with her, and she wants to keep her home. Give her your best analysis of the entire situation.

Some quick points of settled Wyotana law (These may or may not be relevant, and other law, not settled and not listed here, may be relevant.): Wyotana is a separate property state. Wyotana has abolished the tenancy by the entirety. Wyotana has a statute ordering equitable division on dissolution of marriage. That statute contains a number of factors judges should use, including support for minor children, but also includes a provision giving

the judge the power "notwithstanding the foregoing to make a division of all property in a manner consistent with fairness and equity under all the circumstances."

Answers to short answer questions

1. Argue that the implied warranty of habitability found in *Javins* should not be extended to cover commercial leases. (Consider why it was created in *Javins*.)

> This involved examining the justifications for the rule in *Javins* and showing they don't apply in commercial lease cases. Consumer protection cases (UCC and new home sale warranties) inapplicable in commercial cases. Nature of housing market is different (reliance on landlord and the capacity, opportunity, and relative innocence of residential tenant). Commercial leases secure property for particular commercial purposes, not a standard bundle of housing services. Bargaining power is more equal.

2. Name all of the interests created in the following three grants. Add argument and explanation if needed.

(1) "O to A but if A dies while married to a man other than her husband Stan, then to B."

A has a fee simple subject to executory interest. B has an executory interest.

(2) "O to A for life, then to B unless B dies before A."

A has a life estate. B has a contingent remainder. O has a reversion.

(3) "O to A to cultivate the rich and fertile farmland of Blackacre. All my other property and interests not otherwise granted are hereby granted to B."

A has a fee simple absolute. (You should note the presumption against conditions. Here, the language is precatory, as there is no clear expression of an intent to create a future interest. Just hope and purpose language, as in *Wood*.)

3. If *Sanborn v. McLean* were controlling, would *Riley v. Bear Creek Planning Committee* necessarily come out differently? Explain.

Not necessarily. There are two parts to *Sanborn*: finding an implied agreement by the developer to impose the same conditions on his retained land as he imposed on those to whom he sold. This placed a burden on land he later sold to others. The second involved whether there was notice sufficient for this implied obligation to run with the land. The implied obligation arises when a developer imposes conditions on a buyer, when there's a common scheme with substantially uniform obligations on the lots sold – thus making it reasonable for the buyer to expect the developer to adhere to the restrictions on his or her unsold parcels.

Riley does not involve those kinds of facts. Though he bought from a developer that intended to create a housing development with such uniform restrictions, the restrictions were not in place on any other properties at the time of Riley's purchase.

4. Suppose that the present configuration of Blackacre has sentimental value to the remainderman (R). The life tenant (L), however, wants to remake Blackacre in a way that will increase the fair market value of both the life tenancy and the remainder. Make two different arguments that a court should not intervene to stop L. What would the *Melms* court do?

A variety of answers would be acceptable here. One can argue that the court should allow a change that is objectively efficient, especially given that remainderman's sentimental attachment is hard to verify and easy to use as an excuse to extract. Another argument is that R's super-market valuation ought to lead R to buy the property. That would test whether the gains in fmv outweigh the sentimental harms.

It is not enough simply to cite *Melms*. The facts here do not indicate a fundamental change in the area that wipes out the value of the life tenancy, as in *Melms*. It is not enough that a change increases the value of the property. For ameliorative waste to be sanctioned, under the strict reading of *Melms*, we need a wipe-out.

5. The dad in the *Bayliss* case argued on remand that he should be responsible only for tuition charged by in-state schools, not private colleges. Dad is wealthy enough to afford private college tuition. Make the argument for the dad, but recognizing and responding to the strongest arguments against him in light of the *Bayliss* decision.

You need to respond to two arguments: (1) that Dad would have paid for private college if the divorce hadn't happened (and thus awarding the child an expectation interest means awarding private college tuition) and (2) that private college tuition is a necessary. It's not enough to say that people don't need to go to expensive schools. You need to look at the definition of a necessary, which is relative to what children from the same walks of life, etc., typically enjoy. Pointing out that lots of rich kids go to public colleges would be responsive. As to the first point, we'd argue that there's no reason not to trust Dad, that Dad's preference for public school is reasonable (and therefore trustworthy), etc.

6. A developer, *A*, sells half of a parcel of land to another developer, *B*, which land *B* intends to prepare for operation of a pharmacy. In the deed of sale, which is duly recorded, *A* promises that he and his successors will not operate a pharmacy on the half of the parcel *A* retains. *B* leases to Pharmor, which opens a pharmacy. *A* sells to *C*, which then leases to MaxPharm, which opens a pharmacy. Pharmor sues MaxPharm. Analyze under the common law rules for the running of covenants.

You just need to run through all the elements on the burden side and run through all the elements on the benefit side. Touch and concern will be a little tricky, and you need to analyze under the physical, location-specific, and 3rd RS standard. (No need for lots and lots of time here; a quick argument would do.) Vertical privity is also problematic, at least strict vertical privity, on account of the leases.