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Cooperative Apartments: A Survey of Legal Treatment and an Argument for Homestead Protection

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I. INTRODUCTION

"The homestead may be a splendid mansion, a cabin or a tent,"[1] but can it be a cooperative apartment? The supreme courts of both Florida and Georgia recently have answered this question in the negative. The Florida Supreme Court denied to a widow a homestead exemption in her deceased husband's cooperative apartment, ruling that a cooperator has no proprietary interest in the apartment, the building, or the land on which the building is situated.[2] The Georgia Supreme Court denied a homestead tax exemption to cooperators because they lacked the characteristics of ownership needed to bring them within the constitutional exemption from taxation for "owners" of a homestead.[3] Both decisions ignore the claimants' use of their apartments as their primary residences.

The refusal to bring stock-owned cooperative apartments within the purview of homestead statutes deprives cooperators of valuable protections granted to owners of other dwelling units.[4] Such refusals result from the use of technical and mechanical distinctions, rather than a broader, more purpose-oriented approach in definition, thereby ignoring the policy consideration at the very heart of homestead exemption statutes—protection of a debtor's home. Such refusals also reflect the law's continued inability to deal with the hybrid nature of the cooperator's interest in a stock-owned cooperative apartment. This treatment has resulted in an unnecessary gap in homestead coverage

† *The invaluable research work of Theresa Holmes, third year law student, University of Kentucky and Timothy Shane O'Neill, J.D. 1978, University of Kentucky, and the editorial work of Carolyn Dye, J.D. 1976, University of Kentucky in the preparation of this article deserve special recognition.*

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1. Kleinert v. Lefkowitz, 271 Mich. 79, 92, 259 N.W. 871, 875 (1935).

2. *In re* Estate of Wartels, 357 So. 2d 708 (Fla. 1978) (probate homestead exemption).

3. Brandywine Townhouses, Inc. v. Joint City-County Bd. of Tax Assessors, 231 Ga. 585, 203 S.E.2d 222 (1974) (homestead tax exemption).

4. Available demographic data indicate that the elderly disproportionately feel the impact of such refusals. I U.S. DEP'T OF HOUSING & URBAN DEVELOPMENT, CONDOMINIUM COOPERATIVE STUDY III-58.

that can dissappoint the expectations of a layperson who thinks he or she "owns" a cooperative apartment.

This article explores the nature and history of homestead exemption statutes and the interests that have been recognized as sufficient to support a homestead exemption. The article next surveys the legal treatment of cooperative apartment interests. Methods that those states with the highest number of cooperatives have chosen or might choose to resolve the issue of the permissibility of a cooperative homestead are also examined. Finally, the article discusses several problems attending the extension of homestead coverage to cooperatives.

II. HOMESTEAD LEGISLATION

In 1839 the Republic of Texas adopted the first homestead law in America.[5] That statute exempted certain property of a debtor from levy for satisfaction of debts due to creditors. This concept proved popular, and by the beginning of the Civil War, all but a few states had adopted some form of homestead exemption.[6]

The underlying policy of the exemptions was not to secure to the person claiming it a certain dollar amount of property free from creditors' claims. Instead, the exemptions were primarily designed to protect homes and families.[7] The homestead laws, unlike bankruptcy laws, did not discharge liability for debts. The creditor could continue to prosecute his or her claim as though the debtor were not within the protection of the homestead law, and a judgment could be entered against the debtor. The homestead mechanism provided protection by making the homestead unavailable for satisfaction of the debt.[8] Although the homestead exemption occasionally saved the home of a poor debtor from creditors, homestead legislation was not intended to benefit only the poor. The homestead statute adopted in most states secured the family home for all economic classes; any person, rich or poor, could claim its protection.[9]

The early supporters of homestead statutes believed that the state, as well as individuals, benefited.[10] The statutes indirectly protected the public, which otherwise would have been burdened with the support of the insolvent debtor's family.[11] Homestead advocates also believed that the exemption policies helped to ensure a republican form of government, not only by protecting the state's residents from destitution,

5. W. NUNN, A STUDY OF THE TEXAS HOMESTEAD AND OTHER EXEMPTIONS 2 (1931).
6. L. FRIEDMAN, A HISTORY OF AMERICAN LAW 214-15 (1973).
7. R. WAPLES, HOMESTEAD AND EXEMPTION 3 (1892).
8. *Id.* at 8.
9. *Id.* at 3.
10. J. SMYTH, THE LAW OF HOMESTEAD AND EXEMPTIONS 49 (1875). This idea of the state as an incidental beneficiary of homestead laws is still accepted. *See* Ferguson v. Roberts, 64 Ariz. 357, 361, 170 P.2d 855, 857 (1946).
11. W. NUNN, *supra* note 5, at 2; 27 OHIO JUR. 2D *Homesteads* § 3 (1957).

but also by encouraging ". . . those feelings of sublime independence which are so essential to the maintenance of free institutions."[12]

Other factors promoted the enactment of homestead legislation. The boom and bust economic conditions in the mid-nineteenth century contributed to the passage of such legislation.[13] Michigan, for example, adopted its legislation in direct response to the financial conditions caused by the Panic of 1837.[14] To encourage immigration, other states specifically adopted homestead laws that offered the immigrant protection from creditor's claims.[15] More recently, the Supreme Court of Minnesota suggested that homestead exemption laws actually encourage the fulfillment of the debtor's obligations. The court reasoned that debtors whose connection with the community is stabilized by a protected interest in a relatively permanent home are more likely to satisfy the claims of their creditors than are debtors who are not so tied to the community.[16]

Today homestead laws exist in every state except Delaware, Maryland, Pennsylvania, Rhode Island, the District of Columbia,[17] and New Jersey.[18] Nevertheless, homestead provisions are often ineffective. In some instances, eligible debtors do not invoke the protection of homestead provisions because they are unaware that such statutes exist.[19] Furthermore, in many states, homestead statutes exempt property only in a stated dollar amount, an amount which has not been increased in response to current economic conditions.[20] Because of nonuse and inadequate exemption, homestead statutes do not achieve their purpose—to protect the family home.

Because the homestead exemption is statutorily created, its provisions vary from state to state. "Homestead" can be defined as a family residence owned, occupied, dedicated, limited, exempted, and re-

12. Franklin v. Coffee, 18 Tex. 413, 416 (1857). In 1829 United States Senator Thomas Benton, in advocating the adoption of a general homestead policy, said:

> Tenantry is unfavorable to freedom. It lays the foundation for separate orders in society, annihilates the love of country and weakens the spirit of independence. The tenant has in fact, no country, no hearth, no domestic alter, no household god. The freeholder, on the contrary is the natural supporter of a free government; and it should be the policy of republics to multiply their freeholders, as it is the policy of monarchies to multiply tenants.

I T. BENTON, THIRTY YEARS VIEW 103-04 (1854-56).

13. L. FRIEDMAN, *supra* note 6, at 213.

14. *See* Kleinert v. Lefkowitz, 271 Mich. 79, 83, 259 N.W. 871, 872 (1935).

15. L. FRIEDMAN, *supra* note 6, at 215.

16. Denzer v. Prendergast, 267 Minn. 212, 216, 126 N.W.2d 440, 443 (1964).

17. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1290 & n.10 (1950). Delaware, Rhode Island and the District of Columbia exempt only chattels from execution. Maryland and Pennsylvania provide an exemption which may be claimed in either realty or personalty but because the provisions exempt $100 and $300 of value, respectively, they cannot be intended to protect the home of the debtor.

18. *See* text accompanying notes 220-36 *infra*.

19. Haskins, *supra* note 17, at 1300.

20. For example, in Kentucky the original homestead act of February 10, 1866, exempted homesteads of $1,000 in value from sale for debts. DIG. GEN. LAWS KY. 714 (Clarke Supp. 1866). The amount has remained unchanged. KY. REV. STAT. § 427.060 (1972).

strained in alienability as prescribed by statute.[21] Beyond this broad definition, however, the homestead exemption eludes meaningful generalizations. For example, while in its ordinary sense a homestead is a family residence, some jurisdictions do not require the claimant to have a family.[22] On the other hand, the exemption is always subject to limitations of monetary value, size, or both. Some jurisdictions distinguish between the amount of property exempted for urban and rural homesteads.[23] Nearly half the states require actual occupancy of the property by the claimant.[24] The majority of states do not require a formal declaration of homestead; occupancy by the claimant or notification of a homestead claim to specified persons at the time of levy or sale of the property is sufficient to establish the exemption.[25] Some states protect spouses against alienation of the homestead by requiring the consent of a title holder's spouse before conveyance or encumbrance of the property.[26] Many of the states protect the family by continuing the exemption after the owner's death for the benefit of his or her family.[27]

To establish a homestead, the claimant must establish a property interest. This article later explores in more detail the type of property interest that the claimant must demonstrate to support his or her homestead claim. At this point it is sufficient to note that a majority of the statutory schemes do not prescribe the type of interest required to qualify.[28] Instead, the courts have had to determine the sufficiency of property interests that debtors have sought to have protected. In reaching these determinations, the courts have considered both identifiable legislative policies underlying homestead provisions and their own philosophies concerning strict or liberal construction of those statutes.

In cases where the debtor is asking the court to protect a novel kind of property interest, the court's attitude toward construction may be the decisive factor. In construing and applying homestead laws, the courts have generally recognized the importance of fulfilling the legislative purpose[29] behind those laws—to protect the debtor's home and family.[30] This purpose remains constant whether the statute merely provides a homestead during the debtor's life or also continues the ex-

21. R. WAPLES, *supra* note 7, at 1.
22. Haskins, *supra* note 17, at 1293.
23. R. WAPLES, *supra* note 7, at 8.
24. Haskins, *supra* note 17, at 1296-97. Even in those states requiring actual occupancy to establish a homestead, homestead rights may be acquired in advance of actual occupancy if the owner manifests an intent to occupy the property as a home by overt acts and does so within a reasonable period of time.
25. *Id.* at 1297.
26. *Id.* at 1289-90.
27. *Id.* at 1290.
28. *Id.* at 1295.
29. J. SMYTH, *supra* note 10, at 89.
30. R. WAPLES, *supra* note 7.

emption for the debtor's family after his or her death.[31] Some courts, which consider homestead statutes to be in derogation of the common law, have construed the statutes strictly.[32] These courts, however, have based their decision on a misunderstanding of the common law. At common law a person's home and contiguous land were inalienable and indefeasible, except when required by the king or for defense of the country.[33] They were not subject to payment of a creditor's claim. Even after the proscription against alienation of land had been substantially removed, creditors could not sell the debtor's land for satisfaction of a debt.[34] Only by statute did a creditor ever achieve the right to take possession of the land of a debtor.[35] Furthermore, not until 1838 did a statute provide for sale of a debtor's land in satisfaction of a debt.[36] Thus, homestead exemption laws are not in derogation of the common law. Rather, the statutes are the remnants of the common law proscription against taking a debtor's land in satisfaction of debts.

The advisability of homestead laws has never been questioned seriously. The courts therefore should not unduly restrict or impede the enjoyment of homestead benefits by narrow decisions and technicalities.[37] Instead, the courts should render sensible interpretations in light of the purpose underlying the particular statute at issue.[38] A Massachusetts court adopted such an approach in the early case of *Gibson v. Jenney*,[39] which dealt with an exemption for one cow and one hog. The debtor asserted that the exemption continued even after the hog had been slaughtered and packed away for use. The Massachusetts court agreed, reasoning that because the statute was intended to provide sustenance for a poor family it was sensible to construe the statute in a manner which would support the exemption.

The courts should construe homestead statutes to accomplish their intended purpose—to protect the debtor's home. Although legislatures adopted such statutes long before the advent of cooperative apartment ownership, their purpose extends to cooperative apartments, as well as to single-family residences. When a cooperative apartment serves as a debtor's home, that apartment should qualify for the homestead exemption.[40]

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31. Markle, *The Condominium as Homestead Property*, 14 HASTINGS L. REV. 320, 325 (1962-63).

32. J. SMYTH, *supra* note 10, at 89.

33. Riggs v. Sterling, 60 Mich. 643, 647, 27 N.W. 705, 707 (1886).

34. *Id.*

35. For an account of the development of creditor's rights to debtor's property, see T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 390, 392-93 (5th ed. 1956).

36. 1 & 2 Vict., C. 110, § 42 (1838).

37. Comment, *Creation of the Homestead and Its Requirements*, 26 CALIF. L. REV. 241, 250 (1937-38).

38. Gibson v. Jenney, 15 Mass. 205, 206 (1818).

39. 15 Mass. 205 (1818).

40. Mixon, *Apartment Ownership in Texas: Cooperative and Condominium*, 1 HOUS. L. REV. 226, 267 (1963-64).

III. PROPERTY INTERESTS SUFFICIENT TO SUPPORT A HOMESTEAD EXEMPTION

Homestead statutes usually do not define the property interest that a homestead claimant must possess, and the various courts that have construed such statutes have not agreed on the type of property interest needed to support a homestead claim.[41] In general, however, the courts have held that the claimant need not have a present possessory interest in fee simple absolute to claim the exemption.[42] The courts have uniformly recognized as sufficient any present possessory freehold estate, including a life estate.[43]

Conversely, the cases are relatively uniform in holding that a future interest, whether a vested or contingent remainder, a possiblity of reverter, right of re-entry or an executory interest, is an insufficient interest upon which to base a claim of homestead.[44] The rationale for this rule is that while the preceding estate continues, the owner of a remainder interest does not have a present right or claim to occupy the property. The present right to occupy the property is essential for a claim of homestead.[45] The "right to occupancy" rule has been applied to deny a remainderperson a homestead exemption even when the remainderperson occupies the premises during the life of the life tenant

41. *See* cases cited in Annot., 89 A.L.R. 511 (1934) and Annot., 74 A.L.R.2d 1355 (1960). For purposes of this discussion, it is assumed that the other statutorily prescribed conditions for establishing a homestead claim have been demonstrated and are not in issue. Although these conditions precedent vary from state to state, they may include a requirement that the claimant have a family, that the claimant occupy the subject property, that the property is the residence of the claimant, or that the claimant file a formal declaration of homestead. Haskins, *supra* note 17, at 1293. The only issue considered here is the court's resolution of whether the claimant's interest in the property constitutes a property interest within the protection of the statute.

42. Doing v. Riley, 176 F.2d 449 (5th Cir. 1949). *Accord*, California Bank v. Schlesinger, 159 Cal. App. 2d 854, 324 P.2d 119 (1958); Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So. 2d 832 (1946); Rice v. United Mercantile Agencies, 395 Ill. 512, 70 N.E.2d 618 (1946).

43. Deere v. Chapman, 25 Ill. 498 (1861). *Accord*, Brooks v. Goodwin, 123 Ark. 607, 186 S.W. 67 (1916); Economy Sav. & Loan Co. v. Spencer, 75 Ohio L. Abs. 330, 144 N.E.2d 267 (Ct. App. 1956).

44. Anemaet v. Martin-Senour Co., 114 So. 2d 23 (Fla. Dist. Ct. App. 1959); Stombaugh v. Morey, 388 Ill. 392, 58 N.E.2d 545 (1944); Cross v. Fruehauf Trailer Co., 354 Mich. 455, 93 N.W.2d 233 (1958); Greenawalt v. Cunningham, 107 S.W.2d 1099 (Tex. Ct. App. 1937); Qualley v. Zimmerman, 231 Wis. 341, 285 N.W. 735 (1939).

45. Keesee v. Bushart, 203 Ark. 668, 158 S.W.2d 915 (1942) (contingent remainders); Cross v. Fruehauf Trailer Co., 354 Mich. 455, 93 N.W.2d 233 (1958) (vested remainders); Gulf Production Co. v. Continental Oil Co., 61 S.W.2d 185 (Tex. Civ. App. 1933) (possibility of reverter). *But see* Grattan v. Trego, 225 F. 705 (8th Cir. 1915) (holding that either the debtor's ownership of a vested remainder in fee or his present possessory estate from year to year was sufficient to support a homestead claim); Lehman v. Tucker, 176 Okla. 286, 55 P.2d 62 (1936) (indicating in dicta a departure from the general rule). *Contra*, Denzer v. Prendergast, 267 Minn. 212, 126 N.W.2d 440 (1964) (judgment debtor who owned a vested remainder in fee subject to mother's life estate entitled to homestead where he was in possession under an oral agreement that in exchange for support and maintenance of life tenant he and his family shared occupancy of the home with life tenant); Gibbs v. Hunter, 99 S.C. 410, 83 S.E. 606 (1914) (claim of homestead in vested remainder permitted); Panagopulos v. Manning, 93 Utah 198, 69 P.2d 614 (1937) (homestead claim permitted to a claimant who owned a vested remainder in fee where claimant was in exclusive occupancy under a verbal lease from year to year from life tenant and using it as his home).

with the latter's permission.[46] Where the remainderperson occupies the premises under some type of arrangement simultaneously with the life tenant, or without life tenants, the courts have allowed that occupancy to support a homestead claim. However, it will not prevent the sale of the remainder interest.[47]

The owner of an estate for years can claim homestead protection whether the term of the lease is one year or ninety-nine years.[48] Because the homestead protection extended to the owner of a leasehold is inferior to the lessor's title,[49] however, the tenant's right to a homestead exemption does not extend beyond the term of the lease.[50] Courts have also applied homestead laws to an estate from period to period.[51] Courts agree less as to whether estates at will or at sufferance are property interests sufficient to support a claim of homestead.[52] Those cases protecting these ephemeral interests have done so on the theory that if the interest is subject to sale under execution, then ownership of that interest coupled with the requisite occupancy rises to sufficient dignity to be protected by the homestead exemption laws.[53]

Several cases have reserved for a surviving spouse or minor children a homestead in the deceased spouse's unexpired leasehold.[54] It has been argued that a decedent's unexpired leasehold interest constitutes personalty in the hands of an administrator, and would thus be subject to creditors' claims. In reliance on the overriding policy of homestead statutes to protect the home and family of the debtor, however, courts have rejected this argument and have given the lessee's

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46. Butler v. Parker, 200 Tenn. 603, 293 S.W.2d 174 (1956).

47. For example, *A* to *B* for life, then to *C* for life, remainder to *D* and his heirs. *C* is living on the property with or without the life tenant *B* under a lease from *B*. *C*'s creditors could force the sale of *C*'s life estate remainder, but *C*'s interest attributable to the lease would be protected. *Id. Contra*, Panagopulos v. Manning, 93 Utah 198, 69 P.2d 614 (1937); Denzer v. Prendergast, 267 Minn. 212, 126 N.W.2d 440 (1964).

48. *See* Annot., 89 A.L.R. 511, 555 (1934) and Annot., 74 A.L.R.2d 1355, 1378 (1960) and cases cited therein.

49. Stombaugh v. Morey, 388 Ill. 392, 58 N.E.2d 545 (1944).

50. Miller v. Farmers State Bank, 137 Okla. 183, 279 P. 351 (1929). In Berry v. Dobson, 68 Miss. 483, 10 So. 45 (1891), the court refused to set off a homestead to the surviving spouse of a tenant at will, but this decision is distinguishable because the deceased spouse's tenancy at will terminated upon death. Therefore the deceased spouse's estate was not an owner of any interest in the land sought to be claimed as a homestead.

51. *In re* Foley, 97 F. Supp. 843 (D. Neb. 1951) (oral month-to-month lease sufficient to support homestead claim).

52. *See* Annot., 89 A.L.R. 511, 558 (1934) and Annot., 74 A.L.R.2d 1355, 1379 (1960) and cases cited therein.

53. McGuire v. Van Pelt, 55 Ala. 344 (1876) (dicta); Mercer v. McKeel, 188 Okla. 280, 108 P.2d 138 (1940) (tenant by sufferance); Cleveland v. Milner, 141 Tex. 120, 170 S.W.2d 472 (1943) (tenant at will).

At this point, one should note that an owner of a cooperative apartment has an estate for years generally under a long term lease that he or she holds by virtue of a requisite stock ownership.

54. Stombaugh v. Morey, 388 Ill. 392, 58 N.E.2d 545 (1944); Moncur v. Jones, 72 S.D. 202, 31 N.W.2d 759 (1948); Federal Land Bank v. King, 132 Tex. 481, 122 S.W.2d 1061 (1939).

survivors a homestead claim in the unexpired leasehold.[55] These decisions indicate judicial refusal to allow homestead exemption to turn on the niceties of technical classification of property interests;[56] instead, these courts look primarily to the policy behind the exemption laws to support their decision.

Generally, any equitable interest will support a homestead exemption, as long as the interest gives the claimant a right to present possession. A debtor in possession who has had title placed in another as security for a loan has been found to have a sufficient interest to support a homestead claim.[57] A vendee-debtor's interest under a purchase contract that gives the vendee a present right of possession will also support a homestead claim. The vendee-debtor's exemption, however, would be subject to claims of the vendor-creditor, one claiming through the vendor-creditor,[58] or one having a superior right in the land.[59] Even a donee who received a tract of land as consideration for relinquishment of his expectant right of inheritance, took possession, and made improvements has been permitted to claim a homestead right in the property.[60] A debtor in possession who has purchased property but placed title in his or her spouse has been successful in asserting a homestead claim,[61] as has a debtor in possession paying the purchase price but taking title in the name of a third person.[62] A mortgagor's equity of redemption has been recognized as a sufficient interest to support the establishment of a homestead claim by the mortgagor-debtor or one claiming through the mortgagor-debtor.[63] A beneficiary's equitable interest in a trust is also sufficient to support a homestead exemption.[64] However, a trustee who holds mere legal title without any beneficial interest, whether the trust is express or implied, does not have an interest in land sufficient to support a homestead

55. Miller v. Farmers State Bank, 137 Okla. 183, 279 P. 351 (1929).

56. Panagopulos v. Manning, 93 Utah 198, 69 P.2d 614 (1937).

57. Perry v. Adams, 179 Iowa 1215, 162 N.W. 817 (1917); Radford v. Kachman, 27 Ohio App. 86, 160 N.E. 875 (1927).

58. Alexander v. Jackson, 92 Cal. 514, 28 P. 593 (1891); *In re* Estate of Reid, 26 Cal. App. 2d 362, 79 P.2d 451 (1938). *Contra*, Thurston v. Maddocks, 88 Mass. (6 Allen) 427 (1863).

59. Snyder v. Pine Grove Lumber Co., 40 Cal. App. 2d 660, 105 P.2d 369 (1940) (homestead claim of vendee disallowed as against purchaser on foreclosure of mortgage given by owner pursuant to an agreement between vendee and owner).

60. Atkins v. Schmid, 129 S.W.2d 412 (Tex. Ct. App. 1939). *But see* Doak v. Casner, 101 S.W.2d 1033 (Tex. Ct. App. 1937); Page v. Vaughn, 173 S.W. 541 (Tex. Ct. App. 1915) wherein a vendee in possession under an oral contract without a deed but having paid the price could not claim a homestead. No improvements had been made, so nothing took the oral agreement outside the Statute of Frauds.

61. Bessemer Properties, Inc. v. Gamble, 158 Fla. 38, 27 So.2d 832 (1946); Kleinert v. Lefkowitz, 271 Mich. 79, 259 N.W. 871 (1935).

62. Storey v. Storey, 275 Mich. 675, 267 N.W. 763 (1936) (title placed in name of sister of purchaser); Meyer v. Platt, 137 Neb. 714, 291 N.W. 86 (1940) (title placed in name of daughter of purchaser).

63. Roy v. Roy, 233 Ala. 440, 172 So. 253 (1937).

64. A. SCOTT, TRUSTS § 149 (1939).

claim.[65]

Absent a statute expressly to the contrary, the general rule provides that naked possession, without any title whatever, is sufficient to support a homestead claim as against all the world except the true owner or one having better title.[66] The theory underlying this position is that if the debtor's mere possession is of sufficient value to be coveted by creditors, it is of sufficient value to the debtor to enjoy homestead protection. It is of no concern to a creditor that another person has superior title.[67] Not all of the cases support this position, however. Several recent decisions have denied a homestead exemption on these facts on the ground that the right of present possession is the essential element of a homestead claim, not merely possession itself.[68]

This cursory review shows a myriad of cases which attempt to define the requisite property interest sufficient to support a homestead claim. Reviewing the disparate treatment afforded similar interests in various jurisdictions leaves the practitioner-reader frustrated. By not defining the requisite property interest which they seek to protect, the states' statutes and constitutional provisions are silent on the very point where they should have spoken. Courts' uses of technical distinctions between personalty and realty, future interests and present estates, and rights of possession and mere possession to reach these decisions do nothing to dispel the lack of satisfaction one has at the results in such cases. It seems to this author that this mechanistic and technical approach, even though it may result in a decision in a particular case that appears fair, should be abandoned.

The inquiry in each instance should focus on whether allowing or disallowing a homestead claim is in consonance with the underlying object and policy of the homestead law.[69] If the object and policy is to protect the debtor's home, then the debtor's interest, however ephemeral, novel, or difficult to classify under traditional property concepts should be protected. This approach would not give creditors any just complaint. In all situations where the homestead law's protection is applicable, the creditor has a valid, but unenforceable, claim against the debtor's property. Homestead laws protect the debtor's property from these legally recognized and otherwise fully enforceable claims of creditors.

Obviously, it would be most advantageous to creditors if all their debtors had a fee simple absolute interest in property which was subject

65. Oree v. Gage, 38 Cal. App. 212, 175 P. 799 (1918) (mother holding property in trust for daughter could not declare a homestead in it); Rice v. Rice, 108 Ill. 199 (1883). *But see* Furman v. Brewer, 38 Cal. App. 687, 177 P. 495 (1918) wherein a trustee in actual possession and having a beneficial interest was entitled to claim a homestead.

66. Annot., 89 A.L.R. 511, 518-19 (1934); Annot., 74 A.L.R.2d 1355, 1383 (1975).

67. Hill v. First Nat'l Bank, 73 Fla. 1092, 1101, 75 So. 614, 617 (1917).

68. Concerning homestead claims of future interest holders, see text accompanying note 45 *supra*.

69. Haskins, *supra* note 17, at 1294-95.

to execution. Execution on and sale of that kind of property would bring the highest dollar to the creditor. But it is this very debtor whose property is already indisputably within the homestead law's protection and outside the creditor's grasp. The debtor who owns less than the totality of the interest is probably more in need of protection. Yet it is this debtor's interest which falls into the gray area created by conflicting case law and ambiguous statutory language.

Applying a policy-oriented approach (that is, looking to the purpose of the legislation) in determining whether a debtor could claim the protection of the homestead laws would bring more predictability of results to the benefit both of debtors and creditors. A debtor's expectation that his or her "home" was beyond the reach of creditors would be fulfilled.[70] Creditor's expectations would not be defeated because they would know from the outset that the debtor's "home" was immune.

Creditors have no complaint when a debtor with less than a fee is placed on a par with the debtor who is fortunate enough to own the whole[71] and is allowed a piece of land free from levy. The courts unnecessarily search for a way of assigning a particular name to the interest under consideration. It is just as unnecessary to allow the decision to flow from the name assigned. All that need be done to resolve the homestead issue for cooperative apartments is to determine whether the debtor's apartment is his or her home. If so, the property would be protected. The decisions should turn not on technical classifications, but on the underlying premise of homestead laws—protection of the debtor's home.

IV. COOPERATIVE APARTMENTS

Despite a plethora of court decisions, law review articles, and various statutory schemes, the cooperative apartment remains a misunderstood legal orphan. This orphan has been housed in foster homes in nearly every area of property law. Depending upon the context in

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70. The utilitarian philosopher Jeremy Bentham believed that "[t]he idea of property consists in an established expectation; in persuasion of being able to draw such or such an advantage from the thing possessed, according to the nature of the case." J. BENTHAM, THEORY OF LEGISLATION 112 (2d ed. R. Hildreth 1871). This expectation is the work of law because there is no property without law. When the law adopts objects which it promises to protect as property, it gives rise to expectations which should not be upset. Although addressing legislators, Bentham's thoughts have equal importance for the judiciary.

> As regards property, security consists in receiving no check, no shock, no derangement to the expectation founded on the laws, of enjoying such and such a portion of good. The legislator owes the greatest respect to this expectation which he has himself produced. When he does not contradict it, he does what is essential to the happiness of society; when he disturbs it, he always produces a proportionate sum of evil.

Id. at 113.

71. J. SMYTH, *supra* note 10, at 137. The author was specifically addressing the irreconciliability of the construction of homestead laws denying joint tenants and tenants in common the homestead protection while allowing a wrongful possessor to claim its benefits. The thought, however, is equally persuasive in the situation of the denial of homestead protection to cooperators in stock-owned cooperative apartments.

which the problem arises, the cooperative owner can find his or her interest defined as one in real property,[72] personal property,[73] quasi-real property,[74] a leasehold,[75] and, finally, something more than a leasehold, but less than a fee.[76] This section will review the history of the stock cooperative, explain its organization, and review the treatment it has received in the courts and law journals.

A. History

The economic realities of home ownership in large urban areas encouraged the development of cooperative housing corporations.[77] As the quantity of city property desirable and suitable for residential purposes decreased, the price of the property increased. Thus, single-family housing became prohibitively expensive. Utilizing the corporate fiction,[78] however, aspiring home owners discovered that they could economically approximate traditional home ownership in multi-family dwellings.[79]

The move to cooperative ownership began early. According to one chronicler, cooperative apartments began in 18th century France, and appeared in England in the next century.[80] In 1882, the Barrington Apartment Association, probably the earliest American cooperative, was organized in New York City.[81] The fashionable or luxury cooper-

72. *In re* Estate of Pitts, 218 Cal. 184, 22 P.2d 694 (1933).

73. *In re* Miller's Estate, 205 Misc. 770, 130 N.Y.S.2d 295 (S. Ct. 1954).

74. Suskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (Civ. Ct. N.Y. 1964).

75. Carden Hall, Inc. v. George, 56 Misc. 2d 865, 290 N.Y.S.2d 430 (S. Ct. 1968).

76. Isaacs, *"To Buy or Not to Buy: That is the Question" . . . What is a Cooperative Apartment*? 13 REC. N.Y. CITY B.A. 203, 205 (1958).

77. For the most part, the cases and articles cited herein are concerned with privately-financed cooperatives. Government-financed low and middle income cooperatives are different only in the subsidies allowed sponsors and the income ceilings imposed on tenant stockholders. D. CLURMAN & E. HEBARD, CONDOMINIUMS AND COOPERATIVES 166 (1970). *See also* Note, *Cooperative Apartments in Government Assisted Low-Middle Income Housing*, 111 U. PA. L. REV. 638 (1963).

78. Cooperative ownership can be structured in at least three other ways—a joint tenancy, a tenancy in common, or a trust arrangement. Each of these forms has disadvantages which make it inferior to the stock corporation cooperative.

A joint tenancy, where all tenants own the entire premises as co-owners in fee simple, is not practical because of the difficulties presented by the four unities, the lack of divisability, and the ability of joint tenants to create tenancies in common by intervivos gifts.

Problems presented by tenancies in common revolve mainly around difficulties in enforcing financial obligation arrangements. When each tenant owns an undivided interest, the individual apartments are unmarketable, and each owner faces unlimited liability in damage suits.

In the trust form, a popular device in Illinois, an express trust is created, and title to the building is conveyed to a trustee who issues certificates of beneficial interest to the individual apartment owners. The rights of the beneficiaries are governed by a declaration of trust, but apartment owners must relinquish control of the building or expose themselves to the liabilities of a partnership. Comment, *A Survey of the Legal Aspects of Cooperative Apartment Ownership*, 16 U. MIAMI L. REV. 305, 306-31 (1961). *See also* 2 P. ROHAN & M. RESKIN, COOPERATIVE HOUSING LAW AND PRACTICE § 2.01[2]-[3] (1978), and Mixon, *supra* note 40, at 228.

79. Isaacs, *supra* note 76, at 203.

80. McCullough, *Cooperative Apartments in Illinois*, 26 CHI. KENT L. REV. 303, 304 (1948).

81. Isaacs, *supra* note 76, at 209.

ative, largely an American development, had appeared in New York City by 1914.[82] Not until the housing shortage following World War I, however, did cooperative housing become common and popular.[83] The number of cooperative projects continued to increase until the Depression. Due to the financial interdependence peculiar to cooperative ownership, 75% of those operating during the Depression years failed.[84] Following World War II, the tight housing markets in large cities again caused a resurgence in this form of ownership.[85]

The historical development of the cooperative apartment reflects the development of the legal concepts which now underlie modern cooperative law.[86] Generally, this law has developed piecemeal. Thus, few unqualified statements about the cooperative or the nature of the individual cooperator's interest are possible, except the statement that the law does not necessarily reflect the expectations of an individual cooperative owner.

B. Organization and Operation of the Cooperative

A cooperative venture begins when a project sponsor decides to build a new apartment building or to reorganize an existing rental property.[87] The sponsor conveys title to the land (unless the property is only leased) and building to a cooperative corporation, usually in the name of the apartment house. Shares of stock in the new corporation are allocated to each apartment and sold to the apartment "purchaser." The price range of the apartments in each cooperative is determined by the location and desirability of the building, and each apartment is individually priced according to its relative desirability, size, and location. The mortgage status of the building determines each purchaser's actual cash outlay. A highly mortgaged building will demand a smaller original investment per apartment than will a building with little or no outstanding mortgage indebtedness.[88]

Mere ownership of shares confers no right to occupy a cooperative

82. McCullough, *supra* note 80, at 305. These luxury apartments now sell for hundreds of thousands of dollars.

83. Isaacs, *supra* note 76, at 210.

84. Mixon, *supra* note 40, at 229.

85. Cooperative apartments are not subject to rent control and therefore offered landlords in the house-hungry 1940's a sometimes profitable way of increasing rent. See text accompanying notes 174-76 *infra* for a discussion of statutory control of these excesses. On the more positive side, for those who could not find or afford single family homes or vacant apartments, cooperatives offered an iron clad lease for an apartment in a well-maintained building.

86. Unlike condominiums, cooperatives were not created by comprehensive statutes. The focus of this article is on treatment by the courts in the absence of applicable statutes.

87. See Marks & Marks, *Coercive Aspects of Housing Cooperatives*, 42 ILL. L. REV. 728 (1948) for critical appraisal of "forced" cooperation, that is, cooperatives organized by landlords of existing rental properties.

88. For a more detailed examination of the development, financing, and operation of the cooperative corporation than is undertaken in this article, see 2 P. ROHAN & M. RESKIN, *supra* note 78, at §§ 2.02-16.04. *See also* D. CLURMAN & E. HEBARD, *supra* note 77, at 199.

apartment.[89] These shares do, however, entitle the purchaser to a long-term[90] proprietary lease[91] for the rooms or apartment represented by the shares. When all shares in the corporation are sold, the owner-occupiers of the apartments constitute the shareholders of the cooperative corporation.

Although the specific arrangements may vary, a true cooperative evidences eight characteristics.[92] First, "[t]he plan of ownership must provide for the use of all apartments in the building for dwelling purposes by the stockholders of the owning corporation."[93] Courts will invalidate a cooperative venture if the evidence suggests that some apartments are reserved by the project sponsor or sold to other non-resident investors for speculation.[94] Unless prohibited by the proprietary lease, however, individual owners may sublet their apartments for profit.[95]

Second, "[t]he expenses of operating and maintaining common portions of the property (as well as paying taxes and mortgage charges) must be shared by all cooperative owners in an equitable fashion."[96] The "rent" which cooperators pay generally consists of a fixed annual sum based on mortgage and operating expenses;[97] a fixed sum collected for a reserve account used to carry defaulting cooperators or to buy back corporate shares; and a sum which may be levied if the cooperator

89. 2 P. ROHAN & M. RESKIN, *supra* note 78, at § 2.01[4].

90. Under the lease, tenants cannot be ousted from the building except for failure to pay assessments or for flagrant violations of house rules. *See* cases cited at notes 124-25 *infra*.

Although proprietary leases have been drawn to run year to year, the security of the long-term lease has made it the preferred form. Most modern leases run from 20 to 50 years and have automatic renewal clauses. Most leases now have clauses which allow cooperators to cancel, a major departure from the early cooperative's ninety-nine year noncancellable leases. Comment, *supra* note 78, at 312 n.52.

91. A stockholder is not the owner of the corporate property, even if he owns all of the stock, hence he would not be entitled to use and occupy the premises merely by reason of his ownership of the shares . . . . *Thus the proprietary lease is the very foundation of the cooperative arrangement*; the ownership of the shares of stock . . . being important chiefly because they enable one to obtain a proprietary lease entitling the lessee to occupy a given amount of living space or a specific apartment.

McCullough, *supra* note 80, at 315-16 (emphasis added). Generally, ownership of the stock and the lease cannot be separated. *But see* Jackson Heights Courts, Inc. v. 171 24th St., Jackson Heights, Inc., 299 N.Y. 650, 83 N.Y.S.2d 424 (1948), where the court held stock ownership and lease duties separate and distinct.

92. Isaacs, *supra* note 76, at 211. To evict tenants who refuse to join the cooperative and to ensure that cooperators benefit from tax rules, the cooperative must be organized correctly. See text accompanying note 127 *infra*.

93. *Id.*

94. In People *ex rel.* McGoldrick v. Sterling, 283 App. Div. 88, 126 N.Y.S.2d 803 (1953), the court held that if 13 of 32 apartments were reserved for speculation purposes, a true cooperative had not been organized, and new owners could not evict statutory tenants.

State *ex rel.* Leavell v. Nelson, 63 Wash. 2d 299, 387 P.2d 82 (1963) invalidated a project because of the sponsor's attempt to control the board of directors. He sublet his reserved apartments to friendly speculators and by so doing retained landlord control over the other owner-occupiers.

95. See text accompanying notes 132-42 *infra* for tax repercussions.

96. Isaacs, *supra* note 76, at 213.

97. Operating expenses may include the cost of utilities, upkeep of common areas, and any other amenities which the cooperative offers.

fails to maintain his or her apartment. Each share of stock is charged its prorata share of the total annual expense, and each owner pays that proportion which his or her holdings bear to the total.[98]

Third, control of the management, operation, and maintenance of the building must lie with those who occupy the building.[99] In practice, the cooperators usually elect a Board of Directors to establish and enforce house rules[100] that are incorporated by reference in the proprietary lease. House rules cover the minutiae necessary to maintain peace and living standards in the multi-family dwellings. Some cooperatives hire professional managers to perform the same functions as the Board.

Fourth, "[t]he determination of who shall become an owner or occupant of an apartment must be within the control of those who own and occupy the other apartments."[101] Unlike most investors, the cooperators do not have votes equal to the number of their shares in the corporation, but rather the number of apartments they occupy. Each apartment may cast one vote at shareholders' meetings. Cooperators vote on some house rules and, more importantly, on acceptance of prospective tenants.[102] With this veto option, cooperators can review the financial position and general character of anyone attempting to join the cooperative. In so doing, they attempt to protect themselves from those who would be unable to pay the assessments. Upon the death of a cooperator, his or her family is usually allowed to remain in occupancy at least for a specified period as long as the "rent" is paid.[103] The other tenant-stockholders retain the power to vote on anyone who wishes to assume the decedent's lease.

Fifth, the property must be operated on a non-profit basis.[104]

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98. 2 P. ROHAN & M. RESKIN, *supra* note 78, at § 2.01[4]. The mortgage reduction payment refers only to any mortgage outstanding against the building. If there are no mortgages, the cooperator would pay only his share of operation expenses. (Any personal loans negotiated by the cooperator to pay the purchase price of the apartment are his or her responsibility.) *See* Paul Laurence Dunbar Apts., Inc. v. Nelson, 136 Misc. 561, 241 N.Y.S. 354 (Mun. Ct. N.Y. 1930) which held that the assessment for operating expenses, as well as the mortgage payment, equaled "rent" for purposes of summary proceeding.

99. Isaacs, *supra* note 76, at 215.

100. In Lazar v. Knolls Coop. Section No. 2 Inc., 205 Misc. 748, 130 N.Y.S.2d 407 (Sup. Ct. 1954) the court allowed a group of stockholders to vote on the board *before* construction of the apartment building was completed. Because the construction company and the cooperative's temporary board were financially interdependent, the court agreed with the stockholders' claim that the temporary board may have had interests adverse to theirs. See 2B P. ROHAN & M. RESKIN, *supra* note 78, at Appendix E for sample lease and house rules.

101. Isaacs, *supra* note 76, at 218.

102. Sale of a cooperative apartment can follow one of three patterns: the shares of stock can be transferred to a new purchaser and the lease assigned to that same person; the shares of stock can be transferred to the new purchaser and the seller's lease surrendered to the landlord corporation, which then issues a new lease; the landlord corporation can buy back the shares of stock, accept a surrender of the lease, and then find a new buyer. *See* Mixon, *supra* note 40, at 237. No matter which form of transfer is used, the new buyer or sublessee must be approved by the other cooperators.

103. McCullough, *supra* note 80, at 319. See text accompanying notes 163-73 *infra* for discussion of restraint on alienation.

104. Isaacs, *supra* note 76, at 222.

Courts have refused to invalidate a cooperative venture merely because the project sponsor reaped a profit in its development.[105] Once in operation, however, the cooperative must not receive more than twenty percent of its income from sources other than the cooperators' payments.[106] Although some cooperatives lease first floor space to commercial enterprises or professional offices, cooperatives must monitor this practice carefully because serious tax consequences can follow if rental income is too great.[107] Cooperative corporations, if properly organized and operated, report no taxable income. Some states do classify them as corporations "doing business" for franchise tax purposes.[108]

Sixth, a super majority of the cooperators must determine any major changes in the provisions of leases, by-laws, acceleration or additions to mortgages, or alterations in the building.[109] Some cooperatives require two-thirds majorities to approve these actions, while others require complete agreement. Most importantly, only the cooperators can decide when the building should be sold or the corporation liquidated.

Seventh, the price paid for the stock must bear a reasonable relationship to the value of the corporation's equity in the real estate.[110] And eighth, the plan must fulfill requirements of federal and state tax laws so as to grant to cooperators the income tax deductions available to cooperative owners.[111]

The primary objective of any cooperator is "to combine the convenience of apartment dwelling with the economics of home owner-

105. *See* Gilligan v. Tishman Realty & Const. Co., Inc., 283 App. Div. 157, 126 N.Y.S.2d 813 (1953); Greiner v. Gershman, 20 Misc. 2d 697, 190 N.Y.S.2d 263 (Sup. Ct. 1959).

106. I.R.C. § 216(b)(1)(D).

107. See text accompanying notes 127-31 *infra* for tax status of the cooperative corporation and text accompanying notes 132-42 *infra* for tax status of the cooperator.

108. Supporting this view are courts which find that cooperators are beneficiaries of the project to which "numerous profitable advantages inure." Pine Grove Manor v. Director, Div. of Taxation, 68 N.J. Super. 135, 151, 171 A.2d 676, 685 (Super. Ct. App. Div. 1961).

Among the "benefits" found by the court were low-cost housing at monthly payments lower than the prevailing rental market; mortgage amortization payments which increase the cooperators' equity in the corporation assets; the chance to sell their apartment for a substantial profit if the cooperative corporation does not exercise its buy-back option; the right to receive a share of the final distribution of net assets of the corporation on liquidation; and an interest in the residual receipts from washers, dryers, vending machines, etc. in the form of refunds or lower sales prices. *Accord*, State v. Sweeney, 153 Ohio St. 66, 91 N.E.2d 13 (1950); Commonwealth v. 2101 Coop., Inc., 408 Pa. 24, 183 A.2d 325 (1962). *Contra*, 50 E. 75th St. Corp. v. Comm'r, 78 F.2d 158 (2d Cir. 1935); Stafford Owners, Inc. v. United States, 39 F.2d 743 (Ct. Cl. 1930).

In United Hous. Foundation, Inc. v. Forman, 421 U.S. 837 (1975), the Supreme Court dismissed similar arguments regarding "profit" by noting that many of the supposed "benefits" are the same benefits received by individual homeowners.

109. Isaacs, *supra* note 76, at 223. These majorities can vary from 66% to 100%. *See* Jones v. Sutton Place Corp., 23 Misc. 2d 197, 201 N.Y.S.2d 369, 371 (Sup. Ct. 1960) and Tompkins v. Hale, 172 Misc. 1071, 15 N.Y.S.2d 854, 856 (Sup. Ct. 1939).

110. Isaacs, *supra* note 76, at 224.

111. Isaacs, *supra* note 76, at 228. See text accompanying notes 127-31 *infra* for discussion of tax requirements.

ship."[112] Beyond this objective, however, the cooperative offers several advantages. The cooperator may acquire indicia of ownership of the apartments, as well as of a proportionate share of the common areas. Furthermore, cooperative ownership permits one to take advantage of the economic principal of the corporation so that each member shares the cost of the property and its management. Cooperatives also minimize the risk of personal liability to members.[113]

Unfortunately, several serious disadvantages also accompany cooperative ownership. In addition to the general confusion over the nature of his or her interest,[114] the cooperator faces a substantial cash outlay even before occupying his or her apartment,[115] and may have difficulty financing his or her purchase because savings and loan associations generally do not accept stock in a cooperative corporation as security for a loan.[116] Furthermore, because cooperative stock is not generally acceptable as collateral, the investment may be frozen.[117] The cooperator surrenders much of the sovereignty that the fee owner enjoys,[118] yet may encounter difficulty enforcing agreements and covenants.[119] Most seriously, the cooperator may be swept out in a foreclosure, whether personally delinquent or not, if total assessment collections do not cover mortgage payments.[120]

Once the proprietary lease is signed, the cooperator becomes a tenant to the managers of the building.[121] The relationship between the cooperative management and its members, however, is more than a mere tenancy; it

> is fiduciary in nature and the board of directors [is] bound, on the one hand, to manage the affairs of the [cooperative] so as to carry out its purposes to house its members in a comfortable and effi-

112. Mixon, *supra* note 40, at 227.

113. Comment, *supra* note 78, at 305. Not to be forgotten is the fact that ownership brings the pride of ownership, and increases the care and maintenance given the property by all members. Hennessey, *Cooperative Apartments and Town Houses*, 1956 U. ILL. L.F. 22, 23.

114. See text accompanying notes 144-201 *infra* for an extensive treatment of the nature of the cooperator's interest.

115. Anderson, *Cooperative Apartments in Florida: A Legal Analysis,* 12 U. MIAMI L. REV. 13, 14 (1957). Depending on the mortgage position of the building, the cooperator might have to pay the total purchase price in cash at one time.

116. Note, *Cooperative Apartment Housing*, 61 HARV. L. REV. 1407, 1412-14 (1948). *See* Goldstein, *Institutional Purchase Money Financing of Cooperative Apartments*, 46 ST. JOHN'S L. REV. 632 (1972).

117. Anderson, *supra* note 115, at 14.

118. *Id.* See text accompanying notes 121-26 *infra* for an explanation of the peculiar landlord-tenant relationship between a cooperator and his apartment corporation.

119. Johnson, *Legal Problems of Cooperative Housing in Illinois*, 50 ILL. B.J. 940, 943 (1961).

120. Mixon, *supra* note 40, at 228. For this reason a cooperator cannot safely make advance payments on his or her share of the indebtedness. Any such prepayment would only increase his equity in the corporate assets, and thereby give him a larger share of the proceeds, if any, of a foreclosure sale. *See also* 2 P. ROHAN & M. RESKIN, *supra* note 78, at § 2.01[4][c].

121. Brigham Park Coop. Section 4, Inc. v. Lieberman, 158 N.Y.S.2d 135, 136 (Mun. Ct. N.Y. 1956). *See also* 1990 7th Ave. Coop. Corp. v. Edwards, 133 Misc. 831, 234 N.Y.S. 82 (Sup. Ct. 1929).

> cient manner, and on the other hand, to treat its individual members in a fair and equal way. The [tenants], too, [have] the correlative duty to recognize that the co-operative enterprise must be conducted with the objective of securing the greatest good for the benefit of the membership.[122]

In lawsuits to settle specific grievances of cooperators or cooperative managers, courts unanimously have accepted management's right to enforce reasonable house rules.[123] The cases split almost equally in decisions for tenants and managers over the reasonableness of a variety of rules.[124] Generally, courts will enforce any rule that works to the benefit of the majority without causing undue hardship on any one member.[125]

In this area of grievances and rules enforcement, the court decisions generally reflect the expectations of the cooperators. By voluntarily joining cooperatives, cooperators have agreed, sub silentio, to give

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122. Vernon Manor Coop. Apts. v. Salatino, 15 Misc. 2d 491, 495, 178 N.Y.S.2d 895, 900-01 (Westchester County Ct. 1958) (citations omitted). Despite the logical reasoning of the *Vernon Manor* court, other courts have felt compelled to buttress their landlord-tenant relationship decisions with further definition. In the interest of "substantial justice" (protection of cooperators from arbitrary corporation rules), courts have supported their verdicts with inapplicable reasoning.

For example, the New York courts, in Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.S.2d 321 (Civ. Ct. N.Y. 1964) and Carden Hall, Inc. v. George, 56 Misc. 2d 865, 290 N.Y.S.2d 430 (Sup. Ct. 1968) cited estate cases for the proposition that cooperators are *mere lessees* and therefore protected by the rules set forth in the lease. On the other hand, the same court, in Mutual Redevelopment Houses, Inc. v. Hanft, 42 Misc. 2d 1044, 249 N.Y.S.2d 988 (Civ. Ct. N.Y. 1964), denied the plaintiff's contention that defendants were *mere lessees* standing at arm's length in the landlord-tenant relationship. The court held that because the defendants had purchased stock in the corporation, they had received a proprietary lease that gave them more control of the workings of the cooperative. (The cooperators in *Susskind* did not have to pay for fixing warped boards in their bedroom floor; the plaintiff in *Carden Hall* was allowed to keep his dishwasher and washing machine; and the plaintiffs in *Hanft* were allowed to keep their dog).

123. "The question . . . is not one of power, but one of reasonableness." Linden Hall No. 3 Coop. Corp. v. Burkman, 61 Misc. 2d 275, 277, 305 N.Y.S.2d 623, 625 (Sup. Ct. 1969).

124. For tenants:

E.g., Opoliner v. Joint Queensview Hous. Enterprise, Inc., 11 App. Div. 2d 1076, 206 N.Y.S.2d 681 (1960); Carden Hall, Inc. v. George, 56 Misc. 2d 865, 290 N.Y.S.2d 430 (Sup. Ct. 1968); Justice Court Mut. Hous. Coop., Inc. v. Sandow, 50 Misc. 2d 541, 270 N.Y.S.2d 829 (Sup. Ct. 1966); Valentine Gardens Coop., Inc. v. Oberman, 237 N.Y.S.2d 535 (Sup. Ct. 1963).

For landlords:

E.g., Forest Park Coop. Inc. v. Hellman, 2 Misc. 2d 183, 152 N.Y.S.2d 685 (Sup. Ct. 1956); Oberfest v. 300 West End Ave. Assocs. Corp., 34 Misc. 2d 963, 231 N.Y.S.2d 863 (Sup. Ct. 1962); Hilltop Village Coop. No. 4, Inc. v. Goldstein, 43 Misc. 2d 657, 252 N.Y.S.2d 7 (Sup. Ct. 1964); Luna Park Hous. v. Besser, 38 App. Div. 2d 713, 329 N.Y.S.2d 332 (1972); Southbridge Towers, Inc. v. Rovics, 76 Misc. 2d 396, 350 N.Y.S.2d 62 (Sup. Ct. 1973); Vernon Manor Coop. Apts. v. Salatino, 15 Misc. 2d 491, 178 N.Y.S.2d 895 (Westchester County Ct. 1958).

125. For example, in Logan v. 3750 North Lake Shore Drive Inc., 17 Ill. App. 3d 584, 308 N.E.2d 278 (1974), the court held that the board could not refuse plaintiff's request to sublet her apartment. Subleases were permitted under the lease and the board, in trying to initiate a general policy against subleasing, was acting unreasonably. In Baum v. Ryerson Towers, 55 Misc. 2d 1045, 287 N.Y.S.2d 791 (Sup. Ct. 1968), on the other hand, the court allowed the defendant board to change the hours during which the community room could be used. The plaintiffs claimed they were denied the "quiet enjoyment" granted by the lease, but the court noted that any benefit to the plaintiffs (from an injunction) would be outweighed by harm done to the other cooperators.

up some freedom of activity in exchange for economical housing and congenial neighbors. Because cooperators have some say in promulgating house rules, however, they may protect themselves from the vagaries of arbitrary landlords. Thus, as one author has noted, "while the cooperative tenant is still a renter . . . he and the other tenants own the landlord."[126]

C. Tax Treatment of Cooperatives

If the cooperative is to be truly competitive with single-family residences, the cooperative owner must be able to take advantage of tax benefits equivalent to those afforded the owners of single-family residences. The cooperative corporation must satisfy the requirements of IRC section 216(b)(1) if cooperators are to qualify for certain federal income tax benefits. The corporation must (1), have only one class of outstanding stock; (2), be owned by stockholders who are entitled, solely by reason of their stock ownership, to dwell in an apartment in a building owned by the corporation; (3), include no stockholder who is entitled to receive any distribution not out of earnings and profits of the corporation except on a complete or partial liquidation of the corporation; and (4), derive 80% or more of its gross income for the taxable year from tenant-cooperators.[127]

Cooperative management may experience difficulty with the eighty percent gross income requirement. In *Eckstein v. United States*,[128] the Court of Claims reaffirmed the rule that amounts paid by proprietary lessees are contributions to capital and do not constitute income to the corporation. The management is responsible to see that any income received from rented commercial offices or building vending machines does not exceed 20% of gross income.[129] Though cooperative corporations can easily qualify under section 216 if properly organized, too much extraneous income will defeat the cooperative's tax advantages.

Problems may arise under requirements (3) and (4) above if the corporation maintains a large reserve account each year. If the corporation retains funds to apply in the next period instead of returning those funds to cooperators, a portion will be subject to taxation.[130] When reserves or monies paid in excess of actual expenses are refunded on the basis of patronage, those refunds are not considered income to cooperators, but return of overcharge. If, however, refunds are distributed on the basis of the ownership of stock, and as earnings on capital

126. Mixon, *supra* note 40, at 228.
127. I.R.C. § 216(b)(1)(A)-(D).
128. 452 F.2d 1036 (Ct. Cl. 1971).
129. The 20% gross income may be offset by operating expenses to reduce net income to zero for any taxable year. Anderson, *supra* note 115, at 29.
130. Comment, *supra* note 78, at 313 n.58.

investment, the refunds are taxable income.[131]

If a cooperative unit satisfies the requirements in IRC section 216(b)(1), the cooperator[132] may deduct a proportionate share of real estate taxes and interest on any mortgage.[133] Cooperators are also entitled to postpone recognition of capital gains on the sale of their apartments by reinvesting in a new residence.[134]

Unlike taxpayers who own a single-family residence, cooperators may not deduct casualty losses, because section 216 makes no provision for such treatment.[135] Furthermore, losses on cooperative stock are not treated as capital losses. In *Stewart v. Commissioner*,[136] the court disallowed the taxpayer's claim of a substantial loss deduction on the sale of his cooperative stock because the taxpayer could not prove that he had purchased his apartment for any purpose other than use as a residence.[137] In *Peake v. Commissioner*,[138] however, a taxpayer who proved that she purchased her stock for subleasing purposes was allowed a long-term capital loss on the stock.

The Internal Revenue Service consistently has declined to exempt cooperators from gift tax liability[139] pursuant to IRC section 2515 which provides that the creation between husband and wife of a joint tenancy or a tenancy by the entirety in real property shall not be a transfer of property for federal gift tax purposes unless the taxpayers elect to treat it as such. In ruling that cooperators do not qualify for this exemption, the Commissioner has explained that Congress did not intend to modify the common law meaning of "real estate," and thus did not intend to include cooperative interests within the scope of sec-

131. Yourman, *Some Legal Aspects of Cooperative Housing*, 12 L. & CONTEMP. PROB. 126, 135 (1947).

132. I.R.C. § 216(b)(2) defines a cooperator as

> [One] whose stock is fully paid up in an amount not less than an amount shown . . . as bearing a reasonable relationship to the portion of the value of the corporation's equity in the houses or apartment building and the land on which situated which is attributable to the house or apartment which such individual is entitled to occupy.

If its members are to qualify under this section, the cooperative corporation cannot sell shares for more than a nominal price if its assets are heavily mortgaged.

133. I.R.C. § 216(a)(1) (real estate taxes); *id.* § 216(a)(2)(A)-(B) (mortgage interest). These sections do not cover any tax or interest related to space rented to non-members or due for cooperatives constructed on a leasehold. Note, *Condominium and Cooperative Housing: Taxation by State and Federal Governments*, 21 U. FLA. L. REV. 529, 537, 539 (1969). *See also* Comment, *supra* note 78, at 313.

134. I.R.C. §§ 1034(f), 121(d)(3).

In determining the amount reinvested, the cost of the next residence will include the amount paid for the stock and the portion of the mortgage allocated to the apartment. Rev. Rul. 60-76, 1960 - 1 C.B. 296.

135. Anderson, *supra* note 115, at 32. *See also* Note, *Land Without Earth—The Condominium*, 15 U. FLA. L. REV. 203, 217 (1962).

136. 5 T.C.M. (CCH) 229 (1946).

137. *See also* Barnum v. Commissioner, 19 T.C. 401 (1952); Calder v. Commissioner, 16 T.C. 144 (1951).

138. 10 T.C.M. (CCH) 577 (1951).

139. *See* Roth, *The Federal Gift Tax and Joint Ownership of Condominum and Cooperative Apartments*, 52 A.B.A. J. 587 (1966).

tion 2515.[140]

Although IRC section 216 treats cooperators in part as real property owners and allows them substantial advantages over ordinary renters, those advantages are not coextensive with the advantages enjoyed by homeowners. Any tax advantages that cooperators do enjoy are limited strictly by the actions of Congress.[141] In general, the courts have been hesitant to extend the tax advantages given to cooperatives.[142] Moreover, tax decisions involving cooperatives may have impact beyond the immediate area of cooperative taxation. A court that seeks to treat the cooperative interest as an interest in real property may support its decision by citing relevant tax cases. Conversely, courts that focus on the tenancy element in cooperative ownership rarely cite tax decisions to support their reasoning.[143]

D. The Nature of the Cooperator's Interest

Scholars generally agree that the cooperator's shares of stock and proprietary lease do not constitute an interest in real property. It is typically stated that the cooperator owns only shares of stock that entitle him or her to lease the premises for occupancy. Nevertheless, the cooperator still pays "rent" as a "tenant."[144] Judges who agree with

140. Rev. Rul. 66-40, 1966-1 C.B. 227.

141. State legislators, too, afford tax advantages to cooperators. An interesting example of statutory reform on the state level is the issue of the cooperator's qualification for state homestead tax exemptions. Prior to 1969, Florida courts had construed the exemption (FLA. CONST. art. 10, § 7) to apply to any one building, no matter how many owners had homes in the building. Therefore, owners of duplexes and condominiums were allowed to take only their proportionate share of the $5,000 tax exemption. Cooperators, according to the attorney general, could not even qualify for a proportionate share because under the corporate form, legal and equitable title is vested in the corporation, and the interest of the apartment owner is that of a stockholder; because that interest is personalty, no exemption would be allowed. [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 238 (Op. No. 061-143). In 1969, the Florida legislature specifically extended the total exemption to condominium and cooperative owners. 1967 Fla. Laws, ch. 67-339 (1969). *See* Ammerman v. Markham, 222 So. 2d 423 (Fla. 1969).

A Georgia court, faced with a similar constitutional exemption (GA. CONST. § 2-4604 (art. VII, § 1, para. IV)) and a similar legislative extention to cooperators (GA. CODE ANN. § 92-233(b) (1974)) arrived at the opposite conclusion. The court held although members did possess some characteristics of ownership, they occupied under a lease which established a landlord-tenant relationship. They were not, therefore, included in the constitutional definition ("each homestead . . . actually occupied by the owner as resident . . .") and could not be so included by an act of the legislature. Brandywine Town, Inc. v. Joint City-County Bd. of Tax Assessors, 231 Ga. 585, 203 S.E.2d 222 (1974).

142. *See, e.g.*, Borland v. Commissioner, 123 F.2d 358 (7th Cir. 1941) (upholding tax deductions taken by member of cooperative organized under trust form). In *Borland*, the court commented, "[w]hile the applicable principle of law is settled and is grounded on sound reason, its application to the hybrid and anomalous legal situation as here exists [a cooperative] is somewhat puzzling." *Id.* at 360.

143. For contrasting interpretations of the importance of the cooperator's tax breaks, *compare* Justus v. Bowers, 167 Ohio St. 384, 148 N.E.2d 917 (1958) *and* Application of Berger, 23 Misc. 2d 553, 198 N.Y.S.2d 187 (Sup. Ct. 1960) *with* Danforth v. McGoldrick, 201 Misc. 480, 109 N.Y.S.2d 387 (Sup. Ct. 1951) *and* Brandywine Townhouses, Inc. v. Joint City-County Bd. of Tax Assessors, 231 Ga. 585, 203 S.E.2d 222 (1974).

144. McCullough, *supra* note 80, at 310. *See also* H. LESAR, LANDLORD AND TENANT § 310,

these scholars assert, for example, that "it is the shares in the corporation that are sold, and despite a vernacular usage to the contrary, the apartment is not sold, but leased under a so-called 'proprietary' lease."[145] This rationale characterizes the cooperator's property interest first as a valuable right to the *use* of real property rather than an interest *in* it;[146] and second as personalty, with stock ownership as a prerequisite for obtaining a lease.[147] Courts that have not accepted this line of reasoning have been accused of adhering to unsound concepts and creating confusion.[148]

In contrast, courts promulgating this "confusion" have found that a cooperator does own his or her apartment. In *Tudor Arms Apartments v. Shaffer*,[149] for example, the court reasoned that

> the solution cannot turn upon the form of the transaction. . . . [T]he essence of the transaction is that in exchange for a capital investment, a prospective purchaser will obtain a right . . . to occupy a particular unit for an indefinite period, during good behaviour. When all the stock is disposed of, the promoters will be out of the picture and the management will be in the hands of the stockholders. *These are some of the most important indicia of ownership.*[150]

In *Silverman v. Alcoa Plaza Associates*,[151] a dissenting justice noted that concepts of realty and personalty were developed before cooperatives existed, and reasoned that "guidelines to classification should be established by the inherent nature of the property right rather than mere superficial resemblances to other forms."[152] In sum, these courts have held that while a cooperator does not acquire a fee in the apartment, the cooperator does possess, via the stock and proprietary lease, so many rights and obligations characteristic of fee ownership that the two are for practical purposes indistinguishable.[153]

Another argument for classifying the cooperator's interest as own-

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at 200 (1957); 2 P. ROHAN & M. RESKIN, *supra* note 78, at § 2.01[5]; Isaacs, *supra* note 76, at 207; Comment, *supra* note 78, at 316.

145. People *ex rel.* McGoldrick v. Sterling, 283 App. Div. 88, 93, 126 N.Y.S.2d 803, 808 (1953). "[Plaintiffs] are not owners but third parties having distinct rights against and distinct obligations toward the defendant owners." Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 591, 251 N.Y.S.2d 321, 326 (Civ. Ct. N.Y. 1964).

146. 2 P. ROHAN & M. RESKIN, *supra* note 78, at § 1.03 n.3.

147. Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 591, 251 N.Y.S.2d 321, 326 (Civ. Ct. N.Y. 1964). *See also* Silverman v. Alcoa Plaza Assoc., 37 App. Div. 2d 166, 172, 323 N.Y.S.2d 39, 45 (1971): "It thus appears that a proprietary lease is no different from any other type of lease. It is personal property." (Cooperator's lease and stock are goods under UCC.)

148. 2 P. ROHAN & M. RESKIN, *supra* note 78, at § 1.03.

149. 191 Md. 342, 62 A.2d 346 (1948).

150. *Id.* at 348, 62 A.2d at 348 (emphasis added).

151. 37 App. Div. 2d 166, 323 N.Y.S.2d 39 (1971).

152. *Id.* at 173, 323 N.Y.S.2d at 46 (Stever, J., dissenting).

153. *See also* Glennon v. Butler, 66 A.2d 519 (D.C. 1949); R. KRATOVIL, REAL ESTATE LAW § 549 (5th ed. 1969). One author claims that authority exists even for the proposition that a shareholder has an insurable interest in the corporate assets. Rohan, *Cooperative Housing: The Treatment of Casualty Losses, Insurance and Project Termination*, 2 CAL. WEST L. REV. 70, 76 (1966).

ership of real property supports this "indicia of ownership" viewpoint. This argument is based on the assertion that the cooperator has a more direct interest in the real property assets of the corporation than would an ordinary stockholder. At any point, the cooperator knows not only the value of his or her share of the corporate assets, but also the real property source of that value.[154] This argument probably reflects the understanding of a cooperative apartment purchaser who sees him or herself as a home buyer, and not as a tenant.

Cooperatives are not only creatures of statute. They are also agglomerations of legal concepts that are at times contradictory.[155] Courts have tended to focus separately on two distinguishing characteristics—the shares and the lease—and to build their decisions on the traditional law of each of these interests. After classifying each interest separately as personalty, the courts then define the whole as personalty. By splitting cooperative ownership into separate parts, however, the courts have based their decisions on inappropriate criteria. To develop any coherent definition of the cooperator's interest, the courts should instead incorporate the policy behind cooperatives—shared ownership of real property—into the rules affecting the consequences of cooperative ownership.[156] A survey of the treatment of cooperative ownership in several areas of the law indicates that this coherency is currently in short supply.

1. The Cooperative Interest in Estates

In re Estate of Pitts,[157] a 1933 California case, demonstrates one manner in which this coherency can be created: by dealing with the cooperator's interest for estate purposes in a substantive, rather than a superficial, way. In ruling that the cooperative corporation had a lien on the deceased's shares in the cooperative, the court stated:

> While the corporation held the legal title, yet, to all intents and purposes, the entire equitable estate was distributed proportionately among the owners of the apartments. It is unnecessary to assign a name to the interest thus created. It is sufficient for the

154. Note, *Legal Characterization of the Individual's Interest in a Cooperative Apartment: Realty or Personalty?*, 73 COLUM. L. REV. 250, 254 n.32 (1973). The author indicates that this relationship may not give cooperators ownership because it is too similar to the rights of a condominium owner. However, as the following net worth formula shows, the equity relationship between the cooperator and his or her proportionate share of the corporate assets is very close. In the formula, a cooperator's net worth equals

(a) the downpayment made by the member, plus
(b) the member's share of principal amortization on the mortgage, plus
(c) the member's share of surplus and reserve accounts, minus
(d) the member's share of depreciation of the corporate assets.

Pine Grove Manor 6 v. Director, Div. of Taxation, 68 N.J. Super. 135, 147, 171 A.2d 676, 683 (1961).

155. Isaacs, *supra* note 76, at 204.

156. *See* Note, *supra* note 154, at 256-58.

157. 218 Cal. 184, 22 P.2d 694 (1933).

purposes of this case to conclude that the ownership of the apartment constituted an interest in real property.[158]

The majority viewpoint, however, is reflected by *In re Miller's Estate*.[159] In *Miller*, the testator had bequeathed "all real estate owned by me" to his daughter. In construing the will, the court did not consider the testator's intent. Instead, the court asked whether the testator's interests as *shareholder* and *lessee* of a cooperative might pass as real estate under his will. Answering in the negative, the court reasoned: "Considered separately the shares of stock and the lease each would be considered personalty for purposes of estate distribution . . . and the fact that the stock ownership is prerequisite to the procurement of the lease would not seem to affect the legal classification of these assets."[160]

In contrast, one New York case, *In re Estate of Rockwell*,[161] did permit a cooperative to pass as realty. The testator in *Rockwell* bequeathed "any home of which I may die seized . . . to may wife." Although the testator and his wife jointly had purchased another home after the will was executed, the court held that the only "home" to which the testator could have been referring when he wrote his will was his cooperative apartment.[162]

If courts refuse to examine a testator's intent in construing the testator's language, as the *Miller* holding suggests, the families of many cooperative owners may be unpleasantly surprised at the dispositive results of a will that is not worded to devise the cooperative interest specifically. This area of will construction presents the best example of the courts' seeming inability to view the shares of stock and the lease as merging to comprise a single and different form of ownership.

2. *The Cooperative Interest for Restraint on Alienation of Stock*

Cooperators' interests are subject to restraints on alienation. The by-laws of the cooperative corporation and the proprietary leases prescribe the procedures by which cooperative apartments can be sold, as-

158. *Id.* at 191, 22 P.2d at 697.

159. 205 Misc. 770, 130 N.Y.S.2d 295 (Surrogate Ct. N.Y. 1954).

160. *Id.* at 772, 130 N.Y.S.2d at 296. *See also In re* Turner's Estate, 36 Misc. 2d 684, 233 N.Y.S.2d 108 (Surrogate Ct. N.Y. 1962); *In re* Estate of Schlesinger, 22 Misc. 2d 810, 194 N.Y.S.2d 710 (Surrogate Ct. N.Y. 1959). *In re* Bloomingdale's Estate, 142 N.Y.S.2d 781 (Surrogate Ct. N.Y. 1955) held that, although the lease and shares of stock were personalty, they did not pass under the article of the testator's will by which he gave all his "personal effects and belongings" to his wife. Using the test "whether the articles are or are not used in or by the household or for the benefit or comfort of the family," the court held that a $65,000 yacht and six automobiles were personal belongings. It did not, however, apply that test to the testator's cooperative stock and lease. Rather, it decided that while the lease was to be considered personalty, the shares of stock had to be regarded as within the category of securities which the testator had bequeathed as residuary property.

161. 26 Misc. 2d 709, 205 N.Y.S.2d 928 (Surrogate Ct. N.Y. 1960).

162. "This apartment was his home and the intent of the testator to give it to his wife is clear and unmistakable." *Id.* at 711, 205 N.Y.S.2d at 930.

signed, or subleased. These restrictive clauses permit cooperators to exclude undesirable members[163] and to ensure that prospective tenants have sufficiently secure financial resources to pay assessments.[164]

The characterization of the cooperator's interest becomes important when evaluating the validity of the restraints imposed by these restrictive provisions. If the interest in a cooperative is characterized as ownership of real property, its alienability, by tradition, should be unfettered.[165] If the interest is viewed substantially as a leasehold, however, valid restraints on alienation can be imposed.[166]

Restraint clauses have generally been upheld for reasons such as those articulated in the early case of *Penthouse Properties v. 1158 5th Avenue, Inc.*[167] In *Penthouse Properties*, the cooperator desired to assign his ninety-nine-year lease without the permission of the corporation. In refusing to uphold such an assignment, the court noted that the relationship of the tenant-stockholders in a cooperative apartment house is not unlike a partnership. The financial responsibility of each tenant is significant, and the failure of one tenant to pay his or her share of the operating expenses increases the liability of the other tenant-stockholders. This special characteristic of cooperative ownership therefore requires the corporation to place some restraints on the sale of stock, to protect the cooperative owners.[168] Later, in *Wiesner v. 791 Park Avenue Corp.*,[169] the New York Court of Appeals limited this seemingly blanket approval of restraints on alienation by finding that such restraints were permissible, but only in the absence of statutory standards that prohibited them.[170] Those statutory standards would include prohibitions against the denial of housing on the basis of sex, race, color, creed, or national origin.

The best statement of the rule regarding restraints on the alienation of cooperative interests is found in *Mowatt v. 1540 Lake Shore Drive Corp.*,[171] in which the plaintiff had sued the cooperative corpora-

163. Note, *supra* note 116, at 1416.

164. Note, *Cooperative Apartments—A Legal Hybrid*, 13 U. FLA. L. REV. 123 (1960).

165. *Id.* at 126.

166. Note, *supra* note 116, at 1417-18. The author suggests that the nature of the cooperative, both as an investment for the cooperator and as an important solution to housing problems, might justify allowing some restraints. He finds a better reason to be "that the tenant owners' interest is in several important respects less than a complete fee and should, therefore, be governed by the usual rule that restraints on leases are valid." *Id.* at 1418.

167. 256 App. Div. 685, 11 N.Y.S.2d 417 (1939). *See also* 68 Beacon St., Inc. v. Sohier, 289 Mass. 354, 194 N.E. 303 (1935).

168. 256 App. Div. 685, 691-92, 11 N.Y.S.2d 417, 422-23 (1939).

169. 6 N.Y.2d 426, 160 N.E.2d 720, 190 N.Y.S.2d 70 (1959).

170. The court found that "*[a]bsent the application of these statutory standards* there is no reason why the owners of the co-operative apartment house could not decide for themselves with whom they wish to share their elevators, their common halls and facilities, their stockholder's meetings, their management problems and responsibilities and their homes." *Id.* at 434, 160 N.E.2d at 724, 190 N.Y.S.2d at 75 (emphasis added).

171. 385 F.2d 135 (7th Cir. 1967) (applying Illinois law as found in Gale v. York Center Comm. Coop., 21 Ill. 2d 86, 171 N.E.2d 30 (1961)).

tion because the Board of Directors had failed to approve several of her prospective subtenants. The defendant corporation claimed the same full and arbitrary power to withhold consent to the transfers which any landlord has. The court rejected this argument, noting that "[cooperative apartment owners] do not live in a wholly communal manner, and the freedom of each member-tenant to dispose of his property right should be afforded protection. We do not think that absolute control by the group can be justified."[172] Although finding for the defendant, the court concluded that "the requirement of consent in the case at bar is valid if the power to withhold consent must be reasonably exercised in the light of the purposes of the arrangement, and would be void if it need not be."[173]

When deciding cases involving restraints on alienation, the courts have found the cooperators to be more than mere tenants. To balance the competing interests of the cooperator and the corporation, courts have forged a reasonableness standard against which to measure the actions of the cooperative management. The courts emphasize that cooperators have traded their ability to sell their interest freely for the power to protect their investments and to approve their prospective neighbors. The exchange is fair to cooperators when this power of protection is constrained by the requirement that restraints be reasonable.

3. The Cooperative Interest for Eviction, Receivership, and Foreclosure

a. Eviction

When veterans returned home after World War II, they found housing in large cities like New York to be in short supply. Landlords who took advantage of this situation by raising rents earned large windfall profits. To prevent these profits and to protect tenants without a lease, the federal government and some states imposed rent control. To circumvent rent control, some landlords reorganized their rental properties into cooperatives. The more unscrupulous apartment owners used coercion, intimidation, and outright fraud to induce these statutory tenants to "purchase" their apartments at grossly inflated prices. Although passage of emergency measures in several jurisdictions[174] de-

172. 385 F.2d at 137.

173. *Id. See also* Crossman v. Pease & Elliman Inc., 29 App. Div. 2d 4, 284 N.Y.S.2d 751 (1967).

174. *See generally*, Marks & Marks, *supra* note 87, at 728.

E.g., Housing & Rent Act, ch. 161, § 204, 62 Stat. 98 (1948); N.Y. UNCONSOL. LAWS § 8585 (McKinney 1974); NEW YORK, N.Y., ADMIN. CODE §§ 51-6.0c(9)(a) (McKinney 1974).

See Abbot v. Bralove, 176 F.2d 64 (D.C. Cir. 1949); Woods v. Krizan, 176 F.2d 667 (8th Cir. 1949); Richards v. Kaskel, 32 N.Y.2d 524, 347 N.Y.S.2d 1 (1973); Tuvim v. 10 E. 30 Corp., 32 N.Y.2d 541, 347 N.Y.S.2d 13 (1973); Van Vort v. 17 E. 84th St. Corp., 4 App. Div. 2d 483, 166 N.Y.S.2d 765 (1957); Golenpaul v. Frankel, 285 App. Div. 941, 138 N.Y.S.2d 708 (1955); Application of Massey, 279 App. Div. 1090, 112 N.Y.S.2d 677 (1952); Judson v. Frankel, 279 App. Div. 372, 110 N.Y.S.2d 156 (1952); Whitmarsh v. Farnell, 273 App. Div. 584, 78 N.Y.S.2d 782 (1948);

creased this form of fraud, those measures did not aid the bona fide stranger who had been induced to purchase an already occupied apartment in an authorized housing cooperative.

Thus a new issue concerning cooperatives required resolution: whether the owner of a cooperative interest could use eviction proceedings to eject the occupier of his or her apartment. Those who objected to the coercive way that the landlords had formed cooperatives maintained that cooperative purchasers could not evict statutory tenants. They argued that a shareholder is not an owner of corporate property; that the landlord, not the tenant, is considered the fee owner for eviction purposes; that the cooperator, who occupies the cooperative by virtue of a lease, is merely another tenant who cannot bring any action against statutory tenants.[175] Authority exists for each of these arguments;[176] nevertheless, the majority position reaches the opposite conclusion.

In *Curtis v. Le May*,[177] the court began, albeit tentatively, to define the interest in these circumstances. That court decided that because cooperators had to buy stock in the corporation and were assigned all the corporation's rights and interests in the apartments for the term of their leases, the cooperators were "considerably more than mere lessees."[178] Two years later, in *Hicks v. Bigelow*,[179] a Washington, D.C. court considered a similar eviction proceeding and held that although the cooperative corporation and the cooperator were nominally landlord and tenant, the apartments were in substance "owner-occupied."[180] The court cataloged the cooperator's attributes of ownership and concluded that "[t]o say that despite her investment in the cooperative, and despite the privileges and prerogatives vested in her . . . , she

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Shumann v. 250 Tenants Corp., 65 Misc. 2d 253, 317 N.Y.S.2d 500 (Sup. Ct. 1970); Application of Hoenig, 115 N.Y.S.2d 913 (Sup. Ct. 1952), *aff'd sub nom.* Hoenig v. McGoldrick, 281 App. Div. 663, 117 N.Y.S.2d 535 (1952); Mont Cenis Apts., Inc. v. Alexander, 120 Misc. 542, 199 N.Y.S. 69 (Sup. Ct. 1923); Ravitz v. Simetz, 115 Misc. 406, 188 N.Y.S. 402 (Sup. Ct. 1921).

175. Marks & Marks, *supra* note 87, at 746-47.

176. *See* People *ex rel.* McGoldrick v. Sterling, 283 App. Div. 88, 126 N.Y.S.2d 803 (1953); Danforth v. McGoldrick, 201 Misc. 480, 109 N.Y.S.2d 387 (Sup. Ct. 1951); Braislin, Porter & Baldwin, Inc. v. Sawdon, 68 N.Y.S.2d 774 (Justice's Ct. of Eastchester 1946).

177. 186 Misc. 853, 60 N.Y.S.2d 768 (Mun. Ct. N.Y. 1945). The cases discussed in the text are only representative. *See also* 542 Morris Park Ave. Corp. v. Wilkins, 120 Misc. 48, 51, 197 N.Y.S. 625, 627 (Sup. Ct. 1922) ("In a corporation organized under a co-operative ownership plan, . . . the stockholders are in effect regarded as the owners of the rooms occupied or to be occupied by them . . . ."); Kenny v. Thompson, 338 Ill. App. 403, 87 N.E.2d 229 (1st Dist. 1949); Tudor Arms Apts. v. Shaffer, 191 Md. 342, 62 A.2d 346 (1948); Flamman v. McGoldrick, 279 App. Div. 854, 110 N.Y.S.2d 477 (1952); Application of Berger, 23 Misc. 2d 553, 198 N.Y.S.2d 187 (Sup. Ct. 1960).

178. Curtis v. Le May, 186 Misc. 853, 856, 60 N.Y.S.2d 768, 770 (Mun. Ct. N.Y. 1945).

179. 55 A.2d 924 (D.C. 1947).

180. *Id.* at 926. The court noted that in *Bigelow*, the cooperator had most of the attributes of an owner. Furthermore, she had a voice in the operation and management of the building and in the selection of other tenants. Most important, she had an exclusive personal right to occupy her apartment.

is barred from proceeding . . . would be to disregard her rights."[181]

One year later, a New York court interpreting the rent control act refused to issue a blanket ruling. It decided that "[t]he meaning of the word 'title' as used in this statute [Business Rent Law] is to be gathered from the context, . . . [and] [w]here the circumstances are such as to warrant doing so, the courts . . . will pierce the corporate veil, looking behind the corporate fiction."[182] Looking behind that veil, the court concluded that the intention of the rent act would be better served by treating the parties involved as "the titleholders of their respective spaces."[183]

Because they have refused to face squarely the issue of the cooperator's interest in the property, courts are now forced to decide on a case by case basis whether a cooperator qualifies as a landlord for eviction purposes. Thus, a cooperator who purchases an already occupied apartment could find his or her occupancy blocked by a court's refusal of assistance. The courts may not recognize the occupancy right the cooperator thought his or her substantial investment afforded.

b. Receivership

When cooperative apartment buildings have fallen into receivership, the courts have treated cooperators differently than owners of realty with regard to liability for use and occupancy rates. In *Prudence Co. v. 160 West 73rd Street Corp.*[184] the court held that cooperators did have limited liability to receivers. The cooperator was liable for agreed upon assessments, although not for the higher "use and occupancy" rate set by the receiver. Because homeowners are not liable to receivers at all, however, *Prudence* implies that in this respect cooperators are not owners.[185]

c. Liens and Foreclosures

The nature of the cooperator's interest has been determinative in

181. *Id.* Bigelow had invoked a provision of the Washington, D.C. Emergency Rent Act that allowed a "landlord" personally desiring to occupy the property to evict a tenant.

182. Smith v. Feigin, 273 App. Div. 277, 280, 77 N.Y.S.2d 229, 232 (1948). The statute interpreted in this decision was the Business Rent Law. N.Y. UNCONSOL. LAWS § 8558(d) (McKinney 1978).

183. *Id.*

184. 260 N.Y. 205, 183 N.E. 365 (1932).

185. *See also* Moses v. Boss, 72 F.2d 1005 (D.C. Cir. 1934). In Greenberg v. Colonial Studios, 105 N.Y.S.2d 494, *rev'd*, 279 App. Div. 555, 107 N.Y.S.2d 87 (1951), the lower court denied cooperators' contention that their liability to a receiver created a new landlord-tenant relationship which entitled them to the benefit of the rent act. The court noted that since they were liable to the receiver in the first place, they had not been owners, and the application of the receiver did not change their situation. In a cryptic reversal, however, the appellate court held that the plaintiffs, under the circumstances, should be treated as tenants protected by rent laws. Perhaps the court was concluding that cooperative tenants are always beneficiaries of the rent act. Without benefit of a court explanation, however, it seems that the application of a receiver somehow changes the nature of the cooperator's relationship to the corporation.

decisions in the areas of liens and foreclosures. In a tax lien case, *Lacaille v. Feldman*,[186] the court noted that the cooperator was more than a mere lessee. Because of his or her liability for mortgage and tax payments on "leased" apartments and his or her entitlement to certain tax deductions, the court concluded that the cooperative lessee's stock ownership was "collateral to and an implementation of the purposes of the long-term lease."[187] Thus, the court held that the tax warrants filed by the New York State Tax Commission attached to the lease as liens upon a chattel- or quasi-real property interest. The *Lacaille* court cited several eviction cases in support if its "quasi-real" classification. *Lacaille* is still the law in lien cases.

Cooperators faced with foreclosure proceedings on their buildings have sometimes benefited and sometimes suffered from the classification of their interest. For example, in *New York Life Insurance Co. v. 1325 Astor Street Building Corp.*,[188] the plaintiff insurance company claimed that the owners of the cooperative apartments were liable personally for the deficiency existing after sale pursuant to foreclosure of the deed of trust. The company contended that the defendant cooperators, as the purchasers of the property, were the real parties in interest. In denying New York Life's claim and seeking to protect the cooperators, the court held that the insurance company did business only with the corporation and could not later claim that it had done business with the individual cooperators.[189]

A Michigan court denied participation to a group of tenants who *sought* to be named necessary parties defendant to a foreclosure suit. In *Schaffer v. 8100 Jefferson Avenue East Corp.*,[190] the cooperators, who had proof of fraud by the cooperative corporation director, claimed that they were joint venturers rather than cooperators, and as such were equitable owners in common of the real estate. The court denied this claim because the plaintiffs had "accepted the corporate form of ownership"[191] when their interest had been defined in the articles of the association. The court found that because the cooperative association "owned" the property, the cooperator plaintiffs were mere lessees holding no more legal or equitable title than stockholders in other corporations.[192] Thus, the cooperators were not necessary parties to the foreclosure suit.

Neither the *Astor* nor the *Schaffer* court addressed the real nature of the cooperative interest in reaching its decision. Results like these

186. 44 Misc. 2d 370, 253 N.Y.S.2d 937 (Sup. Ct. 1964).
187. *Id.* at 386, 253 N.Y.S.2d at 955. *See also* 2 P. ROHAN & M. RESKIN, *supra* note 78, at § 2.01[5].
188. 325 Ill. App. 536, 60 N.E.2d 257 (1945).
189. *Id.* at 539, 60 N.E.2d at 258.
190. 267 Mich. 437, 255 N.W. 324 (1934).
191. *Id.* at 447, 255 N.W. at 327.
192. *Id. But see* C.G.J. Corp. v. Hurwitz, 123 So. 2d 44 (Fla. Dist. Ct. App. 1960).

will disappoint cooperators who believe they have purchased their apartments. Unless cooperators are protected by state law,[193] courts following *Astor* or *Schaffer* will refuse to accept an "interest in property" argument. Thus the cooperators will have no recourse against a project sponsor who defaults before the requisite number of shares of stock is sold.

4. The Cooperative Interest Under Blue Sky Laws

When a new cooperative venture is planned, a project sponsor generally issues a prospectus, advertising bulletins, and copies of agreements to attract purchasers. When asked to apply Blue Sky laws to cooperatives, however, courts have almost uniformly decided that cooperative apartment stock represents a transaction in real estate rather than an investment for profit in a security. As a result, unless state Blue Sky laws specifically include the sale of shares in cooperatively owned real estate, cooperative purchasers have virtually no protection from fraudulent plans and unscrupulous organizers.[194]

In deciding whether cooperative apartment stock is a security for purposes of Blue Sky laws, the courts have required cooperators to satisfy the three-pronged test traditionally associated with Blue Sky relief. An investor who demands the protection of Blue Sky laws must invest as part of a common scheme or plan; rely on others to manage the investment; and have profit as the primary motive.[195] Although cooperators meet the first requirement, they fail to meet the second because they have a voice in the management of their apartments. In addition, because they invest to obtain a place to live, they do not meet the third requirement. An Ohio court reasoned that those who purchase cooperative stock do so to acquire a percentage interest in an apartment building and the right to occupy a particular apartment as their home. Thus, if corporate stock is involved in such a transaction, its sole purpose is to work out the cooperative features of joint ownership, and not necessarily to serve an investment function.[196] In effect, the courts have found that the subject of the sale is real estate. The corporation exists only to

193. Under Florida law, for example, a foreclosure will not terminate a lease junior to the mortgage if the lease is recorded or the tenant is in possession unless the tenant is made a party defendant. Anderson, *supra* note 115, at 36.

194. *See* Miller, *Cooperative Apartments: Real Estate or Securities*, 45 B.U. L. REV. 465, 484-86 (1965).

Some of the decisions surveyed by Miller involve tortured definitions of "securities" and "profits" and seem only to invite more confusion regarding the cooperator's interest. It is eminently more practical for states to pass disclosure and registration rules such as those in New York and to provide specific protection for cooperators. *See* N.Y. GEN. BUS. LAW § 352-e (McKinney 1968 & Supp. 1978).

195. Miller, *supra* note 194, at 467.

196. State v. Hersch, 101 Ohio App. 425, 429, 131 N.E.2d 419, 422 (1956). *See also* Willmont v. Tellone, 137 So. 2d 610, 612 (Fla. Dist. Ct. App. 1962); Brothers v. McMahon, 351 Ill. App. 321, 115 N.E.2d 116 (1953); State v. Silberberg, 72 Ohio L. Abs. 481, 130 N.E.2d 244 (Ct. App. 1955), *aff'd*, 166 Ohio St. 101, 139 N.E.2d 342 (1956).

make the real estate ownership convenient, and the purpose of any stock purchase is home ownership rather than profit.[197]

In 1975, the United States Supreme Court decided *United Housing Foundation, Inc. v. Forman*,[198] and held that low-to-middle income subsidized cooperative housing did not qualify as an investment protected by federal securities laws.[199] The Court asserted that "[c]ommon sense suggests that people who intend to acquire only a residential apartment in a state-subsidized cooperative, for their personal use, are not likely to believe that in reality they are purchasing investment securities simply because the transaction is evidenced by something called a share of stock."[200] The Court chose to look at the economic reality, not the form[201] of a cooperative housing transaction. In *Forman*, the Court decided only that the transaction involved was not for investment purposes; the decision does not determine the nature of the interest owned by cooperators.

V. COOPERATIVE HOMESTEADS IN SELECTED STATES

Statistical material collected in a 1975 study of condominium and cooperative housing units by the Department of Housing and Urban Development[202] provides a demographic profile of cooperative apartment ownership in the United States. This study reveals that virtually all cooperative units are the cooperator's primary homes,[203] and that family income distribution of cooperative and condominium apartment owners in 1970 was almost identical to that of owners of conventional housing units.[204] The study also reported that cooperative as well as condominium owners tend to be either young couples or older couples whose children have left home.[205] These factors provide additional reasons why the states should protect cooperative apartment owners through homestead exemptions commensurate with those afforded the owners of traditional, single-family homes.

Most of the available statistical data does not distinguish between condominium and cooperative apartments. Nevertheless, it seems clear that cooperative apartments are concentrated only in certain regions in

197. Miller, *supra* note 194, at 468.

198. 421 U.S. 837 (1975).

199. Numerous articles have appeared since *Forman* was decided. See, for example, Recent Cases, 26 CASE W. RES. L. REV. 735 (1976); Comment, *Cooperative Housing Shares: A Security or Substantively Secure?*, 12 URB. L. ANN. 277 (1976). Project, *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 254 (1975).

200. 421 U.S. at 851.

201. *Id.* at 848.

202. I - III U.S. DEPT. OF HOUSING & URBAN DEVELOPMENT CONDOMINIUM COOPERATIVE STUDY (1975) [hereinafter cited as HUD STUDY].

203. I HUD STUDY, *supra* note 202, at III-30.

204. *Id.* at III-31.

205. *Id.* at III-33.

the United States,[206] and that they are found primarily in urban environments.[207] For these reasons this article limits the analysis of the cooperator's interest under homestead exemption legislation to the ten states which account for more than 80 percent of the cooperative housing in the United States: Florida, California, New York, Illinois, Michigan, Pennsylvania, Texas, New Jersey, Arizona, and Ohio.[208] Recent data confirm that nearly two-thirds of all the new construction of cooperative apartment units between 1970 and 1974 occurred in nine of these ten states.[209]

A. Pennsylvania

The Commonwealth of Pennsylvania does not provide by statute for a homestead exemption either during the lifetime of the debtor or for the benefit of the debtor's surviving spouse, minor children, or both. Since 1849, however, that state has exempted a portion of the debtor's property from levy and execution sale pursuant to any judgment on a

206. *Id.* at III-2. Condominium and Cooperative Housing Stock—By Region (in thousands of units):

	North East	North Central	South	West	United States
Condominiums	141	165	586	360	1,252
Cooperatives	221	80	70	68	439
TOTAL	362	245	656	428	1,691

	North East	North Central	South	West	United States
% of U.S. Condominiums	11%	13%	47%	29%	100%
% of U.S. Cooperatives	50%	18%	16%	16%	100%
% of All Owner-Occupied Units (estimated)	20%	30%	32%	18%	100%

Id.

207. It is estimated that 30-35% of cooperatives in the United States are located in New York City with other relatively high concentrations of cooperative and condonimum units in Chicago, Detroit, and Philadelphia. *Id.* at III-23.

208.

STATE	COOPERATIVES (in thousands of units)
Florida	40
California	50
New York	145
Illinois	35
Michigan	15
Pennsylvania	10
Texas	5
New Jersey	15
Arizona	—
Maryland	5
TOTAL FOR TOP TEN STATES	320

Id. at III-17.

209. Top Ten States Ranked by Recent Construction Activity

contract.[210] This legislation ensured the debtor of the primary necessities of life and a nucleus with which to begin life anew.[211] The method chosen by the Pennsylvania legislature to achieve these objectives does not pose the same qualification problems for cooperative debtors as do more typical homestead laws.

The Pennsylvania debtor's exemption is available to any debtor who faces levy and sale pursuant to an adverse judgment on a contract. Unlike conventional homestead statutes,[212] the Pennsylvania statute does not restrict the exemption to specific types of property. A qualifying debtor may exempt a residence, cash, or other property. Thus, the cooperator could invoke the exemption to protect his or her leasehold and stock interest in a cooperative apartment. Because the statute is not restrictive, the Pennsylvania courts need not characterize the cooperator's interest as realty, personalty, or a hybrid property interest. Under the statute, the debtor need only notify the sheriff of the claimed exemption before sale, and, if the exemption is claimed in property, designate the property he or she elects to retain as exempt.[213] The major impediment to effectuating the legislative objectives behind the Pennsylvania exemption is that the small amount—$300—of protection it affords any debtor, whether a cooperator or not is of little practical significance.[214]

The protections granted upon the death of a debtor are somewhat

RANK	STATE
1	Florida
2	California
3	Ohio (not one of the ten major cooperative housing states)
4	Texas
5	Illinois
6	Michigan
7	Arizona
8	New York
9	Pennsylvania
10	Maryland

Id. Maryland will not be discussed because it does not have a homestead exemption law.

210. 12 PA. CONS. STAT. ANN. § 2161 (Purdon 1967).

Until 1951, this exemption from levy and sale on execution also covered those judgments obtained upon distress for rent. Insofar as this section was applicable to distress for rent, it was repealed by the Landlord and Tenant Act of April 6, 1951, Pub. L. No. 69, § 601 (68 PA. CONS. STAT. ANN. tit. 68, § 250.601 (Purdon 1967)).

211. Mayhugh v. Coon, 460 Pa. 128, 134, 331 A.2d 452, 455 (1975).

212. *See, e.g.*, ILL. REV. STAT. ch. 52, § 1 (1977).

213. Maschke *ex rel.* Ehnes v. O'Brien, 142 Pa. Super. Ct. 559, 17 A.2d 923 (1941).

214. 12 PA. CONS. STAT. ANN. § 2161 (Purdon 1967). The legislature's failure to increase the value limit for debtor exemptions and homestead exemptions in response to changing economic conditions has seriously decreased the ability of these exemptions to fulfill the common purpose of protecting the individual debtor and his or her family from complete impoverishment. While a value limit is clearly desirable, it should not remain fixed in disregard of economic and other social changes. Haskins, *supra* note 17, at 1293.

more generous. Upon death, real or personal property, or both, to the extent of $2,000 may be retained or claimed as exempt by the spouse of any decedent domiciled in Pennsylvania or, under certain circumstances, by children or parents of the decedent-debtor who were members of his household.[215] This exemption takes priority not only over general creditors but also over creditors who held judgment liens on the decedent's real estate during his or her lifetime.[216] Furthermore, the exemption may be claimed even though the estate is insolvent.[217] Only purchase money mortgages have priority over this statutory exemption.[218] Because realty or personalty can be claimed under this exemption, the exemption will protect the surviving spouse's or children's interest in the decedent's cooperative apartment. This exemption can be claimed to the extent of the statutory amount without encountering the difficulties attendant to the characterization of the cooperator's interest for homestead protection.[219]

B. New Jersey

New Jersey has no specific intervivos or probate homestead exemption. Other legislation, however, protects the debtor and his or her family from complete impoverishment at the hands of creditors, and may protect a cooperator-debtor's interest in a cooperative apartment. New Jersey also provides for special tax treatment of homestead property, and in specific instances makes such treatment available to the owners of cooperative apartments.

Any New Jersey debtor whose family resides in the state may exempt from judicial seizure a portion of his or her personal property,[220] including goods and chattels, shares of stock or interest in a corporation, and other personal property to the extent of $1,000.[221] The exemption protects the debtor during his or her lifetime and continues for the benefit of his or her family after his or her death.[222] After the death of any person leaving a family residing in the state his or her family may claim a statutory exemption of all wearing apparel of the decedent and personal property to the extent of $500.[223] This exemption operates against all creditors and before any distribution or other disposi-

215. 20 PA. CONS. STAT. ANN. § 3121 (Purdon 1975).

Throughout the remainder of this article, homestead protection invoked during the life of the debtor-claimant shall be referred to as "intervivos homestead" provisions, and homestead protection available upon the death of a debtor shall be referred to as "probate homestead" provisions.

216. Koss' Estate, 59 Pa. D. & C. 308 (1947).

217. Newcomer's Estate, 9 Pa. D. & C.2d 99, 109 (1956).

218. 20 PA. CONS. STAT. ANN. § 3126(a) (Purdon 1975).

219. If the decedent's interest in the cooperative apartment is specifically devised or bequeathed by him, and if other assets are available for satisfaction of the exemption, the interest may not be claimed under this provision. 20 PA. CONS. STAT. ANN. § 3121 (Purdon 1975).

220. N.J. STAT. ANN. § 2A:17-19 (West Supp. 1978).

221. *Id.* In addition, all wearing apparel is exempted.

222. *Id.*

223. *Id.* § 3A:8-6 (West 1953).

tion of the decedent's personal property.[224] By accepting the provisions of the decedent's will, however, a surviving spouse loses the statutory exemption.[225]

These New Jersey statutes embody a legislative policy that neither a living debtor nor the family of a deceased debtor should be wholly impoverished by the forced payment of debts.[226] Unlike homestead provisions, however, the New Jersey exemptions apply only to personalty. This limitation indicates that the legislature did not intend to protect the residence of the debtor and his or her family from creditor's claims. This assertion is supported by New Jersey laws that subject all real estate of living debtors to levy and sale by execution.[227]

At common law, real estate could not be sold for the payment of debts,[228] and even creditors with large claims against a landowner had no power to collect the debt. In 1743 the New Jersey legislature decided "to remedy this mischief" by making real estate chargeable with debts and liable to be sold for their satisfaction.[229] Unlike other jurisdictions, however, New Jersey failed to balance the creditor's right to secure satisfaction of debts with the need of shelter for debtors and their families. Thus, New Jersey did not temper its creditors' rights legislation by providing a homestead exemption to satisfy the legitimate shelter needs of the debtor and his or her family.

The owner of a New Jersey cooperative apartment may be able to claim the state personalty exemptions to protect his or her interest in the cooperative apartment by characterizing that interest as personalty. The personalty exemptions apply specifically to shares of stock in any corporation,[230] thus protecting one of the two components of the cooperator's interest. The other component, the leasehold, if given its technically correct common law definition, would also be classified as personalty. Thus, both interests would be within the protection of the exemption statutes.

Allowing legal consequences to flow from such a mechanical characterization of the cooperator's interest is generally unsatisfactory, even though in New Jersey this characterization ironically may establish protection for the debtor-cooperator where none was intended. Because of the hybrid character of the cooperator's interest, a less mechanical analysis is better suited to this legal phenomena of cooperative apartments. Such an analysis would examine the characteristics of the cooperator's interest relevant to the particular purpose of the legis-

224. *Id.* This statutory exemption does not apply against reasonable funeral expenses of the deceased. *In re* Cunningham's Estate, 17 N.J. Misc. 33, 3 A.2d 876 (Union County Orphans' Ct. 1939).

225. N.J. STAT. ANN. § 3A:8-6 (West 1953).

226. Carey v. Monroe, 54 N.J. Eq. 632, 633-34, 35 A. 456, 457 (1896).

227. N.J. STAT. ANN. § 2A:17-17 (West 1952).

228. *See* text accompanying note 35, *supra*.

229. Voorhees v. Chaffers, 24 N.J.L. 507, 509 (1854).

230. N.J. STAT. ANN. § 2A:17-19 (West Supp. 1978).

lation at issue. In light of the identified legislative purpose, the cooperator's interest may then be classified as within or without the particular statutory scheme.[231]

Under this analysis, an interest in a cooperative apartment should not be protected from creditors in New Jersey. The avowed intent of the New Jersey statutes is to make the debtor's real property subject to levy and execution to satisfy creditor's claims. Thus, a debtor who owns his or her residence in fee enjoys no exemption. Because the rights of the cooperator are in effect similar to those of the fee owner the cooperator should be treated in the same manner. The cooperator should not be protected from creditors' claims through a facile characterization of his or her interest as personalty.

While New Jersey does not provide for intervivos or probate homestead protection, the New Jersey constitution was recently amended to give to the state legislature the authority to "adopt a homestead statute which entitles homeowners, residential tenants, and net lease residential tenants to a rebate or a credit of a sum of money related to property taxes paid by or allocable to them at such rates and subject to such limits as may be provided by law."[232] Pursuant to this provision, the New Jersey legislature has allowed a property tax deduction to individuals 65 or older, or less than 65 but permanently and totally disabled, whose income is not over $5,000 and who reside in their own "dwelling house."[233] This deduction is also available to a surviving spouse 55 or older who remains in the dwelling house of the deceased spouse for as long as the survivor remains unmarried.[234] The New Jersey legislature has also provided for a rebate to citizens who pay property taxes on their dwelling houses, as well as their interests in mutual housing corporations and cooperative housing corporations.[235] This homestead credit may be deducted from an individual's state income tax if the individual is either a "qualified residential tenant or shareholder in a cooperative."[236]

The property tax deduction for individuals who are 65 or older may not apply to all cooperators over 65 because the statute requires the claimant to own and reside in a "dwelling house." The analysis advanced in this article suggests that this result is inequitable. In contrast, the rebate for property taxes and homestead credit against state income tax is available specifically to cooperators.

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231. *See* text accompanying note 4 and notes 155-56, *supra*.

232. N.J. CONST. art. 8, § 1, ¶ 5.

233. N.J. STAT. ANN. §§ 54:4-8.40 to 4-8.54 (West Supp. 1978).

234. N.J. STAT. ANN. § 54:4-8.41a (West Supp. 1978). *See also* N.J. STAT. ANN. §§ 54:4-8.10 to 4-8.23 (West Supp. 1978), which grants a war veteran or a veteran's widow a $50 deduction from real or personal property taxes, or both.

235. N.J. STAT. ANN. §§ 54:4-3.80 to 3.84; 54:4-6.2 to 6.13 (West Supp. 1978).

236. N.J. STAT. ANN. § 54A:4-3 (West 1978 Pamphlet).

C. *Arizona*

The cooperator should find it easier to qualify for Arizona's homestead provisions than for the exemptions in some of the other jurisdictions surveyed. Arizona's homestead scheme is generous in terms of dollar value, class of beneficiaries protected, and interests sufficient to support a claim. Any state resident over 18 may hold a homestead exempt from attachment, execution, and forced sale. The protected property may be either real property, including a dwelling house, where the claimant resides or other land designated by the claimant. The Arizona provision may be used to exempt property up to $15,000 in value.[237]

The Arizona state courts have been liberal in determining the quantum of title or right required to support a claim of homestead. In an early case, *In re Irving*,[238] the court specifically embraced the concept that the smaller the estate and interest of the debtor, the more important it is to preserve that interest for the debtor and his or her family through the protection of the statute.[239] *Irving* involved a lease that granted the lessee the privilege of removing all improvements built on the leased premises including a building in which he conducted a mercantile business and resided with his family. The court found that the lessee was entitled to claim as a homestead both the leasehold interest in the land and the building.[240] Recognizing the state's interest in protecting families against pauperism and securing to them the means of reasonable comfort,[241] the court concluded that the Arizona legislature did not intend to deprive a person of the benefits of the homestead laws merely because he or she did not own the fee in the land upon which he or she resided.[242]

The Arizona courts have actually gone beyond recognition of a lessee's right to come within the homestead law's protections. In another case where the debtor was in possession of the land but was not the record title owner, the Supreme Court of Arizona found mere possession a sufficient predicate for her declaration of homestead.[243] In 1974, a United States district court seated in Arizona reaffirmed the concept that a possessory right is of sufficient value to the debtor to be protected under the homestead law.[244] Consequently, the Arizona courts would probably accept an argument that the cooperator's possessory interest falls within the intervivos homestead provisions.

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237. ARIZ. REV. STAT. § 33-1101(A) (1974).

238. 220 F. 969 (D. Ariz. 1915). *Irving* was litigated under a prior Arizona statute which provided for a homestead exemption in terms similar to the present statutory scheme for intervivos homesteads. CIV. CODE ARIZ. § 3288 (1913).

239. 220 F. at 972.

240. *Id.*

241. *Id.* at 973.

242. *Id.* at 972.

243. Ferguson v. Roberts, 64 Ariz. 357, 361, 170 P.2d 855, 858 (1946).

244. First Nat'l Bank v. Boyd, 378 F. Supp. 961, 963-64 (D.C. Cir. 1974).

Arizona provides for an allowance to survivors of a decedent rather than a probate homestead. The surviving spouse or dependent children of the decedent are entitled to an allowance of $6,000. This allowance is specifically in lieu of any homestead exemption the decedent may have had during his or her lifetime.[245] It is exempt from, and has priority over, all claims against the decedent's estate except the expenses of administration. The allowance is in addition to any share passing to the surviving spouse or child by intestate succession, but is chargeable against any share passing by the will of the decedent unless the will provides otherwise.[246] Because the survivor would receive cash in lieu of a homestead, analysis of the availability of a probate homestead in a cooperative apartment is unnecessary.[247]

D. Illinois, Michigan, Ohio, and Texas

1. Illinois

Under Illinois law, homestead property constitutes an estate in land and is not a mere exemption.[248] Whether this characterization of the homestead interest is proper, the classification has "induced the [Illinois] courts to look more favorably upon the householder's interest and has made its destruction more difficult."[249] Illinois statutes provide for intervivos and probate protection from forced sale and execution.[250]

In Illinois all householders having a family are entitled to a homestead estate, to the extent of $10,000, in either a farm or a lot with buildings occupied as a residence by the householder.[251] It may be owned outright by the householder or "rightly possessed by lease or otherwise." This homestead property is "exempt from attachment, judgment, levy or execution sale for the payment of his debts or other purposes and from the laws of conveyance, descent and devise."[252] Certain debts are expressly excepted, however, and do not receive this

245. ARIZ. REV. STAT. § 14-2401 (Supp. 1978).

246. *Id.* This statutory provision is similar to the provisions of UNIFORM PROBATE CODE § 2-401, but the UPC provides that the homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by will of the decedent unless otherwise provided, by intestate succession, or by way of the elective share.

247. A subsidiary question remains from Arizona's prior homestead law. The old law presumed the existence of a residential homestead in the decedent's estate. That is, if there was no realty, there would not be a homestead to set apart. O'Connell and Effland, *Intestate Succession and Wills: A Comparative Analysis of the Law of Arizona and the Uniform Probate Code*, 14 ARIZ. L. REV. 205, 237 (1972). Under the present statutory scheme, at least one commentator has stated that the homestead allowance is applicable to estates that do not include real estate as well as those that do. Kruse, *Highlights of Proposed Arizona Probate Code Revision*, 8 ARIZ. B.J. 5, 7 (1972).

248. ILL. REV. STAT. ch. 52, § 1 (1977). *See also* Weigand v. Weigand, 410 Ill. 533, 103 N.E.2d 137 (1952); Rice v. United Mercantile Agencies, 395 Ill. 512, 70 N.E.2d 618 (1947); Garwood v. Garwood, 244 Ill. 580, 91 N.E. 672 (1910).

249. Note, *The Illinois Homestead Exemption,* 1950 U. ILL. L.F. 99, 101.

250. ILL. REV. STAT. ch. 52, §§ 1, 2 (1977).

251. *Id.* § 1.

252. *Id.*

protection. The legislature has provided that the homestead may be sold to satisfy unpaid taxes, assessments for debts incurred either in purchasing or improving the property, and for condominium common expenses.[253]

If a claim is made against the homestead property, an attempt must first be made to set the homestead off from the rest of the premises and to sell the remaining part to satisfy the claim.[254] If the premises are not divisible and their value exceeds the claim, the homestead may be sold with $10,000 of the sales price reserved for the homestead claimant.[255] Illinois further protects homestead residents by limiting the ability of an individual to release or waive the homestead exemption or to convey the homestead property.[256] If conveyance occurs, however, the homestead protection continues, for one year after receipt of the proceeds, in $10,000 of the homestead sales price.[257] The Illinois statutes also protect up to $10,000 of insurance money paid for the loss of a building which was exempted as a homestead.[258]

The homestead protection continues after the death of the householder for the benefit of the surviving spouse or children as long as they continue to occupy the homestead.[259] This intervivos protection also continues in the event that one of the spouses deserts the family.[260] The Illinois probate statutes specify how the homestead property is to be set apart from the estate and protected by the estate's administrator, executor, or representative.[261] If, however, a decedent devises homestead property to his surviving spouse, and the surviving spouse accepts the devise, this acceptance operates as an election by the surviving spouse to take under the will in lieu of the homestead estate.[262]

The Illinois constitution provides that the Illinois General Assembly may provide tax exemptions for homestead property,[263] but thus far the Assembly has acted only to a limited extent. Real property that is

253. *Id.* § 3.

Illinois provides special protection to homestead owners who have defaulted in their mortgage payments. In such an instance

> the court may permit the owner to remain in such occupancy [of the homestead] notwithstanding the entry of an order placing a mortgagee in possession; provided, however, that such owner shall pay to such mortgagee while such mortgagee is in possession after foreclosure sale and deficiency the fair rental value of such portion of the premise so occupied.

Id. ch. 95, § 22b.60.

254. *Id.* ch. 52, §§ 4, 8-12; *id.* ch. 106, §§ 51, 55, 63.

255. *Id.* ch. 52, §§ 8, 11, 12.

256. *Id.* § 4.

257. *Id.* § 6.

258. *Id.* § 7.

259. *Id.* § 2.

260. *Id.*

261. *Id.* ch. 110 1/2, §§ 20-1 to 20-23.

262. *See* Remillard v. Remillard, 6 Ill. 2d 567, 129 N.E.2d 744 (1955); Stubblefield v. Howard, 348 Ill. 20, 180 N.E. 410 (1932); Koelling v. Foster, 254 Ill. 494, 98 N.E. 952 (1912); Note, *supra* note 249, at 119-20.

263. ILL. CONST. art. 9, § 6.

owned and used exclusively as a home by a disabled veteran, his or her spouse, or his or her unmarried surviving spouse is exempt from taxation up to an assessed value of $15,000.[264] Illinois statutes also provide for a $1,500 reduction in assessed value of the homestead of certain persons over 65.[265] This provision is expressly applicable to cooperative apartments occupied by eligible persons.[266] Finally, persons who improve property owned and used exclusively for a residential purpose can take an annual $25,000 exclusion in actual value for up to 4 years from when the improvement is completed and occupied.[267]

2. *Michigan*

Homestead protection against forced sale or execution is a constitutional right in Michigan.[268] Michigan law provides numerous benefits to homestead property in the form of intervivos and probate exemptions from forced sale or execution, special tax credits, and deferments of special assessments. The Michigan statute that sets forth the extent of homestead protection[269] does not require a claimant to own a fee simple in order to claim homestead protection,[270] and the courts have extended this protection to a homestead held under a life estate[271] and by a leasehold.[272] The Michigan legislature has expressly extended this protection to condominium apartments.[273] Furthermore, home-

264. ILL. REV. STAT. ch. 120, § 500.23 (1977).

265. *Id.* § 500.23-1.

266. *Id.* The statute also benefits persons over 65 who are liable for real estate taxes and who are "owner[s] of record of a legal or equitable interest in [a] cooperative apartment building, other than a leasehold interest." *Id.*

267. ILL. REV. STAT. ch. 120, §§ 500.23-2 & -3 (1977), *as amended by* Act of Aug. 1, 1978, Pub. Act 80-1288, 1978 Ill. Legis. Serv. 597 (West).

268. MICH. CONST. art. 10, § 3 provides:

> A homestead in the amount of not less than $3500 and personal property of every resident of this state in the amount of not less than $750, as defined by law, shall be exempt from forced sale on execution or other process of any court. Such exemptions shall not extend to any lien thereon excluded from exemption by law.

269. MICH. COMP. LAWS ANN. § 600.6023(8) (1963). The statute provides in part:

> (8) A homestead of not exceeding 40 acres of land and the dwelling house and appurtenances thereon, and not included in any recorded town plat, city or village, or, instead, and at the option of the owner, a quantity of land not exceeding in amount 1 lot, being within a recorded town plat, city or village, and the dwelling house and appurtenances thereon, owned and occupied by any resident of this state, not exceeding in value $3,500.00. This exemption extends to any person owning and occupying any house on land not his own and which such person claims as a homestead. But this exemption does not apply to any mortgage on the homestead, lawfully obtained, except that such mortgage is not valid without the signature of a married judgment debtor's wife unless:
>
> (a) The mortgage is given to secure the payment of the purchase money or a portion thereof; or
>
> (b) The mortgage is recorded in the office of the register of deeds of the county wherein the property is located, for a period of 25 years, and no notice of a claim of invalidity is filed in such office during the 25 years following the recording of the mortgage.

270. *See* Barnes v. Detroit, 379 Mich. 169, 177, 150 N.W.2d 740, 743 (1967).

271. Schumann v. Davis, 215 Mich. 19, 183 N.W. 740 (1921); Myers v. Myers, 186 Mich. 215, 152 N.W. 934 (1915).

272. Maatta v. Kippola, 102 Mich. 116, 60 N.W. 300 (1894).

273. MICH. COMP. LAWS ANN. § 559.19 (1967).

steads held as tenancies in common,[274] in joint tenancy,[275] or as tenancies by the entirety[276] are also entitled to protection.

Michigan law provides a probate homestead protection for the survivors of a homestead owner. If the decedent leaves a family, homestead property is protected from forced sale or execution during the minority of his or her children.[277] If the decedent leaves no children, his widow may claim the homestead exemption during her widowhood unless she owns a homestead in her own right.[278] A widow may elect to take these homestead rights in lieu of testate or intestate statutory shares.[279]

Michigan also provides tax advantages for certain owners of homestead property.[280] A Michigan taxpayer is allowed a credit against state income tax for property taxes on a homestead that would be deductible for federal income tax purposes.[281] For purposes of this tax credit, "homestead" is defined broadly to include a dwelling, a unit in a multiple unit dwelling, certain farm property, mobile homes, and trailer coaches in a trailer coach park.[282] The property may be owned outright, rented, or leased.[283]

Michigan law also defers special assessments on a homestead under certain conditions.[284] To qualify, one must be over 65, a U.S. citizen and Michigan resident, and sole owner of the homestead for 5 years or more. The claimant must not have received an annual household income in excess of $6,000 and the assessment made against the homestead must be greater than $300 exclusive of any interest payable.[285] Qualification for the deferment delays the due date of the spe-

274. *See* Barnes v. Detroit, 379 Mich. 169, 150 N.W.2d 740 (1967); Fitzsimons v. Kane, 245 Mich. 246, 222 N.W. 111 (1928); Lawrence v. Morse, 122 Mich. 269, 80 N.W. 1087 (1899); King v. Welborn, 83 Mich. 195, 47 N.W. 106 (1890); Sherrid v. Southwick, 43 Mich. 515, 5 N.W. 1027 (1880).

275. *See* Tharp v. Allen, 46 Mich. 389, 9 N.W. 443 (1881).

276. *See* Dunn v. Minnema, 323 Mich. 687, 36 N.W.2d 182 (1949); McCaslin v. Schouten, 294 Mich. 180, 292 N.W. 696 (1940); Jendon v. Diltz, 240 Mich. 512, 215 N.W. 313 (1927); Sanford v. Bertrau, 204 Mich. 244, 169 N.W. 880 (1918); Zeigen v. Roiser, 200 Mich. 328, 166 N.W. 886 (1918); Cole v. Cole, 126 Mich. 569, 85 N.W. 1098 (1901).

277. MICH. COMP. LAWS ANN. § 600.6023(10) (1968).

278. *Id.* § 600.6023(10)(c).

279. *See* MICH. COMP. LAWS ANN. §§ 702.69-.70 (1968).

280. *See* MICH. COMP. LAWS ANN. §§ 206.501-.532 (Supp. 1978).

281. MICH. COMP. LAWS ANN. § 206.520(1) (Supp. 1978).

282. *Id.* § 206.508(2).

283. *Id.* §§ 206.508(2), .520.

284. *Id.* §§ 211.761-.770. The statute provides:

> "Special assessment" means an assessment against real property calculated on a benefit or ad valorem basis for curb and gutter, sidewalk, sewer, water, or street paving; a drain; or a connection fee or similar charge for a sewer or water system. Special assessment does not include charges for current service.

Furthermore, for purposes of the deferment, "homestead" is defined as "a dwelling or a unit in a multiple-unit dwelling, owned and occupied as a home by the owner thereof, including all contiguous unoccupied real property owned by the person. Homestead includes a dwelling and an outbuilding used in connection with a dwelling, situated on the lands of another." *Id.* § 211.761.

285. *Id.* § 211.763.

cial assessment until one year after the homestead owner's death or until the homestead is conveyed or sold in whole or in part to another.[286] In the interim, the state retains a lien against the homestead property.[287]

3. Ohio

Ohio's statutory scheme provides for intervivos and probate homestead exemptions as well as allowances or exemptions in lieu of homestead. The Ohio courts have consistently articulated a judicial policy of liberal construction with regard to exemption statutes to effectuate the benevolent purposes of the statutes[288]—to secure to the debtor and his dependents a home free from the claims of creditors.[289]

The Ohio intervivos homestead exemption is available to a husband and wife living together or to a widow or a widower living with an unmarried daughter or unmarried minor son.[290] Qualified claimants may hold exempt a family homestead not exceeding $1,000 in value.[291] This provision has been interpreted to entitle any judgment debtor with a family to claim a homestead exemption.[292]

The probate homestead apparently is available to either surviving spouse. According to one Ohio statute, when the executor or administrator petitions to sell the lands of a decedent survived by a widow or an unmarried minor child for the satisfaction of debts, there should be set apart for the widow a homestead not exceeding $1,000 in value.[293] Another more recent statute provides that the court shall order the set-off and assignment of homesteads for the benefit of a decedent's surviving spouse or minor children who are entitled to a homestead.[294] This latter statute controls when inconsistent with the earlier statute, and has been held applicable to a widower.[295]

The Ohio homestead exemption for realty is supplemented by a

286. *Id.* § 211.762. This statute also provides that "[t]he death of a spouse shall not terminate the deferment of special assessments for a homestead owned by a husband and wife under tenancy by the entireties as long as the surviving spouse does not remarry. Special assessments deferred hereunder may be paid in full at any time."

287. *Id.* §§ 211.766-.770.

288. *See generally* 27 OHIO JUR. 2D *Homesteads* § 5 (1957).

289. *Id.* § 3.

290. OHIO REV. CODE ANN. § 2329.73 (Page 1954).

The Ohio Supreme Court has construed this statute to mean that a widow may hold exempt from execution a homestead out of her own property although she is not living with an unmarried daughter or an unmarried minor son. Allen v. Russell, 39 Ohio St. 336, 338 (1883).

291. OHIO REV. CODE ANN. § 2329.73 (Page 1954).

292. *In re* Zerkle's Estate, 68 Ohio App. 480, 42 N.E.2d 204 (1941).

Ohio law specifically authorizes homestead protection for lessees. OHIO REV. CODE ANN. § 2329.74 (Page 1954). This protection does not act as an impediment to the rights of the landlord with regard to the underlying fee. The statute specifically provides that it does not prevent a sale of the fee simple subject to the lease. *Id.*

293. OHIO REV. CODE ANN. § 2329.75 (Page 1954). The statute refers specifically to a widow.

294. *Id.* § 2127.26 (Page 1976).

295. Barnhiser v. Barnhiser, 25 Ohio Op. 388, 390 (Prob. Ct. 1943).

scheme of allowances and exemptions in lieu of homestead. An intervivos homestead may be charged with certain liens.[296] If homestead property is sold to satisfy those liens, the balance of any proceeds, not to exceed $500, is awarded to the head of the family or the wife in lieu of homestead.[297] In the case of a probate homestead,[298] the residue of the proceeds, not exceeding $500, is payable to the widow or to an unmarried minor child in lieu of homestead.[299] Finally, the Ohio scheme gives certain relatives of a decedent a further exemption that can be applied to real or personal property to the extent of $500 in value, in addition to the amount of chattel property otherwise exempted by law.[300]

4. Texas

In Texas, homestead exemptions, established constitutionally and by statute,[301] are available for both urban and rural homesteads for business or private use.[302] Homesteads enjoy intervivos protection against forced sale for the payment of debts, except where such debts are incurred for the purchase of the homestead or for part of the purchase money, the taxes due on the property, or for work and material used in constructing improvements on the property.[303] When the tract of land upon which a rural family homestead is located is larger than the number of acres protected by homestead, either the head of the family or a board of special commissioners may designate the portion of the property to be protected.[304] This intervivos homestead protection is supplemented by the exemption of certain kinds of personal

296. The homestead exemption does not extend to a judgment rendered on a mortgage executed by a debtor and spouse, nor to a claim for manual work or labor for less than $100, nor to impair the lien, by mortgage or otherwise, of the vendor for the purchase money of the premises in question, nor a mechanic's lien or the lien of other persons, under a statute in Ohio, for materials furnished or labor performed in the erection of the dwelling house thereon, nor for the payment of taxes due thereon. OHIO REV. CODE ANN. § 2329.72 (Page 1954).

297. *Id.* § 2329.80.

298. See note 296 *supra*, regarding the extent of this homestead.

299. OHIO REV. CODE ANN. § 2329.76 (Page 1954).

300. *Id.* § 2329.81.

301. *See* TEX. CONST. art. 16, § 51; TEX. CIV. CODE ANN. tit. 57, § 3833 (Vernon Supp. 1978).

302. TEX. CIV. CODE ANN. tit. 57, § 3833 (Vernon Supp. 1978). The statute provides:

(a) If it [the property] is used for the purposes of a home, or as a place to exercise the calling or business to provide for a family or a single, adult person, not a constituent of a family, the homestead of a family or a single, adult person, not a constituent of a family, shall consist of:

(1) for a family, not more than two hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(2) for a single, adult person, not a constituent of a family, not more than one hundred acres, which may be in one or more parcels, with the improvements thereon, if not in a city, town, or village; or

(3) for a family or a single, adult person, not a constitutent of a family, a lot or lots, not to exceed in value ten thousand dollars at the time of their designation as a homestead, without reference to the value of any improvements thereon, if in a city, town, or village.

303. TEX. CONST. art. 16, § 50; TEX. CIV. CODE ANN. tit. 57, § 3839 (Vernon 1966).

304. TEX. CIV. CODE ANN. tit. 57, §§ 3841-3859 (Vernon 1966).

property from attachment, execution, and seizure for the satisfaction of debts except for encumbrances "properly fixed" upon the personalty.[305]

Upon the death of an individual, his or her homestead property will descend and vest like any other interest in realty,[306] unless the surviving spouse elects to use the homestead or the guardian of the deceased's minor children receives permission by court order to use and occupy this property.[307] The homestead property may also be set apart from the rest of the estate and delivered for the use of any of the decedent's unmarried daughters.[308] If the probate homestead is set apart by election or court order, however, it is similar to the intervivos probate protection.[309] If the homestead property is subject to a valid lien or encumbrance, the debt will continue against the property until satisfied.[310] Texas law also provides that if the stated exemptions cannot be used because the decedent did not own any of the specific property exempted, the court may grant the widow and children a reasonable allowance not to exceed $10,000 in lieu of the homestead, and $1,000 in lieu of other kinds of exempt property.[311]

Texas also provides certain tax benefits for homestead property. The state constitution provides that $3,000 of the assessed valuation of a residence homestead is exempt from taxation for all state purposes.[312] In addition, when a Texas county levies *ad valorem* taxes for the construction and maintenance of "farm to market roads" or for "flood control," the first $3,000 value of a residential homestead is exempt from assessment, provided that the exempt amount does not exceed the statutory ceiling.[313] Tax claims can be satisifed by sale of a homestead only if the taxes involved were levied directly on the homestead property.[314] Any Texas county, city, town, school district, or other state political subdivision may exempt from their *ad valorem* taxation an amount not less than $3,000 for residence homesteads held by individuals 65 or older.[315] A person 65 or older may also defer payment of *ad valorem* property taxes on his or her homestead until he or she no longer owns or occupies the property as a homestead.[316]

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305. TEX. CONST. art. 16, § 49; TEX. CIV. CODE ANN. tit. 56, § 3836 (Vernon Supp. 1978).
306. TEX. CONST. art. 16, § 52; TEX. PROB. CODE ANN. §§ 271-272, 278-279, 283 (Vernon 1956).
307. TEX. CONST. art. 16, § 52; TEX. PROB. CODE ANN. §§ 271-272, 284-285 (Vernon 1956).
308. TEX. PROB. CODE ANN. §§ 271-272 (Vernon 1956).
309. *Id.* § 270. *See also* TEX. PROB. CODE ANN. § 281 (Vernon 1956) which makes the homestead property exempt from funeral expenses of the deceased and medical expenses for the deceased's last illness.
310. *Id.* § 277.
311. *Id.* § 273 (Vernon Supp. 1978), §§ 274-276 (Vernon 1956).
312. TEX. CONST. art. 8, § 1-b(a).
313. *Id.* §§ 1-2; TEX. TAX CODE ANN. tit. 122, § 7048a(2) (Vernon 1960).
314. TEX. TAX CODE ANN. § 7279 (Vernon 1960).
315. TEX. CONST. art. 8, § 1-b(b).
316. TEX. TAX CODE ANN. tit. 122, § 7329a (Vernon Supp. 1978).
See also TEX. CIV. CODE ANN. tit. 20A, § 695c(20)(5) (Vernon Supp. 1978), which says that

5. Conclusion

Illinois, Michigan, Ohio, and Texas have not yet decided, legislatively or judicially, whether homestead protections extend to stock-owned cooperative apartments. Such an extension is feasible under the present law of each of these states. The legislatures of Illinois, Michigan, and Ohio have extended homestead protection to leasehold property occupied and used as the claimant's home.[317] In Texas, the courts have applied homestead provisions to leasehold property.[318] Therefore, the leasehold interest of the cooperator claimant should be protected in these four states. This established right of a lessee to qualify for homestead protection, coupled with state policies of liberal construction of the homestead provisions,[319] should promote recognition of homestead protection for the cooperator's stock interest as well.

Because the cooperator's interest in the cooperative apartment consists of a long term lease and stock, protecting the leasehold interest without also immunizing the stock from creditors' claims would be meaningless. Only by virtue of a stock interest in the corporation is the cooperator entitled to occupancy under the lease. To find that the cooperator's interests were divisible would be both "confusing and unfortunate":

> It would be confusing because of the substantial question as to what a purchaser at execution sale would get. He would have a share of stock, the primary value of which lies in the holder's being entitled to a non-profit lease on a designated apartment. But, because the judgment debtor's lease is exempt, this attribute of his purchase is missing. It is unlikely that this stock would bring full value at execution sale. Also, standard cooperative leases provide that ownership of apartment leases cannot be separated from ownership of the related share of stock. If this provision be enforced, the homestead claimant will be evicted by the project, and his en-

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the state may not deny old-age assistance to a person who is 65 or older because he owns a residence homestead.

317. ILL. REV. STAT. ch. 52, § 1 (1977); MICH. COMP. LAWS ANN. § 600.6023(8) (1963); OHIO REV. CODE ANN. tit. 23, § 2329.74 (Page 1954). *See also* Rice v. United Mercantile Agencies, 395 Ill. 512, 70 N.E.2d 618 (1946); Stombaugh v. Morey, 388 Ill. 401, 58 N.E.2d 545 (1944).

318. *See* Beckner v. Barrett, 81 S.W.2d 719 (Tex. Civ. App. 1935); Sterling Nat'l Bank & Trust Co. v. Ellis, 75 S.W.2d 716 (Tex. Civ. App. 1934); Evans v. Galbraith-Foxworth Lumber Co., 51 S.W.2d 831 (Tex. Civ. App. 1932); Cry v. J.W. Bass Hardware, 273 S.W. 347 (Tex. Civ. App. 1925); Stephens v. Cox, 255 S.W. 241 (Tex. Civ. App. 1923); Ellis v. Bingham, 150 S.W. 602 (Tex. Civ. App. 1912).

319. *See In re* Neale, 274 F. Supp. 969, 973 (N.D. Tex. 1967); Scogin v. Scogin, 337 Ill. 427, 169 N.E. 201 (1929); Zachman v. Zachman, 201 Ill. 380, 391, 66 N.E. 256, 260 (1903); Bartold v. Lewandowska, 304 Mich. 450, 8 N.W.2d 133 (1943); Miller v. Detroit Sav. Bank, 289 Mich. 494, 286 N.W. 803 (1939); Kleinert v. Lefkowitz, 271 Mich. 79, 259 N.W. 871 (1935); Riggs v. Sterling, 60 Mich. 643, 27 N.W. 705 (1886); Andrews v. Security Nat'l Bank, 121 Tex. 409, 50 S.W.2d 253 (1932); Orr v. Orr, 226 S.W.2d 172 (Tex. Civ. App. 1949); Uptmor v. Janes, 210 S.W.2d 235 (Tex. Civ. App. 1948); Reconstruction Fin. Corp. v. Burgess, 155 S.W.2d 977 (Tex. Civ. App. 1941); Panhandle Const. Co. v. Head, 134 S.W.2d 779 (Tex. Civ. App. 1939); 27 OHIO JUR. 2D *Homesteads* §§ 3, 5 (1957).

> tire constitutional protection disappears. A holding that cooperative stock is not entitled to homestead protection would be unfortunate because cooperative ownership would not be on par with single dwelling ownership, in which both possessory rights and homeowner's equity are protected from creditor's levy.[320]

Recognition of homestead protection for cooperators' leasehold and stock interests in these four states would constitute a continuation of and adherence to the policies underlying such legislative protections and would not be a major deviation from any public policy.

E. Florida

Florida's homestead law offers both intervivos and probate protection against the forced sale of homestead property,[321] as well as a $5,000 tax exemption for qualified homestead property.[322] These provisions are intended to preserve "a home where the family may be sheltered and live beyond the reach of economic misfortune."[323] To further this policy, the Florida courts have followed the practice of construing these laws liberally.[324]

Article 10 of the Florida constitution provides the basis for the intervivos homestead protection. That provision states that a "head of a family" may hold up to 160 acres of contiguous, nonmunicipal land, or one-half acre of municipal land on which his or her residence is located, as well as $1,000 worth of personalty, free from forced sale or a lien resulting from a court judgment, decree, or resolution.[325] A lien may be applied against homestead property, however, if it arose due to nonpayment of taxes or debts incurred for the purchase, improvement, or repair of the property.[326] To assure homestead protection, the head of a family must claim and designate the homestead before a levy is made against the property or prior to the day of sale of the property.[327] This exemption may be applied to leasehold property under certain conditions,[328] as well as to mobile and modular homes.[329]

The probate homestead exemption is for the most part a continua-

320. Mixon, *supra* note 40, at 267-68.

321. FLA. CONST. art. 10, § 4; FLA. STAT. ANN. §§ 222.01-.19 (West 1977 & Supp. 1978), §§ 732.401-.403 (West 1976).

322. FLA. CONST. art. 7, § 6; FLA. STAT. ANN. §§ 196.031, .041 (West 1971 & Supp. 1977).

323. 16 FLA. JUR. *Homesteads* § 4 (1957).

324. *Id.* § 5. *See also* FLA. STAT. ANN. § 222.19(1) (West 1977).

325. FLA. CONST. art. 10, § 4(a)(1)-(2).

326. *Id.*

327. FLA. STAT. ANN. §§ 222.01-.02 (West Supp. 1978).

328. *Id.* § 222.05 provides that

> [a]ny person owning and occupying any dwelling house, including a mobile home used as a residence, or modular home, on land not his own which he may lawfully possess, by lease or otherwise, and claiming such house, mobile home, or modular home as his homestead, shall be entitled to the exemption of such house, mobile home, or modular home from levy and sale as aforesaid.

329. *Id.* §§ 222.01, .02, .05.

tion of the intervivos exemption for the benefit of the deceased's surviving spouse or heirs.[330] The homestead may not be devised if the decedent is survived by a spouse or minor child, with the exception that it may be devised to the surviving spouse if there are no minor children.[331] If the homestead is not devised under Florida law, it descends according to the state's intestacy laws, with the express statutory reservation that a surviving spouse shall take a life estate in the property, with a vested remainder to those lineal descendants alive at the time of the decedent's death.[332]

Florida law also provides a $5,000 tax exemption for homestead property.[333] The claimant must fulfill three requirements to qualify for this exemption. First, he or she must have either legal or beneficial title in equity in real property[334] held jointly, in common, or by the entirety. The property may even be a condominium or stock-owned cooperative apartment.[335] Third, he or she must make this property his or her permanent home or the home of persons who are legally or naturally dependent upon him or her.[336] This tax exemption does not apply to assessments for special benefits, and may not exceed the value of the real estate or, in the case of a stock cooperative, the value of the stockholder's interest in the corporation.[337] One exemption per individual or family dwelling house may be taken; in the case of a cooperative apartment corporation or condominium development, one exemption per apartment is permitted.[338]

Florida's application of homestead exemptions to stock-owned cooperatives is somewhat confused. While a cooperator may claim the

330. *See* FLA. CONST. art. 10, § 4(b).

331. *Id.* § 4(c); FLA. STAT. ANN. § 732.4015 (West 1976).

332. FLA. STAT. ANN. § 732.401 (West 1976).

A family allowance provision supplements the probate homestead exemption. The allowance provides that a deceased's surviving spouse and lineal heirs whom the decedent was obligated to support or who were in fact supported by the decedent are entitled to a reasonable allowance in money not in excess of $6,000 for maintenance during administration. The surviving spouse or minor children are also entitled to automobiles, household furniture, furnishings, and appliances in decedent's place of abode up to a net value of $5,000 as well as personal effects of the decedent up to a net value of $1,000 unless the personal effects are otherwise specifically disposed of by will. FLA. STAT. ANN. §§ 732.402-.403 (West 1976).

333. FLA. CONST. art. 7, § 6; FLA. STAT. ANN. §§ 196.031, .041 (West 1971 & Supp. 1978).

334. FLA. STAT. ANN. § 196.031(1) (West 1971).

335. *Id.* This statute defines a "cooperative apartment corporation" as

> a corporation, whether for profit or not for profit, organized for the purpose of owning, maintaining and operating an apartment building or apartment buildings to be occupied by its stockholders or members; and "tenant-stockholder or member" means an individual who is entitled, solely by reason of his ownership of stock or membership in a cooperative apartment corporation, to occupy for dwelling purposes an apartment in a building owned by such corporation. A corporation leasing land for a term of ninety-eight years or more for the purpose of maintaining and operating a cooperative apartment thereon shall be deemed the owner for purposes of this exemption.

Id. § 196.031(2).

336. *Id.* § 196.031(1).

337. *Id.*

338. *Id.*

homestead tax exemption, his or her family is not protected by the probate homestead exemption. This result may be due to the difference in language in the constitutional and statutory sections that provide for these two exemptions.[339] For example, in the homestead tax exemption provisions, the express use of the term "cooperative apartment corporation" has brought the stock cooperative within the meaning of "real property" and "dwelling house" for purposes of the tax exemption.[340] In contrast, neither the Florida constitution nor state statutes have extended the intervivos or probate homestead exemptions to stock cooperatives, and the case law evidences a judicial refusal to imply such an extension. In 1971, the Florida Attorney General ruled that an owner of a stock cooperative had but a personalty interest in his or her stock and was without the requisite "interest in land" to qualify for an intervivos or probate homestead exemption under Florida law.[341] The Florida courts adopted this view in *Estate of Wartels*,[342] and ultimately held that the cooperative apartment dweller does not quality for homestead protection.[343] Both *Wartels* and the Attorney General's Opinion stated that this result did not conflict with the homestead tax exemption because the tax benefit had been expressly extended to cooperatives and did not affect other homestead provisions.[344]

Wartels and the 1971 Attorney General's Opinion are contrary to the Florida policy of construing homestead provisions liberally for the protection of its residents.[345] Moreover, in the attempt to limit these exemptions to comport with historically characterized property interests, the Florida courts have in effect elevated the fulfillment of technical requirements above the protective purpose of the homestead exemption. The Florida opinions inaccurately characterize a cooperator's interest as a personalty interest in stock, while ignoring the cooperator's long-term leasehold interest in the cooperative apartment.[346] The cooperator's stock interest entitles him or her to occupancy under the lease. Thus the homestead protection that Florida accords to leaseholds[347] should apply analogously to cooperative apartments.

Homestead protection could be extended to cooperative apartments. While cooperatives enjoy no express statutory or constitutional inclusion, neither are they expressly precluded. The only constitutional

339. *Compare* FLA. CONST. art. 10, § 4 [*and*] FLA. STAT. ANN. § 222.01-.19 (West 1977 & Supp. 1978), §§ 732.401-.403 (West 1976) *with* FLA. CONST. art. 7, § 6 [*and*] FLA. STAT. ANN. §§ 196.031, .041 (West 1971 & Supp. 1978).

340. Ammerman v. Markham, 222 So. 2d 423, 426 (Fla. 1969). *See also* [1961-1962] FLA. ATT'Y GEN. BIENNIAL REP. 89 (Op. No. 061-55).

341. [1971] FLA. ATT'Y GEN. ANN. REP. 27 (Op. No. 071-19).

342. 338 So. 2d 48 (Fla. Dist. Ct. App. 1976), *aff'd*, 357 So. 2d 708 (Fla. 1978).

343. 357 So. 2d at 711.

344. 357 So. 2d at 710; [1971] FLA. ATT'Y GEN. ANN. REP. 27 (Op. No. 071-19).

345. *See* text accompanying note 324 *supra*.

346. *See* text accompanying notes 89-91 *supra*.

347. FLA. STAT. ANN. § 222.05 (West Supp. 1978).

requirement for an intervivos and probate homestead exemption is that it apply to an appropriate number of acres of "contiguous land and improvements thereon."[348] In *Wartels*, the Florida Supreme Court cited three prior cases to support the proposition that this "contiguous land" language requires homestead property to consist of "interest in realty."[349] Those decisions, however, did not restrict exemption from forced sale or execution to realty interests. Furthermore, in contrast with the "contiguous land" restriction in the intervivos and probate exemption provision, the Florida constitution restricts the homestead *tax* exemption to situations in which the claimant possesses a legal title or beneficial title in equity to *real property*.[350] An express statutory extension of this exemption to a stock-owned cooperative was necessary because the cooperator's interest in the stock and lease are both technically classified as personalty. Because the Florida constitutional provision for homestead property exemptions does not contain such a "real property" requirement, an express extension by the legislature would not seem to be needed to extend this exemption to cooperative apartments. Indeed, the Florida legislature may have intended to extend this homestead protection to stock-owned cooperatives when it granted such protection to property held by leasehold.[351]

F. New York

The New York homestead laws have recently been amended to provide liberal intervivos and probate homestead protection.[352] The New York provisions currently exempt from forced sale homestead property up to $10,000 in value "above liens and encumbrances."[353] Furthermore, any lot of land upon which a dwelling, a cooperative apartment, or a condominium unit stands may constitute a homestead as long as the claimed homestead is owned and occupied as a principal residence.[354] Should a person cease to occupy the property as a homestead, the exemption ceases unless "the suspension of occupation is for a period not exceeding one year, and occurs in consequence of injury

348. FLA. CONST. art. 10, § 4(a)(1).

349. Estate of Wartels, 357 So. 2d 708, 710 (Fla. 1978). *See* Pasco v. Harley, 73 Fla. 819, 75 So. 30 (1917); Hill v. First Nat'l Bank, 73 Fla. 1092, 75 So. 614 (1917); Milton v. Milton, 63 Fla. 533, 58 So. 718 (1912).

350. FLA. CONST. art. 7, § 6(a).

351. *See* text accompanying notes 328, 346-47 *supra*.

An additional argument to extend intervivos and probate homestead protection to stock-owned cooperatives can be made from the recent action of the Florida legislature giving such homestead protection to mobile homes. *See* FLA. STAT. ANN. §§ 222.01, .02, .05 (West Supp. 1978). A mobile home is personalty, and the previously mentioned statutes do not require that it be attached to the land so as to be converted to an interest in realty. It is arguable that if Florida has given homestead protection to such a personalty interest as a mobile home, then such protection should also be provided for a stock-owned cooperative apartment.

352. N.Y. CIV. PRAC. LAW § 5206 (McKinney 1978).

353. *Id.* § 5206(a).

354. *Id.*

to, or destruction of, the dwelling house upon the premises."[355]

If the value of the homestead exceeds $10,000 a judgment may be had against the surplus.[356] When this is the case, the land may be sold, but $10,000 of the proceeds is paid to the judgment debtor. The exemption continues to apply to those proceeds for one year unless the debtor acquires a new homestead. In that event, the exemption ceases as to the proceeds not used to acquire the new homestead. The new homestead, however, is protected as against "every debt against which the property sold was exempt."[357]

New York's probate homestead exemption is merely a continuation of its intervivos protection. The protection passes to the homestead owner's surviving spouse and children and continues until the youngest surviving child reaches majority and until the surviving spouse dies.[358] When probate homestead property is sold or when the homestead owner had sold the property but died without having collected payment, the court may direct that a portion of the proceeds be invested for the benefit of the survivors, or be "otherwise disposed of as justice requires."[359]

The New York homestead statute explicitly exempts from forced sale the "shares of stock in a cooperative apartment corporation."[360] This obviously protects the cooperator's stock interest in the apartment, and by implication protects the cooperator's leasehold interest because only through possession of the protected stock is he or she entitled to hold the lease. A court could not consistently protect the stock interest of a cooperator and at the same time deny the cooperator a right to which he or she is entitled through ownership of the stock.

G. California

California, too, extends the protection of its homestead provisions to cooperators in a stock-owned cooperative. The California Code defines "homestead" as a "dwelling house in which the claimant resides, together with outbuildings, and the land on which the same are situated,"[361] and expressly states that a "dwelling house may be in a . . . stock cooperative."[362] Furthermore, the California homestead law pro-

355. *Id.* § 5206(c).
356. *Id.* § 5206(d).
357. *Id.* § 5206(e).

See N.Y. PRIV. HOUS. FIN. LAW § 85-b (McKinney 1976) on how to establish the resale price of a subsidized cooperative apartment.

358. N.Y. CIV. PRAC. LAW § 5206(b) (McKinney 1978).
359. *Id.* § 5206(e).
360. *Id.* § 5206(a)(2).
361. CAL. CIV. CODE § 1237 (West Supp. 1978).
362. *Id.* The statute also states that a dwelling house may be a condominium, a planned development, a community apartment project, or may be situated on real property held under a lease of 30 years or more.

For purposes of the homestead exemption, the stock cooperative must fall within the statutory definition found in CAL. BUS. & PROF. CODE § 11003.2 (West Supp. 1978), which states:

vides that a homestead may be selected from

> any freehold, title interest or estate which vests in the claimant the immediate right of possession, even though such possession is not exclusive, and includes land held under a long term lease . . ., and ownership rights in a condominium, planned development, *stock cooperative*, or community apartment project even though the title, interest, or estate of the condominium, planned development, stock cooperative or community apartment project is in a leasehold or subleasehold.[363]

California's intervivos homestead provisions protect against execution or forced sale of any property which fulfills the statutory requirements for a valid homestead.[364] The head of a family or a person 65 or older may select up to $30,000 of property at its actual cash value for the homestead protection, while other persons are limited to $15,000 worth of protection.[365] An unmarried individual may designate homestead property from the property he or she owns. A married couple may select property for the homestead exemption from separate property, from their community or quasi-community property, or from property they hold as joint tenants or tenants in common.[366] As a condition precedent to qualification for such protection the claimant must file a proper declaration of homestead with the county recorder in the county where the land is situated.[367]

The intervivos homestead exemption does not protect homesteads in certain situations. If residence is taken in a condominium, planned development, community apartment project, or stock cooperative subject to an underlying agreement or obligation, that agreement or a lien arising from it may be enforced as if no homestead were declared.[368] The California Civil Code also prescribes situations in which a court judgment may be satisfied by the execution or forced sale of a homestead. These situations occur when a judgment is obtained before the declaration of homestead is recorded and when the judgment is on debts secured by certain statutory liens or by encumbrances on the homestead.[369] A creditor must meet detailed statutory requirements before proceeding against the homestead under these provisions.[370]

A "stock cooperative" is a corporation which is formed or availed of primarily for the purpose of holding title to, either in fee simple or for a term of years, improved real property, if all or substantially all of the shareholders of such corporation receive a right of exclusive occupancy in a portion of the real property, title to which is held by the corporation, which right of occupancy is transferable only concurrently with the transfer of the share or shares of stock in the corporation held by the person having such right of occupancy.

363. CAL. CIV. CODE § 1238 (West Supp. 1978) (emphasis added).
364. CAL. CIV. CODE § 1240 (West 1954).
365. CAL. CIV. CODE § 1260 (West Supp. 1978).
366. *Id.* § 1238.
367. *See* CAL. CIV. CODE §§ 1241(1), (4), 1262-1264, 1266-1304 (West 1954 & Supp. 1978).
368. CAL. CIV. CODE § 1237 (West Supp. 1978).
369. *Id.* § 1241.
370. CAL. CIV. CODE §§ 1245-1259 (West 1954 & Supp. 1978).

California provides a probate homestead exemption by statute. A surviving spouse and minor children may continue to occupy the decedent's homestead property until an inventory has been filed with the probate court.[371] Subsequently, the court will set aside any or all of the decedent's property to be exempt from execution for the protection of his surviving spouse or minor children.[372]

This probate homestead exemption is created by one of two methods. The first is through the continuation of an intervivos homestead exemption as previously declared and recorded by the decedent.[373] The California statutes provide specifically how such homestead property will descend and vest in either the surviving spouse or the heirs and devisees of the decedent.[374] The intervivos protection of a lessee-stockholder's interest in a stock-owned cooperative may also be extended so that an interest in a stock-owned cooperative receives the protection of the probate homestead exemption.

If the probate homestead is valued at $10,000 or less, the allowable amount for the intervivos homestead, the limits of protection are the same.[375] If the value is greater than $10,000, an inheritance tax referee must appraise the property and determine whether the premises can be divided without material injury. If divisible, the referee will set apart to the protected parties a portion of the premises equal in value to the intervivos limit.[376] If the referee should report that the property cannot be divided, however, the court may order a sale of the entire premises[377] and distribute the cash equivalent of the homestead exemption to the surviving spouse or heirs and devisees of the decedent.[378]

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371. CAL. PROB. CODE § 660 (West Supp. 1978).

372. *Id.*

373. *See* CAL. CIV. CODE § 1265 (West Supp. 1978); CAL. PROB. CODE §§ 660, 663 (West Supp. 1978).

374. When a married couple has declared an intervivos homestead exemption, the exemption descends and vests to the survivor

> [i]f the homestead selected by the husband and wife, or either of them, during their coverture, and recorded while both were living, other than a married person's separate homestead, was selected from the community property or quasi-community property, or from the separate property of the person selecting or joining in the selection of the same, and if the surviving spouse has not conveyed the homestead to the other spouse by a recorded conveyance which failed to expressly reserve his homestead rights as provided by Section 1242 of the [California] Civil Code.

CAL. PROB. CODE § 663 (West Supp. 1978); CAL. CIV. CODE § 1265 (West Supp. 1978). In all other cases, the homestead is to descend and vest in the decedent's heirs and devisees subject to the court's power to temporarily set aside the homestead for the decedent's family. *Id.*

375. CAL. PROB. CODE § 664 (West Supp. 1978).

376. *Id.*

377. *Id.* § 665.

378. *See In re* Durham's Estate, 108 Cal. App. 2d 148, 238 P.2d 1057 (1951).

However, some situations exist in which the homestead property will still not be subject to forced sale or execution. CAL. PROB. CODE § 735 (West 1956) provides that

> [i]f there are subsisting liens or encumbrances on the homestead, and the funds of the estate are adequate to pay all claims against the estate, the claims secured by such liens or encumbrances, whether filed or presented or not, if known or made known to the executor or administrator, must be paid out of such funds. If the funds of the estate are not sufficient for that purpose, the claims so secured shall be paid proportionately with other claims allowed,

The probate homestead may also be created by the court, if the decedent failed to declare and record an intervivos homestead, or if the surviving spouse selected the homestead out of the decedent's separate property without the decedent joining in its declaration or recording. In this case, a probate court may select, designate, or set apart property for a homestead exemption for the protection of the decedent's surviving spouse and minor children.[379] The probate statutes do not designate the type of property a court may select in providing the homestead exemption. The California courts have generally looked to the intervivos homestead statutes to determine those types of property which may be set aside for the probate homestead.[380] Thus, a court may apply the probate homestead exemption to stock-owned cooperatives in instances where the decedent failed to declare an intervivos homestead for such property. Nor do the probate statutes specify the amount of property that the court may select for probate homestead protection when the decedent has failed to record a declaration of homestead. Several California decisions indicate that the courts are not limited by the amount set in the intervivos homestead exemptions.[381] For example, in *Estate of Nelson*,[382] a California appellate court upheld a lower court's selection of an apartment house worth $224,000 as the homestead of a surviving spouse. Thus, it would seem that a California decedent may provide more protection for his or her survivors by failing to declare a homestead and allowing for its provision by the probate court than if he or she were to declare and record an intervivos homestead to be continued as a probate homestead.

VI. Miscellaneous Problems

The premise of this article has been that the cooperator's interest, both the stock and long-term lease, in a stock-owned cooperative should be afforded the same protection given single dwelling ownership. Fairness, logic, and public policy demand that parity be achieved by protecting cooperative apartment ownership to the same extent that the state would protect a single family home from creditors. Such a result is achievable but there are problems which would flow from bringing the cooperative apartment within the protection of state homestead legislation.

The nature of the cooperators' undivided joint ownership in the assets of the cooperative corporation results in a certain degree of

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and the liens or encumbrances on the homestead shall only be enforced against the homestead for any deficiency remaining after such payment.

379. Cal. Prob. Code § 661 (West Supp. 1977).

380. Comment, *The Probate Homestead in California*, 53 Calif. L. Rev. 655, 658 (1965).

381. *In re* Adams' Estate, 128 Cal. 380, 57 P. 569 (1899); *In re* Estate of Smith, 99 Cal. 449, 34 P. 77 (1893); *In re* Walkerly's Estate, 81 Cal. 579, 22 P. 888 (1889); Estate of Nelson, 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964); *In re* Muntz's Estate, 69 Cal. App. 404, 231 P. 371 (1924).

382. 224 Cal. App. 2d 138, 36 Cal. Rptr. 352 (1964).

financial interdependence among all the cooperators.[383] The corporation itself has the financial obligations of paying property taxes, making mortgage payments, and financing the ordinary expenses of the project such as upkeep of common areas and amenities.[384] To meet these financial obligations, the corporation, through its board of directors, annually fixes a sum of money denominated as "rent" or a project assessment which the individual cooperators must pay.[385] If a cooperator fails to pay the assessment, the other cooperators must do so to protect their own interests. If a sufficient number of cooperators default, however, the project may fail. The corporation would then have insufficient funds to meet its financial obligations, inducing mortgage foreclosure or attachment by project creditors,[386] discontinuance of utility service, and abandonment of upkeep in common areas.[387]

Unpaid project assessments present a very real danger to the financial integrity of the corporation. One way the corporation attempts to protect itself from this danger is by retaining power to evict individual nonpaying cooperators.[388] This power to evict should not be disturbed in extending homestead protection to cooperators. The individual cooperator's homestead exemption must be subordinate to this power of the corporation.[389] The respective rights of the cooperator and corporation would then be determined by analogy to those cases in which the homestead exemption in a traditional leasehold interest is claimed: the tenant may not assert a homestead interest against his or her landlord in the premises he or she occupies by virtue of the lease.[390]

Another problem flows from the cooperator's status as a stockholder in the cooperative corporation. In the usual homestead exemption situation, the claimant asserts a right to maintain his or her home as exempt from certain classes of personal creditors. Due to the corporate structure of the cooperative project, however, potential creditors of the corporation itself as well as personal creditors of the individual cooperators may seek to enforce claims against the cooperative property. The corporate form insulates cooperators from individual liability for corporate debts, and creditors of the corporation may not by direct le-

383. P. KEHOE, COOPERATIVES AND CONDOMINIUMS 15 (1974); Mixon, *supra* note 40, at 269.

384. P. KEHOE, *supra* note 383, at 15.

385. *See* text accompanying note 98 *supra*.

386. P. KEHOE, *supra* note 383, at 15-16.

The creditors of the corporation cannot seek direct payment of the corporation's debts from the individual cooperators. If the corporation is forced into bankruptcy and liquidated, however, the individual cooperator would probably lose all or a part of the money invested in the corporation's stock. Also the cooperators' proprietary leases may be cancelled as part of the liquidation process, causing the cooperators to lose their right to occupy their apartments.

387. Mixon, *supra* note 40, at 269.

388. *See* text accompanying notes 123-25 *supra*.

389. Mixon, *supra* note 40, at 269.

390. Moncur v. Jones, 72 S.D. 202, 214, 31 N.W.2d 759, 765 (1948); Federal Land Bank v. King, 132 Tex. 481, 485, 122 S.W.2d 1061, 1063 (1939).

gal action force individual cooperators to pay the corporate bills.[391] Nevertheless, if the corporation defaults in its obligations, the cooperators will effectively be forced to pay corporate creditors to prevent the loss of their financial investment. Moreover, the corporate creditor may hold a blanket mortgage given by the corporation on the building and possibly even the underlying land that make up the cooperative project. The mortgagee's right to foreclose and force a sale of the mortgaged property may be superior to the rights of the cooperators to live in the cooperative project.[392] Likewise, if the corporation is forced to declare bankruptcy, the claims of all its creditors will be paid in full before any of the cooperator-shareholders receive a distribution.[393] In either case, the individual cooperators would be unable to stand behind the corporate structure and refuse to answer personally to corporate creditors. To do so would cost them their homes.

The precarious position of the cooperators in this regard raises the issue of whether the homestead exemption should be superior or inferior to the claims of corporate creditors. Two competing interests are at stake. The first is the broad purpose of homestead statutes to protect the home of a debtor from forced sale. The other is the right of corporate creditors to look to corporate assets as a source for repayment of obligations incurred by the corporation. If a creditor could not seek satisfaction from the only significant assets of a cooperative corporation—the land and buildings—because individual cooperator's apartments were protected by the state's homestead laws, it is probable that many potential creditors would refrain from advancing any credit at all. Financial realities are thus at loggerheads with the purpose of the homestead laws. On balance, while homestead laws should protect a cooperator's interest from personal creditors' claims, these laws should not shelter the cooperative property from the claims of creditors of the corporation.[394]

Most homestead legislation provides for a monetary limitation on the amount of property which can be claimed under the exemption. The cooperator's interest must therefore be valued to determine the extent of its qualification for protection. This valuation should ignore the corporate ownership of the real estate and consider the cooperator's proportionate share of the project's land value at the time of homestead

391. P. KEHOE, *supra* note 383, at 15-16.

392. *Id.* at 30.

The cooperative corporation may have given a mortgage to finance its own purchase of the building and land. This is referred to as a blanket mortgage. The installment payments are made by allocating a portion of the project assessments paid by each cooperator to this end.

393. *Id.* at 30.

394. California seems to have reached this result. CAL. CIV. CODE § 1237 (West Supp. 1978) provides that "[t]he dwelling house may be in a . . . stock cooperative . . . . In such cases . . . an underlying lease or sublease, indebtedness, security or other interest or obligation may be enforced in the same manner as if no homestead were declared. . . ."

qualification.[395] Furthermore, the cooperator's homestead exemption cannot be limited to a proportionate share of one exemption for the entire cooperative project. To assure cooperator's homestead protection that is coextensive with that available to owners of single-family residences, each cooperator's apartment unit must be entitled to its own homestead exemption.[396]

VII. CONCLUSION

From the inception of the use of stock-owned cooperative housing, courts have struggled to assign a name to the cooperator's interest. The concept of cooperative apartments developed long after the common law characterized property interests as either personalty or realty. This apparently simple but technical scheme of classification proves particularly dysfunctional when applied to cooperatives because the cooperative form does not fit comfortably within either pigeonhole.

The cooperator possesses too many rights and obligations peculiar to fee ownership to be classified as a mere tenant with only a personalty interest in the leasehold. The two components of the cooperator's interest—stock and a long term lease—considered separately are easily classified as personal property. When these interests are combined, however, these components no longer resemble their parts. The preceding analysis shows that insistence upon viewing the quantum of the cooperator's rights as a personalty interest often defeats the cooperative's policy of shared ownership.

Similarly, the concept and passage of homestead exemption legislation predated the widespread use of cooperative apartments as an alternative to single-family home ownership. Although the legislation typically did not define the precise property interest a claimant must possess to take advantage of the exemptions, the states were commonly motivated by a desire to secure to a debtor and his or her family a "home" safe from creditor's claims. Statistics reveal that the modern cooperative usually serves as the cooperator's primary residence. The cooperator utilizes the vehicle of stock ownership in the cooperative project to guarantee his or her right to possess the cooperative apartment. The right to possess the cooperative apartment-home is as in need of protection from creditors' claims as is the possession of an owner of a single-family residence.

The denials of homestead exemptions to cooperators in the *Wartels* and *Brandywine* decisions demonstrate the inequity resulting from the law's resistance to extending the boundaries of old concepts to encompass new, but analogous, situations. The law of cooperative ownership fails to meet the expectations of cooperators, even though no

395. Mixon, *supra* note 40, at 268.
396. *See* note 141 *supra*.

good reason exists for the failure to include the interests of cooperators within the protection of homestead exemptions. Recognition of the real nature of the cooperator's interest in his or her apartment would spare the courts the task of applying mechanical characterizations to define the cooperators' interest. The expectations of the cooperator would be fulfilled, and the policy underlying homestead legislation—protecting the debtor and his or her family in their "home" —would be realized.

A POSTSCRIPT: THE BANKRUPTCY REFORM ACT OF 1978

The Bankruptcy Act in effect until October 1, 1979,[397] merely incorporates into federal bankruptcy law the various state exemption statutes and decisions, as well as other federal statutes that grant allowances and exemptions.[398] A cooperator who invokes bankruptcy must rely on his or her state homestead exemption to protect his or her cooperative apartment. Thus, the bankrupt cooperator can now claim a bankruptcy exemption in a cooperative apartment only if the state in which he or she is domiciled protects the cooperative apartment under its homestead laws or the decisions construing them.

The Bankruptcy Reform Act of 1978,[399] which will be effective substantively on October 1, 1979, will have a profound effect on the nature of the cooperator's interest in bankruptcy. The new Act specifically includes the debtor's interest in a cooperative among the bankruptcy exemptions:

> The following property may be exempted . . .:
>
> The debtor's aggregate interest, not to exceed $7,500 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, *in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence*, ...[400]

When the new federal bankruptcy law was considered, the disparity in the exemptions offered by the states militated in favor of uniform bankruptcy exemptions. The states, however, preferred to retain their

397. 11 U.S.C. §§ 1-1103 (1976).

398. 1A COLLIER ON BANKRUPTCY ¶ 6.13, at 867-68 (14th ed. 1978).

Currently, no uniform exemption legislation exists. In 1976, the National Conference of Commissioners on Uniform State Laws promulgated a Uniform Exemption Statute. None of the states, however, have elected to adopt the uniform act. *See* D. EPSTEIN & J. LANDERS, DEBTORS AND CREDITORS 131 (1978). One commentator suggests that debtor-creditor law, for nonbankruptcy matters as well as in the bankruptcy courts, would be much improved by the enactment of federal preemptive exemption legislation. Shanker, *The Abuse and Use of Federal Bankruptcy Power*, 26 CASE W. RES. L. REV. 3 (1975). Federal preemption, the author states, would eliminate "tension-creating situations" such as improper motivations either in favor of or against bankruptcy declaration dependent upon state exemption provisions. *Id.* at 10-11.

399. Pub. L. No. 95-598, 92 Stat. 2549 (to be codified in 11 U.S.C. §§ 101-411).

The Bankruptcy Reform Act may also be found at 47 U.S.L.W. 1-44 (1978).

400. Bankruptcy Reform Act, *supra* note 399, § 522(d)(1) (emphasis added).

chosen methods of protecting debtors.[401] The Bankruptcy Reform Act of 1978 strikes a middle ground between these positions. The Act establishes a uniform federal exemption,[402] but it also preserves the right of the individual states to provide for other more or less generous treatment of debtors.[403] Thus, under the new Act, the debtor may claim (1) an exemption as to any property exempted under nonbankruptcy federal law, state law, or local law, or (2) the federal bankruptcy exemption *unless* the state law applicable to the debtor "specifically does not so authorize."[404]

The exemption provided in the Bankruptcy Reform Act will affect homestead exemption claimants. Although homestead exemption statutes are available to debtors in attachment and execution proceedings, they are used frequently in bankruptcy proceedings. Furthermore, once the cooperator-debtor has chosen to declare bankruptcy, he or she is likely to choose the federal bankruptcy exemption over his or her state homestead exemption unless (1) the homestead provisions in his or her state are more generous than the federal exemption, or (2) his or her state has overruled the use of the federal exemption through specific state legislation.

It is unclear at this time which states, if any, may choose to disallow the federal exemption with their own legislation. In addition, because there is, of course, no case authority under the new Act, the precise effect of current state legislation and the potential effects of future legislative attempts to overrule the bankruptcy exemptions is unknown. In any event, the attempt to provide some uniformity in bankruptcy exemption law has been weakened by allowing state legislatures to prohibit the use of the federal minimum exemptions in a bankruptcy case. The cooperator-bankrupt may be unable to claim the new federal minimum exemption, which specifically protects an interest in a cooperative apartment, if his or her state legislature prohibits use of the federal minimum exemption. If the cooperator is precluded from electing the bankruptcy exemption by state law, or if he or she chooses state exemptions, the conflicting, confused, and often inequitable state law analyzed in this article will determine whether his or her

401. 1A COLLIER, *supra* note 398, ¶ 6.02, at 796 & n.10.

402. Bankruptcy Reform Act, *supra* note 399, § 522(d).

403. *Id.* § 522(b).

This exemption provision in the new Act actually represents a compromise between the House and Senate versions of the bill. The House had provided for a federal minimum exemption, but gave the debtor an option to elect the state exemptions. The Senate bill, however, had retained the prior method of incorporating the state law of exemptions into a bankruptcy case. King, *The New Bankruptcy Code: Many Improvements Over Earlier Law*, NAT'L L.J., Nov. 6, 1978 at 26, col. 4.

404. Bankruptcy Reform Act, *supra* note 399, § 522(b)(1).

In addition, the debtor may claim as exempt any interest in property that the debtor held as a tenant by the entirety or joint tenant to the extent that such interest is exempt from process under applicable nonbankruptcy law. *Id.* § 522(b)(2)(B).

interest in a cooperative apartment is exempted in the bankruptcy proceeding.