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## Kentucky Law Survey: Real Property

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# REAL PROPERTY

BY JOHN T. BONDURANT\* AND DAVID E. ARVIN\*\*

The Kentucky Law Survey has not specifically considered developments in property law for the last thirteen years.<sup>1</sup> Consequently, the authors have expanded the customary one year survey period to include appellate decisions rendered from January 1, 1976 through June 30, 1980.<sup>2</sup> Because of the large number of important decisions in that period, this article cannot consider many important property topics such as bailments,<sup>3</sup> mineral estates,<sup>4</sup> joint bank accounts,<sup>5</sup> real estate brokers,<sup>6</sup> escrows<sup>7</sup> and *lis pendens* filings.<sup>8</sup> Rather, the focus

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<sup>1</sup> See *Court of Appeals Review — Property*, 56 Ky. L.J. 435 (1968).

<sup>2</sup> The beginning of this time period was selected to coincide with the inception of Kentucky's intermediate appellate court, the court of appeals. See Ch. 84, § 3, 1974 Ky. Acts 168.

<sup>3</sup> See *Central Parking System v. Miller*, 586 S.W.2d 262 (Ky. 1979) (liability of parking garage operators); *Vinson v. Gobrecht*, 560 S.W.2d 242 (Ky. Ct. App. 1977) (bailor's contributory negligence).

<sup>4</sup> See *Commerce Union Bank v. Kinkade*, 540 S.W.2d 861 (Ky. 1976) (broad form deeds); *Bigge v. Tallent*, 539 S.W.2d 288 (Ky. 1976) (oil and gas lease not forfeited by non-production); *L.E. Cooke Corp. v. Hayes*, 549 S.W.2d 837 (Ky. Ct. App. 1977), *appeal dismissed per compromise and settlement*, 572 S.W.2d 420 (Ky. 1978) (payment of annual \$1.00 royalty sufficient to sustain mineral lease terminable at option of lessee).

<sup>5</sup> See *Bealert v. Mitchell*, 585 S.W.2d 417 (Ky. Ct. App.), *discretionary review denied*, 585 S.W.2d 412 (Ky. 1979) (joint owner of savings and loan association account has power to delete the name of the other joint owner); *Anderson v. Anderson*, 583 S.W.2d 504 (Ky. Ct. App. 1979) (surviving spouse may bring back into deceased spouse's estate money individually owned by deceased spouse and passing to deceased spouse's children via joint bank account); *Barton v. Hudson*, 560 S.W.2d 20 (Ky. Ct. App. 1979) (allowing attachment of the entire corpus of a joint bank account by judgment creditor).

<sup>6</sup> See *Leishman v. Goodlett*, 608 S.W.2d 377 (Ky. Ct. App.), *discretionary review denied*, 609 S.W.2d 368 (Ky. 1980) (no recovery from the real estate education, research and recovery fund for dishonest acts of a real estate licensee which are not subject to Kentucky Real Estate Commission regulation); *Helm v. Warner*, 597 S.W.2d 159 (Ky. Ct. App. 1980) (intentional acts of wrongdoing required to subject a licensee to discipline before the Kentucky Real Estate Commission); *Neel v. Wagner-Shuck Realty Co.*, 576 S.W.2d 246 (Ky. Ct. App. 1978) (broker's procurement of unconditional binding contract between buyer and seller entitles broker to commission,

will be on developments of interest to the real estate practitioner including discussions of contracts for the sale of real property, private law devices for land use control, common law dedication and easements appurtenant.

## I. CONTRACTS FOR THE SALE OF REAL PROPERTY

### A. *Right of First Refusal*

*Wilson v. Grey*<sup>9</sup> presented for the first time in Kentucky the question of whether a lease clause giving the lessee a right of first refusal on any sale of property could apply to the sale of one co-owner's interest to another co-owner.<sup>10</sup> The property was originally devised to the lessees by the sole owner for a period of ten years. The lease contained a right of first refusal clause which read in pertinent part: "Should lessor ever desire to sell the leased premises lessees are given the right to purchase the same at the price which lessor has been offered for the premises."<sup>11</sup>

Two years after the lease was entered into the lessor died, devising the leased premises as follows: an undivided one-half interest to one son and an undivided one-fourth interest each to another son and a former daughter-in-law. The second son then sold his one-fourth interest to the first son in a bona fide

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regardless of whether the buyer is "ready, willing and able" to complete the deal); *Miller v. Gohmann*, 565 S.W.2d 162 (Ky. Ct. App.), *discretionary review denied*, 585 S.W.2d 394 (Ky. 1978) (broker with knowledge of defect in seller's title not entitled to receive commission).

<sup>7</sup> See *Fisk v. Peoples Liberty Bank & Trust Co.*, 570 S.W.2d 657 (Ky. Ct. App.), *discretionary review denied*, 585 S.W.2d 399 (Ky. 1978) (attorney may act as escrow agent for both parties if there is no conflict in his representations).

<sup>8</sup> See *Leonard v. Farmers & Traders Bank*, 605 S.W.2d 770 (Ky. Ct. App.), *discretionary review denied*, 609 S.W.2d 365 (Ky. 1980) (lis pendens is for notice only, and does not create a lien on subject property with priority over subsequent purchasers); *Bonnie Braes Farms, Inc. v. Robinson*, 598 S.W.2d 765 (Ky. Ct. App. 1980) (filing of lis pendens cannot be abuse of process, but may give rise to slander of title action).

<sup>9</sup> 560 S.W.2d 561 (Ky. 1978), *rev'g Grey v. Wilson*, 554 S.W.2d 867 (Ky. Ct. App. 1977).

<sup>10</sup> All the parties agreed that the case presented a question of first impression, but the court of appeals disagreed, characterizing the dispute as one that "can be resolved by the application of well accepted rules of construction of contracts." 554 S.W.2d at 869.

<sup>11</sup> 560 S.W.2d at 561.

arm's length transaction, whereupon the lessees brought an action for specific performance of the right of first refusal provision in the lease agreement.<sup>12</sup> In a brief opinion without cited authority, the Supreme Court of Kentucky held that where the sale is between or among existing co-owners there has been no conveyance that would trigger any preemption rights of lessees.<sup>13</sup>

The *Wilson* holding is consistent with a majority of similar cases in other states.<sup>14</sup> Logically, such a holding would appear proper in that the parties to a lease would not normally consider a sale between co-lessors as activating a right of first refusal. If *Wilson* is read narrowly, however, the result reached would follow only when there is but one original lessor and not in other co-lessor situations. The Court observed that

[w]hen the lease was executed there was but one "lessor." Obviously a "sale" could have been made only to a person or persons other than that lessor. When she died [her children] became the collective "lessor," and the sale of [one's share

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<sup>12</sup> *Id.* at 561-62.

<sup>13</sup> *Id.* at 562.

<sup>14</sup> See, e.g., *Kroehnke v. Zimmerman*, 467 P.2d 265 (Colo. 1970) (a conveyance of leased premises from lessors to their wholly owned corporation held not a sale within the meaning of first refusal provision); *Isaacson v. First Sec. Bank*, 511 P.2d 269 (Idaho 1973) (conveyance of leased farm to lessor's son for approximately one third actual value held not a sale for purpose of first refusal clause); *Heidlebaugh v. Korn*, 498 P.2d 1195 (Mont. 1972) (provision in lessor's will giving son right to purchase leased premises from other devisees at the appraised value fixed in the estate held not a sale for purpose of first refusal provision); *Rogers v. Neiman*, 193 N.W.2d 266 (Neb. 1971) (sale by each of two co-lessors of their undivided one-fifth interest to another co-lessor held not a sale for the purpose of the lessee's first refusal option); *Sand v. London & Co.*, 121 A.2d 559 (N.J. Super. Ct. App. Div. 1956) (sale of leased premises from one company to another company owned and controlled by the same interests not a sale in violation of first refusal clause); *Torrey Delivery, Inc. v. Chautauqua Truck Sales & Serv., Inc.*, 366 N.Y.S.2d 506 (App. Div. 1975) (conveyance from merged corporation to surviving corporation not a sale within meaning of lease clause). *But see Meyer v. Warner*, 448 P.2d 394 (Ariz. 1968) (sale of one-half undivided interest from one co-lessor to the other co-lessor held to be a sale for purposes of first refusal clause).

In determining what constitutes a "sale" within the meaning of a first refusal clause, the courts have looked either to the presence or absence of an arm's length transfer between the lessor and the transferee, or to the effect of the conveyance as to removing from the subject property the lessee's right of first refusal. Annot., 70 A.L.R. 3d 203, 206-07 (1976).

to another] was not a sale to a person other than the lessor.<sup>15</sup>

The above statement by the Court suggests that if plural lessors grant a right of first refusal, a subsequent sale among co-lessors *would* effect a sale within the meaning of the lease agreement. The lessee could then exercise his preemptive right. This would permit a lessee to exercise a right of first refusal in a sale between multiple original lessors, yet deny a lessee this right in a sale between heirs, devisees or donees of a singular lessor. Some uncertainty remains, however, and a court presented with sympathetic facts might extend *Wilson* to a case where multiple original lessors are involved. In any event, attorneys should be alert to *Wilson* and follow its application, especially when drafting documents for co-owners which grant a right of first refusal.

*Jones v. White Sulphur Springs Farm, Inc.*<sup>16</sup> addressed the extent to which a lessee, pursuant to a right of first refusal, may deviate from the terms of a third party's offer to the lessor.<sup>17</sup> Jones received an acceptable offer from Marston<sup>18</sup> and, in accordance with the lease agreement,<sup>19</sup> conveyed this offer to the lessee White Sulphur. White Sulphur announced that it wished to exercise its option and began negotiations with Jones which resulted in a memorandum of agreement containing terms different from those in the Marston offer.<sup>20</sup>

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<sup>15</sup> 560 S.W.2d at 562.

<sup>16</sup> 605 S.W.2d 38 (Ky. Ct. App.), *discretionary review denied*, 609 S.W.2d 364 (Ky. 1980).

<sup>17</sup> This case also dealt with rescission based on unilateral mistake, discussed in the text accompanying notes 78-89 *infra*.

<sup>18</sup> The entire agreement was made subject to preemption by White Sulphur's right of first refusal. 605 S.W.2d at 40.

<sup>19</sup> The lease agreement between Jones and White Sulphur contained a first refusal clause which read as follows:

In the event first party shall desire to sell said farm other than by public auction during the term of this lease or any renewals thereof, he shall require a written offer from a prospective purchaser and second party shall have the right of the first refusal to purchase said farm at the price set forth in said written offer. Second party shall have thirty (30) days after actual receipt of notice and a copy of such written offer to notify first party of his exercise of this option.

*Id.*

<sup>20</sup> *Id.* at 40-41.

Both agreements, however, provided for a payment of \$100,000 to be made to Jones within ninety days after the date of the Marston offer. At the end of the ninety day period Marston tendered the \$100,000, Jones refused to accept it and Marston instituted suit.<sup>21</sup>

On appeal it was argued that a party attempting to purchase property subject to a first refusal option held by someone else has no standing to object to the improper execution of the option.<sup>22</sup> The court rejected this argument and ruled unqualifiedly that a prospective purchaser does have the right to insist on strict compliance by the lessee with the terms of the first refusal provision.<sup>23</sup>

The court then turned to the question of whether the first refusal provision had been properly exercised. It recognized that only minor variations from the third person's offer which have no effect on the substance of the agreement are permissible<sup>24</sup> and that for an optionee to exercise his option he must give as much as or more than the option requires.<sup>25</sup> Although the court was equivocal on whether certain terms negotiated between Jones and White Sulphur constituted an improper exercise of the right of first refusal,<sup>26</sup> it is clear that even mi-

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 41.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* (quoting *Brownies Creek Collieries, Inc. v. Asher Coal Mining Co.*, 417 S.W.2d 249 (Ky. 1967)).

<sup>25</sup> 605 S.W.2d at 41 (citing *Cozart v. Turley*, 411 S.W.2d 481, 485 (Ky. 1967)). Standing alone, this rule has no place in the law governing exercise of rights of first refusal, for it serves to protect primarily the seller and to a lesser extent the holder of the right. Rights of first refusal in a lease, however, involve three parties who need protection under the law. The third party offeror reasonably expects to be regarded as something more than a bidding agent of the seller attempting to extract a better price from the preemptor. Therefore, the "as much as or more than the option requires" rule must be read in conjunction with the "minor variations" rule.

*White Sulphur Springs* deals with these two rules awkwardly, but the result of the case leaves it clear that only minor variations between offer and acceptance are permissible and any variations must result in a better deal for the seller. "The variations . . . made White Sulphur's offer less than Marston's [and] leads to the conclusion that White Sulphur never effectively exercised the option." 605 S.W.2d at 41 (emphasis added).

<sup>26</sup> The better holding on this issue would have been that the first refusal right was *not* properly exercised. In a letter between attorneys for the parties it was said: "[I]f your clients decide not to execute said contract, we are hereby accepting the

nor variations from the original offer will receive very strict scrutiny by the court.<sup>27</sup> Doubts as to the materiality of terms will probably be resolved in favor of the third party offeror.<sup>28</sup>

Finally, the court concluded "that if White Sulphur may have at one time had any superior right [to Marston], it was ended by failure of White Sulphur to timely tender payment . . . ."<sup>29</sup> Although it was undisputed that White Sulphur had not tendered payment during the ninety day period, White Sulphur asserted that it had been making efforts to close the deal. The court was unconvinced, again taking a hard line approach: "[W]hen a lessee holding a right of first refusal receives notice of the lessor's desire to sell, he must indicate his acceptance within the time specified . . . , and must be *will-ing and able to pay for the land at that time.*"<sup>30</sup> In the absence of a clear understanding to the contrary, a preemptive right to purchase can only be effectively exercised by closing the deal through payment of the purchase price,<sup>31</sup> and not by

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terms of sale according to the Marston offer . . . ." *Id.* at 40. Unfortunately for White Sulphur, however, its opportunity to accept terms identical to Marston's offer evaporated when White Sulphur initially began to negotiate different terms. Qualified or conditional acceptances are counter-offers and operate as a rejection of the original offer. 1 WILLISTON ON CONTRACTS § 77 (3d ed. Jaeger 1957). Had White Sulphur wanted to exercise its first refusal, it should have immediately given its unqualified acceptance of the offer and then requested other terms while not insisting on them. Such acceptances are generally recognized as valid. *Id.* § 79.

<sup>27</sup> Although the court concluded that the variations were material, it would appear that they were rather insignificant as a part of the whole transaction. The contract was for a 560 acre farm at \$800 per acre, or \$448,000. 605 S.W.2d at 40. The difference between the Jones—Marston deal and the Jones—White Sulphur deal did not amount to more than a small fraction of this amount: less than 1%.

<sup>28</sup> Since resolution of this issue was unnecessary to the ultimate holding of the case, it would be presumptuous to say that minor variations between offer and acceptance will no longer be permitted in this context. The prudent practitioner, however, will be sensitive to the problem when assisting clients in exercising a right of first refusal. Kentucky is not alone in its reluctance to permit the preemptor to vary the terms of a third party's offer. *See, e.g., Coastal Bay Golf Club, Inc. v. Holbein*, 231 So. 2d 854 (Fla. Dist. Ct. App. 1970); *Hartmann v. Windsor Hotel Co.*, 68 S.E.2d 34 (W. Va. 1951).

<sup>29</sup> 605 S.W.2d at 41-42.

<sup>30</sup> *Id.* (emphasis added) (citing Note, *The Right of First Refusal Appendant to a Lease*, 53 IOWA L. REV. 1305, 1316 (1968)).

<sup>31</sup> The court noted that "White Sulphur's lease stated that White Sulphur would have the right of first refusal 'to purchase said farm . . . .'" 605 S.W.2d at 42 (emphasis added). Apparently it was the use of the word "purchase" in the first refusal

entering into an executory contract to purchase at a future time.

## B. Remedies<sup>32</sup>

### 1. Deposits—Retention or Return<sup>33</sup>

*Edwards v. Inman*<sup>34</sup> raised the question of when the buyer may recover his deposit from the seller on a real estate purchase contract that fails to close. Inman had made a \$5,000 deposit on a contract to purchase a farm from Edwards for \$50,000, subject to Inman's obtaining a loan.<sup>35</sup> The bank, suspecting a shortage in acreage, required that a survey be made, and a surveyor hired by Edwards found only 188 acres, twenty-four short of the contract acreage. As a result, the loan was not made and the deal did not close.<sup>36</sup> Inman sued for return of the \$5,000 deposit but was awarded only \$3,800; the remaining \$1,200 was awarded to Edwards for incidental expenses he had incurred.<sup>37</sup>

The court of appeals reversed, holding that the agreement became void when the condition of obtaining financing failed<sup>38</sup>

clause that persuaded the court that the parties contemplated a completed deal.

<sup>32</sup> For in depth treatment of the law of remedies in the vendor-purchaser relationship, see 3 AMERICAN LAW OF PROPERTY §§ 11.66-.81 (A.J. Casner ed. 1952 & Supp. 1977); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES §§ 12.7-.15 (1973); M. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL PROPERTY §§ 12.1-.2(c) (3d ed. 1975).

<sup>33</sup> See generally D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.5 (1973); Dunbar, *Drafting the Liquidated Damage Clause - When and How*, 20 OHIO ST. L.J. 221 (1959) (written by an attorney for practical application); Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495 (1962).

<sup>34</sup> 566 S.W.2d 809 (Ky. Ct. App. 1978).

<sup>35</sup> *Id.* at 810. The contract read in pertinent part:

This bid of [sic] contingent upon the purchaser being able to get a loan. Possession of land will be given after crops are harvested. Two weeks will be aloud [sic] Loan commitment.

. . . If Loan is not approved the down payment will be refunded. As evidence of good faith binding this contract, a deposite [sic] of \$5,000.00 is made herewith to be applied on purchase price upon pasing [sic] of deed or refunded should title prove uninsurable or if offer is not accepted.

*Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* These expenses included \$500.00 for real estate commission, \$200.00 for cost of survey, and \$500.00 for attorneys' fees.

<sup>38</sup> *Id.* at 811. See generally M. FRIEDMAN, CONTRACTS AND CONVEYANCES OF REAL



and that Inman was entitled to a full refund. The court then fashioned a new legal principle by concluding: "In the absence of an agreement to the contrary, the burden is on the seller to pay for surveys and other incidentals in the sale of real estate."<sup>39</sup>

Local customs vary widely as to who must pay various closing costs.<sup>40</sup> In some instances the allocation of closing costs between buyer and seller may be implied through the doctrine of custom.<sup>41</sup> In other instances, however, the allocation is not agreed upon or the closing attorney assigns the costs according to his own practice. Therefore, awareness of the *Edwards* rule could be helpful in a dispute over the allocation of closing costs.

## 2. Damages

*Evergreen Land Co. v. Gatti*<sup>42</sup> involved a refinement of the long standing rule<sup>43</sup> that the measure of damages for breach by the purchaser of real property is the difference between the contract price and the market value<sup>44</sup> at the time of

PROPERTY § 1.5 (3d ed. 1975). See also Aiken, "Subject to Financing" Clauses in Interim Contracts for Sale of Realty, 43 MARQ. L. REV. 265 (1959-60) (a comprehensive treatment of the problems arising out of the inartfully drawn "subject to financing" clause).

<sup>39</sup> 566 S.W.2d at 811.

<sup>40</sup> D. SIROTA, ESSENTIALS OF REAL ESTATE FINANCE 270-74 *passim* (1976); U.S. DEP'T OF HOUSING & URBAN DEV., REAL ESTATE SETTLEMENT COSTS (CCH) ¶ 700-1400 *passim* (1977 rev.).

<sup>41</sup> It is well established that a custom which is lawful, and which is permitted to enter into contracts made with reference to it, becomes a part of the contract, the same as if the custom were incorporated therein, and the rights of the parties to the contract are to be governed by the provisions of the custom or usage.

*Stuart v. Clements*, 216 S.W. 136, 138 (Ky. 1919). See generally 21 AM.JUR.2D *Customs and Usages* §§ 1-20, 24 (1965); 25 C.J.S. *Customs and Usages* §§ 1-13, 26 (1966).

<sup>42</sup> 554 S.W.2d 862 (Ky. Ct. App. 1977).

<sup>43</sup> The rule was first announced in *McBrayer v. Cohen*, 18 S.W. 123 (Ky. 1892).

<sup>44</sup> "Market value" should be regarded as a word of art, not unlike the concept of the "reasonable man." It has been judicially defined as "the price at which an owner who desires to sell but is not required to do so would sell the property in its then condition to a purchaser who desires to purchase but is not compelled to do so." *Commonwealth, Dep't of Highways v. Darch*, 374 S.W.2d 490, 491-92 (Ky. 1964). See generally Note, *Evidence of Market Value of Real Property in Eminent Domain*

the breach, provided the market value is less than the contract price. In addition, the aggrieved seller may recover the cost of reselling the property<sup>46</sup> and either lost rents or interest,<sup>46</sup> whichever is higher.

In *Gatti*, Evergreen Land Company agreed to sell and Gatti agreed to buy a 3.01 acre tract of land fronting on a highly developed commercial strip for \$165,000.<sup>47</sup> The contract provided: "Seller represents the site is presently zoned C-1, Commercial."<sup>48</sup> The title examination revealed that "[i]n fact, 2.86 acres was zoned C-2, and .15 acre or approximately 5% of the tract was zoned R-4."<sup>49</sup> Gatti immediately notified Evergreen that, because of the zoning discrepancy, he would not accept title to the property. The property was sold soon thereafter at public auction for \$121,000 as a result of a foreclosure action that had been pending throughout the negotiations.<sup>50</sup>

Evergreen brought suit, claiming damages of \$47,000 based on the \$44,000 difference between the contract price and the subsequent sales price, plus court costs of \$3,000 incurred during the foreclosure proceedings. The trial court denied relief, holding that Gatti's rescission was justified on the basis of Evergreen's misrepresentation. The court of appeals reversed and remanded the case for a determination of the materiality of the misrepresentation.<sup>51</sup>

The court of appeals also considered the measure of damages and found the above formula advanced by Evergreen<sup>52</sup>

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*Proceedings*, 49 Ky. L.J. 132 (1960) (discussing the various factors which may be considered by the trier of fact in determining market value).

<sup>46</sup> *McBrayer v. Cohen*, 18 S.W. at 124.

<sup>46</sup> *Graves v. Winer*, 351 S.W.2d 193, 196 (Ky. 1961).

<sup>47</sup> 554 S.W.2d at 863.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 864.

<sup>51</sup> *Id.* at 867.

<sup>52</sup> As authority for this calculation, Evergreen relied on *Davis v. Lacy*, 121 F. Supp. 246 (E.D. Ky. 1954): "The damages recoverable under the defendants' choice of remedy are measured by the difference between the purchase price which plaintiff agreed to pay and the amount received for the property at the second sale, and in addition 'the cost and expense of the second sale . . .'" *Id.* at 252. Evergreen, however, ignored the qualifier immediately preceding the above quotation: "They readvertised and resold the property . . . No claim is made that the sale was unfair

essentially correct but overly simplistic. While resale price may be evidence of market value, the resale must have been "made under conditions comparable to the conditions under which the contract was made, and within a reasonable time after the breach . . ." <sup>53</sup> The court doubted the relevance of the amount brought at the foreclosure sale in fixing damages. <sup>54</sup>

The opinion contains a thorough presentation of how to approach the damages issue, an approach that may be employed with minor variations in most situations where there has been a breach of an executory contract for the sale of real property. First, two market values must be established: <sup>55</sup> (1) the true value of the property, and (2) the market value of the property had it actually conformed to the contract specifications. <sup>56</sup> If a material difference between these two values exists, then the party who would suffer because of this difference has a right to rescind and the other party is not entitled

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or that the amount realized does not represent its fair market value." *Id.* The *Davis* case, therefore, supported the rule to be adopted in *Gatti*.

<sup>53</sup> 554 S.W.2d at 866.

<sup>54</sup> Actually the court would not have been without precedent if it had held as a matter of law that the foreclosure sale is not sufficiently comparable to be probative of market value. *Levassor v. Central Sav. Bank & Trust Co.*, 60 S.W.2d 597, 599 (Ky. 1933) (judicial notice taken that property does not generally bring as much at forced sales as at voluntary sales).

<sup>55</sup> Market value must be established through competent evidence. This may come from the owner himself, and non-expert opinion evidence is generally admissible. *Commonwealth Dep't of Highways v. Brown*, 415 S.W.2d 370 (Ky. 1967). The witness must demonstrate, however, at least minimal knowledge of property values in the area to qualify his opinion as competent. *Commonwealth Dep't of Highways v. Fister*, 373 S.W.2d 720 (Ky. 1963).

While Kentucky courts are liberal in admitting lay opinion as evidence of the value of real estate, it carries very little weight with the trier of fact. Note, *supra* note 44, at 138-40. It is always preferable to put on disinterested, well-qualified experts, especially professional appraisers if they are available. Professional appraisers make powerful witnesses, and almost invariably obtain verdicts that more than compensate for their fees. See generally 2 P.O.F. 3 (1959) (qualification of real estate appraiser as expert witness); 4 P.O.F.2d 590 (1975) (testimony of real estate appraiser). See also Moskowitz, *How to Use Experts Effectively in Land Regulation Proceedings*, 3 REAL EST. L.J. 359 (1975).

<sup>56</sup> In *Gatti*, for example, true value would be the market value of the land with its C-2 and R-4 zoning; conforming value would be its market value if it were actually zoned C-1.

to any relief.<sup>57</sup> If the difference between these two values is insignificant, however, the damaged party has a duty to complete the contract, his failure to do so giving rise to a cause of action.<sup>58</sup>

What then is to be the plaintiff's award for the loss of his bargain in the case of a wrongfully rescinded contract? If there has been a resale, the plaintiff must first prove that it was made within a reasonable time after the breach, and under conditions comparable to those under which the contract was made.<sup>59</sup> If he can do so, "the resale price would . . . be evidence of actual value, and the difference [between the resale price and the contract price] would be a proper measure and element of damages."<sup>60</sup>

If the resale price fails to meet the tests of comparability of time and conditions, then the plaintiff's award must be determined by the contract price-market value differential as discussed earlier.<sup>61</sup> The *Gatti* court assumes that the trier of fact will determine this differential with reference to the conforming value, *i.e.*, the market value of the property *as though it conformed to the contract specifications*.

Finally, the defendant is entitled to a setoff as compensation for whatever loss he may have incurred from the "immaterial breach" of the plaintiff.<sup>62</sup> Thus, if the damages can be established by a resale price of the property, the defendant may deduct from the plaintiff's award any amount by which the conforming value exceeds the true value.<sup>63</sup> If the damages must be established, however, by the difference in the contract price and the conforming value, the defendant would not be entitled to any setoff since the setoff would have been incorporated in the calculation of the conforming value.<sup>64</sup>

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<sup>57</sup> 554 S.W.2d at 866.

<sup>58</sup> See notes 65-75 *infra* and accompanying text for discussion of that part of the case pertaining to materiality of the misrepresentation.

<sup>59</sup> 554 S.W.2d at 866.

<sup>60</sup> *Id.* Thus, true value would be established as the resale price.

<sup>61</sup> See text accompanying note 56 *supra*.

<sup>62</sup> For a discussion of the theory of this setoff, see notes 65-75 *infra* and accompanying text.

<sup>63</sup> 554 S.W.2d at 866-67.

<sup>64</sup> *Id.* at 876.

### 3. *Equitable Remedies*

#### a. *Misrepresentation*

The court of appeals in *Gatti*<sup>65</sup> remanded the case for a determination of whether the misrepresentation of property zoned C-2 and R-4 as C-1 was a material misrepresentation.<sup>66</sup> The following instructions were given to the trial court:

[I]f the proof regarding damages indicates little or no difference in value between the contract price and the actual value of the land due to a zoning variance, then the misrepresentation was immaterial, the rescission constituted a breach, and [Gatti] should have completed the contract and sought damages [for any proven diminution in value] rather than to arbitrarily rescind the contract and become liable to [Evergreen] for damages.<sup>67</sup>

The trial court was also told to take the view that

[Gatti] is now in the position where he must prove the materiality of the misrepresentation, and if he cannot prove such a fact by additional convincing evidence, [Gatti] must be responsible for the reasonably foreseeable damages caused by his arbitrary rescission of the contract.<sup>68</sup>

*Gatti* is a classic application of the doctrines of material breach and substantial performance to contracts for the sale of real property. The court of appeals provided three guidelines for the fact finder as an aid in determining materiality. First, the misrepresentation is material if the variance would deprive the purchaser of his intended use for the property.<sup>69</sup> Second, the misrepresentation is material if it is proved to be the sole reason for the discrepancy in value.<sup>70</sup> Finally, the

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<sup>65</sup> 554 S.W.2d 862 (Ky. Ct. App. 1977). See notes 42-64 *supra* and accompanying text for the facts of this case and a discussion of the damages issue.

<sup>66</sup> The trial court stated: "The written contract will stand as is, and the court will not tamper with its meaning. The contract speaks for itself . . . . By not accepting the various contentions of either side, the court will strictly rely on the contract itself." *Id.*

<sup>67</sup> *Id.* at 866.

<sup>68</sup> *Id.* at 865.

<sup>69</sup> *Id.* at 864. See generally J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* §§ 11-22 (2d ed. 1977).

<sup>70</sup> *Id.* at 866.

court strongly implied that the “ten per cent rule,” allowing rescission of real estate contracts with acreage errors of ten percent or more,<sup>71</sup> is applicable to *Gatti*-type cases where a qualitative discrepancy exists.<sup>72</sup>

Whatever standards for “materiality” are applied, one proposition emerges clearly in *Gatti*: “The court does not look lightly at rescission, and rescission will not be permitted for a slight or inconsequential breach.”<sup>73</sup> Moreover, the burden of showing the materiality of the misrepresentation is on the party seeking to rescind.<sup>74</sup> In a case in which materiality might be in issue, the party seeking rescission would be well advised to seek a declaration by the court<sup>75</sup> of the materiality of the misrepresentation before refusing to perform further under the contract.

### b. *Unilateral Mistake*

In *Jones v. White Sulphur Springs Farm, Inc.*,<sup>76</sup> the court of appeals invoked the long-standing Kentucky formulation of the unilateral mistake rule<sup>77</sup> to uphold a contract for

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<sup>71</sup> See note 100 *infra* for a detailed explanation of this rule.

<sup>72</sup> The court reasoned:

The Appellant argued that since the portion zoned R-4 represented only 5% of the total area, rescission should not be allowed, because it would not have been allowed if the spur had not existed. Even though zoning may relate to quality, whereas size relates to quantity, there is merit in the Appellant's argument.

554 S.W.2d at 865.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 865, 867.

<sup>75</sup> See KY. REV. STAT. [hereinafter cited as KRS] § 418.045 (1972) (authorizing declaratory judgment actions in contract disputes); Ky. R. Civ. P. 57 [hereinafter cited as CR].

As a prophylactic measure, the parties may include in their contract a definition of “material breach” (an unlikely solution), or a mechanism for the resolution of such disputes. Additionally, an arbitration clause may provide a workable solution. *Compare Fite & Warmath Constr. Co. v. MYS Corp.*, 559 S.W.2d 729 (Ky. 1977) and *Warner, The Kentucky Law Survey—Remedies*, 67 Ky. L.J. 665 (1978-79) with *Prudential Resources Corp. v. Plunkett*, 583 S.W.2d 97 (Ky. Ct. App. 1979).

<sup>76</sup> 605 S.W.2d 38 (Ky. Ct. App.), *discretionary review denied*, 609 S.W.2d 364 (Ky. 1980).

<sup>77</sup> The rule first appeared in Annot., 59 A.L.R. 809 (1929) (unilateral mistake as basis of bill in equity to rescind the contract), and was announced by the court of appeals by way of dicta in *Fields v. Cornett*, 70 S.W.2d 954, 957 (Ky. 1934).

sale of the Jones' farm to Marston. The contract provided, in pertinent part,

that certain farm . . . containing approximately 450 acres located on the north side of Highway 460 . . . and . . . 110 acres more or less located on the south side of Highway 460 [would be sold for \$800 per acre].

. . . .

[T]hen upon payment of the initial payment of One Hundred Thousand Dollars [the Joneses agree to convey a deed for residence and four acre lot].<sup>78</sup>

A misunderstanding arose whereby the Joneses contended that the \$100,000 initial payment was in addition to the \$800 per acre and Marston maintained that the total purchase price was \$800 per acre.<sup>79</sup> The Joneses sought to rescind the contract "on the grounds that there was no meeting of the minds or mutual assent . . ."<sup>80</sup>

The court rejected this contention, stating that the written agreement effected a merger of all prior negotiations and agreements. Furthermore, the court found nothing in the writing to establish that the \$100,000 was a separate sum.<sup>81</sup> The parties to a writing are bound by its terms except in cases of fraud, illegality or mutual mistake. Noting that none of these issues had been raised, the court concluded that this was a case of unilateral mistake.<sup>82</sup> To rescind a contract for a unilat-

<sup>78</sup> 605 S.W.2d at 40. This contract was made subject to a right of first refusal held by White Sulphur Springs Farm, an aspect of the case decided adversely to White Sulphur and discussed in the text accompanying notes 16-31 *supra*.

<sup>79</sup> *Id.* at 41-42.

<sup>80</sup> *Id.* at 42.

<sup>81</sup> An objective reading of the document suggests that the \$100,000 was to be included in and not in addition to the \$800 per acre. But the language is not so clear as to preclude the interpretation urged by the Joneses. Under these circumstances it would have been proper to admit extrinsic evidence to show the intent of the parties, although the law requires that such evidence be clear and convincing. *Glass v. Bryant*, 194 S.W.2d 390 (Ky. 1946).

<sup>82</sup> Since mistake was not being urged by either party, it is somewhat puzzling that the court decided the case on that basis, for it seems doubtful that either party was laboring under a mistake. The problem is better characterized as a misunderstanding. See G. PALMER, *MISTAKE AND UNJUST ENRICHMENT* 9-13 (1962). Cf. RESTATEMENT (SECOND) OF CONTRACTS § 293 (Tent. Draft No. 10, 1975) (mistake defined). A finding of misunderstanding between the parties would require the court to base its holding on whether there had been a meeting of the minds.

eral mistake in Kentucky, four conditions must exist: (1) the consequences of the mistake must be so grave that enforcement of the contract would be unconscionable; (2) the mistake must be material to the contract; (3) the mistaken party must have exercised ordinary diligence; and (4) the rescission must be without serious prejudice to either party.<sup>83</sup>

The court, in denying rescission, found that the Joneses had failed to exercise ordinary diligence in handling the transaction.<sup>84</sup> This result illustrates the great potential for injustice to the mistaken party under the unilateral mistake rule.<sup>85</sup> A better approach in this case might have been to find the contract ambiguous and thus subject to the introduction of parol evidence.<sup>86</sup> The court could have then determined if there had been a meeting of the minds. The Kentucky Supreme Court would do well to consider abandoning the old rule entirely in favor of one with less potential for injustice.<sup>87</sup>

### c. *Mutual Mistake*

Whereas relief from unilateral mistake in a contract is only available in a narrow set of circumstances, a finding of mutual mistake may be the basis for relief in many situa-

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<sup>83</sup> 605 S.W.2d at 42-43.

<sup>84</sup> "Mrs. Jones testified that she did not read the contract with Marston. The representative selected by the Joneses to handle the transaction did not inquire whether the \$800 per acre consideration was to be for the entire farm." *Id.* at 43.

<sup>85</sup> Circumstantial evidence indicated that the Joneses had not intended to sell the farm for only \$800 per acre. In addition to the ambiguity of the contract, it is unlikely that anyone would have sold farmland in that vicinity (Scott and Franklin Counties) at that price in 1974. Further, unless White Sulphur, a bankrupt, anticipated a windfall it is unlikely that it could have afforded to purchase the farm.

<sup>86</sup> It is well settled that parol evidence is admissible to prove the terms of an ambiguous contract. *Caudill v. Citizens Bank*, 383 S.W.2d 350 (Ky. 1964); *Teague v. Reid*, 340 S.W.2d 235 (Ky. 1960); *Annot.*, 40 A.L.R.3d 1384 (1971).

<sup>87</sup> RESTATEMENT (SECOND) OF CONTRACTS § 295 (Tent. Draft No. 10, 1975) contains a good approach to unilateral mistake:

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by that party if he does not bear the risk of the mistake . . . , and

- (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
- (b) the other party has reason to know of the mistake or his fault caused the mistake.



tions.<sup>88</sup> Additionally, the three basic remedies for mutual mistake—rescission,<sup>89</sup> reformation<sup>90</sup> and restitution<sup>91</sup>—are considerably more versatile.<sup>92</sup> In appropriate cases the court will authorize alternative remedies of reformation or rescission, leaving the final solution up to the parties.<sup>93</sup>

*Bush v. Putty*<sup>94</sup> offers an enlightening contrast between rescission and reformation when there has been a mutual mistake concerning the subject matter of a transaction. In that case, Bush agreed to sell "approximately 125 to 130 acres of land"<sup>95</sup> to Putty for \$90,000. Aside from this recitation in the contract there was no discussion between the parties of acreage or of price per acre. In fact, while "both parties were familiar with the farm and its boundaries, neither party knew the farm's exact acreage."<sup>96</sup>

While the contract was executory a survey revealed that the farm contained 105.99 acres, or at least fifteen percent less than the contract recital. Putty tendered a reduced sum of money proportionate to the acreage deficiency and sued for specific performance at that price.<sup>97</sup> Bush asked that Putty perform the contract at the agreed price, or that the contract be rescinded. The circuit court found for Putty, stating that the farm's acreage was material to the contract, and ordering specific performance at the reduced price.<sup>98</sup>

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<sup>88</sup> J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 9-26 (2d ed. 1977); 17 AM. JUR. 2D *Contracts* § 143 (1964); 17 C.J.S. *Contracts* § 144 (1963).

<sup>89</sup> *E.g.*, *McGeorge v. White*, 174 S.W.2d 532 (Ky. 1943). *See generally* Annot., 153 A.L.R. 4 (1944).

<sup>90</sup> *E.g.*, *Wheeler v. Keeton*, 262 S.W.2d 465 (Ky. 1953). *See generally* 66 AM. JUR. 2D *Reformation of Instruments* §§ 22-23 (1973).

<sup>91</sup> *E.g.*, *Bradshaw v. Kinnaird*, 319 S.W.2d 475 (Ky. 1958). *See generally* RESTATEMENT OF RESTITUTION § 21 (1937).

<sup>92</sup> Although rescission and/or restitution will be granted in the limited instances where relief is available for a *unilateral* mistake, the court will not invoke a reformation remedy except where the mistake is *mutual*. *See* *Fields v. Cornett*, 70 S.W.2d 954, 957 (Ky. 1934); Annot., 59 A.L.R. 809 (1929).

<sup>93</sup> *E.g.*, *Harrison v. Talbot*, 32 Ky. (2 Dana) 258 (1834). *See generally* Annot., 1 A.L.R.2d 9, 106 (1948).

<sup>94</sup> 566 S.W.2d 819 (Ky. Ct. App. 1978).

<sup>95</sup> 566 S.W.2d at 820 (quoting from a recital in the contract signed by the parties).

<sup>96</sup> *Id.* at 821.

<sup>97</sup> *Id.* at 820.

<sup>98</sup> *Id.* at 821-22. *Harrison v. Talbot*, 32 Ky. (2 Dana) 258 (1834), is the leading

Although the court of appeals agreed that the farm's acreage was material, it rejected the circuit court's remedy and ordered rescission of the contract. It reasoned that since there had been a serious mistake, no contract had ever been made and that, therefore, enforcement would be unconscionable.<sup>99</sup> The court rejected the specific performance remedy<sup>100</sup> stating only "that the remedy is not appropriate for the facts in this case."<sup>101</sup> It appears that because specific performance with abatement in price would have led to an unconscionable result, the court chose rescission as the preferable remedy — a safe decision, but questionable in light of prior Kentucky

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case authority in this country for determining whether to grant equitable relief to an aggrieved party for a mutual mistake in acreage when land is sold by the gross.

The Court established four classifications for sales of land in gross. The first two include sales made without reference to acreage, or sales whose circumstances indicate that the parties intended to risk the contingency of quantity. The Court concluded that modification of contracts falling in either of these categories should not be available. The third category encompasses sales in which the parties evidence an intent to use no more than the usual rates of excess or deficit in similar cases; the fourth encompasses sales which, though deemed sales in gross, are in fact understood to be sales by the acre. In sales falling in either of the last two categories, an unreasonable surplus or deficit may entitle the injured party to equitable relief.

The *Harrison* court ruled that the case fell in the third category and denied specific performance of the contract, which resulted in relief to the injured party, *Harrison*. The Court did not, however, fashion any specific remedy for the controversy. Therefore, *Harrison* should be cited for its four-class formulation to determine when relief may be available, but *not* for the specific remedy applicable. *Accord*, *Wallace v. Cummins*, 334 S.W.2d 904, 907-08 (Ky. 1960). For a comprehensive analysis of the rule of *Harrison v. Talbot*, see Annot., 1 A.L.R.2d 9, 67-73 (1948).

A corollary to *Harrison v. Talbot* is the 10% rule. Once it is determined that acreage was material, even though the sale was in gross, the variance from the acreage recited in the agreement must also be material. *Harrison* described a material variance as simply "an unreasonable surplus or deficit." 32 Ky. (2 Dana) at 267.

The first case to actually mention a 10% rule was *Boggs v. Bush*, 122 S.W. 220 (Ky. 1909), in which the Court stated:

While the courts have not set a rule applicable to all cases, in Kentucky no case to which our attention has been called has granted the relief where the deficit was less than 10 per cent., and none where it was refused where the deficit was as much as or more than 10 per cent.

*Id.* at 222. After *Boggs*, the Court automatically applied the 10% rule, and, in *Chilton v. Head*, 237 S.W. 422 (Ky. 1922), it was permanently established. The 10% rule has been adopted in no other state than Kentucky. See generally Annot., 1 A.L.R.2d 9, 100-05 (1948).

<sup>99</sup> 566 S.W.2d at 822-23.

<sup>100</sup> *Id.* at 822.

<sup>101</sup> *Id.* at 821.

cases.

The difficulty could have been avoided and the case decided on sound precedent if the court had made an independent evaluation of the evidence.<sup>102</sup> Examination of Putty's position would have revealed that Putty had no real concern for acreage;<sup>103</sup> and therefore, Bush should have been granted specific performance of the contract at the agreed price.<sup>104</sup>

### C. *Installment Land Contracts*

In the significant case of *Sebastian v. Floyd*,<sup>105</sup> the Supreme Court of Kentucky joined a growing number of states<sup>106</sup> in holding that a seller may not enforce a provision in an installment land sale contract<sup>107</sup> that provides for forfeiture of

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<sup>102</sup> Since the case was tried entirely by deposition, the court was not constrained by the "clearly erroneous" standard of CR 52.01. It was in as good a position as the trial court to judge the credibility of the witnesses. See *Huffman v. Russell Fed. Sav. & Loan Ass'n*, 390 S.W.2d 644 (Ky. 1965).

<sup>103</sup> The evidence revealed that Putty had rented the farm from Bush, from 1971 until January, 1976, and that Putty was engaged in a farming operation on the property. Obviously, he knew and considered the farm's capacity for production of income when contracting with Bush for a gross sale at \$90,000. An acreage deficiency would have no effect on the farm's value to Putty. This, combined with the absence of any discussion of acreage by the parties, plainly reveals that the sale was made in gross without concern for the acreage.

<sup>104</sup> See 71 AM.JUR.2D *Specific Performance* § 115 (1973); 81 C.J.S. *Specific Performance* § 77c (1977).

<sup>105</sup> 585 S.W.2d 381 (Ky. 1979).

<sup>106</sup> *E.g.*, *Honey v. Henry's Franchise Leasing Corp.*, 415 P.2d 833 (Cal. 1966); *Freedman v. Rector of St. Mathias Parish*, 230 P.2d 629 (Cal. 1951); *H & L Land Co. v. Warner*, 258 So. 2d 293 (Fla. Dist. Ct. App. 1972); *Skendzel v. Marshall*, 301 N.E.2d 641 (Ind. 1973); *Nigh v. Hickman*, 538 S.W.2d 936 (Mo. Ct. App. 1976).

Only the Kentucky and Indiana Courts have indulged in judicial legislation on the matter, and even Indiana has carved out exceptions to its new rule. See *Strausbaugh, Exorcising the Forfeiture Clause from Real Estate Conditional Sales Contracts*, 4 REAL EST. L.J. 71 (1975).

State legislatures have been active, however, in regulating the extent to which forfeiture clauses in land contracts may be enforced. Oklahoma has outlawed the enforcement of all forfeiture clauses in land contracts, dictating that they are to be treated in all respects as mortgages. OKLA. STAT. tit. 16, § 11A (Supp. 1979). Maryland distinguishes the sale of residential property sold to a noncorporate purchaser from the sale of all other property. On the former, judicial sale is the exclusive remedy; on the latter, there are no statutory regulations. MD. REAL PROP. CODE ANN. §§ 10-101 to -108 (1974 & Cum. Supp. 1980); MD. R.P. W79.

<sup>107</sup> For additional information concerning the legal problems associated with land contracts see G. OSBORNE, G. NELSON & D. WHITMAN, *REAL ESTATE FINANCE LAW*

all payments upon the purchaser's default. In a brief and lucid opinion the Court reasoned, "[t]here is no practical distinction between the land sale contract and a purchase money mortgage . . . ." <sup>108</sup> Stating that both are financing devices whereby the seller retains a lien on the property as security for part or all of the purchase price, the Court concluded that there should be no distinction in their enforcement. Since purchase money mortgages are enforced through judicial sales <sup>109</sup> with the mortgagee recovering only the amount owed plus costs, <sup>110</sup> and the mortgagor retaining any balance, <sup>111</sup> land contracts should be enforced in the same manner. <sup>112</sup>

The Court stated that a rule treating the seller's interest in a land contract as a lien best protects the interests of both buyer and seller. The remedy of a judicial sale allows the seller fulfillment of his expectations in the deal while still protecting the purchaser's equity in the property. <sup>113</sup>

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§§ 3.25-.32 (1979); Hines, *Forfeiture of Installment Land Contracts*, 12 KAN. L. REV. 475 (1964); Nelson & Whitman, *The Installment Land Contract—A National Viewpoint*, 1977 B.Y.U. L. REV. 541.

<sup>108</sup> 585 S.W.2d at 383.

<sup>109</sup> KRS § 426.525 (Cum. Supp. 1980) forbids foreclosure of a mortgage. This proscription refers to the practice of "strict foreclosure," requiring no judicial sale, used in a minority of jurisdictions. If the mortgagor does not pay off the debt within a specified period of time following his default, title to the property vests in the mortgagee without a sale. G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 107 at §§ 7.9-10. Except for its limited right of redemption, strict foreclosure operates in much the same way as enforcement of land contracts prior to *Sebastian*.

The term "foreclosure" is therefore a misnomer in Kentucky, and when used it refers to the institution of a suit to enforce a lien against property as provided in KRS §§ 426.005-.006 (1972). *Insurance Co. of N. America v. Cheatham*, 299 S.W. 545, 546 (Ky. 1927).

<sup>110</sup> 585 S.W.2d at 383.

Since July 15, 1980, attorneys' fees, to the extent they are actually incurred, may also be recovered from the mortgagor, if the written instrument provides for them. KRS § 453.250 (Cum. Supp. 1980).

<sup>111</sup> 585 S.W.2d at 383. See KRS § 426.685(2) (1972).

<sup>112</sup> See *Gamble v. Bryant*, 599 S.W.2d 472 (Ky. Ct. App.), *discretionary review denied*, 599 S.W.2d 921 (Ky. 1980), where the court stated that the seller's recovery on a land contract must be measured by the amount owed on the contract, plus interest accrued under the contract and any expenses incurred because of the purchaser's default. The court reversed a lower court judgment awarding the seller fair rental value of the property.

<sup>113</sup> 585 S.W.2d at 383. The only commercially available practice guide for Kentucky attorneys engaged in enforcement of mortgage liens is 3 J. RICHARDSON, *KENTUCKY PRACTICE* §§ 421-460 (2d ed. 1968). See generally G. OSBORNE, G. NELSON & D.

*Sebastian* will no doubt be unpopular among those who find that enforcement of land contracts now requires more time and money than before. It should serve, however, to prevent the abuses of land contracts which have resulted from forfeiture of the purchaser's equity. The decision also provides sellers an advantage they did not have under the old system of enforcement, that of a personal judgment against the defaulting purchaser should there be a deficiency in proceeds of the sale.<sup>114</sup>

#### D. *Realty Limited with a Contingent Future Interest*

When real property is limited with a future interest in persons unborn or whose identity is not presently ascertainable, a problem arises in conveying good title.<sup>115</sup> In *Blackaby v. Barnes*,<sup>116</sup> certain property was willed to Anna Barnes for life with the remainder to her children. Anna and her only living children, Darlene Studle and Karen Kay Barnes, and Darlene's husband, Ronald, joined in an agreement to convey the land to the Blackabys.<sup>117</sup> The Barnes family petitioned the circuit court for approval of the sale, but the court denied approval, stating: "[W]here a contingent interest in unborn children exists, real estate may not be conveyed by private sale."<sup>118</sup>

The court of appeals affirmed, holding that in the absence of express authority from the legislature, a private sale of contingent interests in realty is not permissible.<sup>119</sup> The decision

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WHITMAN, *supra* note 107 at §§ 7.11-18; 55 AM.JUR.2D *Mortgages* §§ 1361-1387 (1971); 59 C.J.S. *Mortgages* §§ 604-812 (1949).

<sup>114</sup> KRS § 426.005(1) (1972) provides: "In an action to enforce a mortgage or lien, judgment may be rendered for the sale of the property and for the recovery of the debt against the defendant personally." Additionally, the seller has the following statutory rights: attorneys' fees, KRS § 453.250 (Cum. Supp. 1980); recoupment of expenses incurred in preserving or maintaining property abandoned by the mortgagor, KRS § 426.525 (Cum. Supp. 1980); and unlimited interest rates on principal sums of more than \$15,000, KRS § 360.010(1) (Cum. Supp. 1980).

<sup>115</sup> See generally 51 AM.JUR.2D *Life Tenants and Remaindermen* §§ 81-83 (1970); 31 C.J.S. *Estates* §§ 88c-89 (1964).

<sup>116</sup> 587 S.W.2d 852 (Ky. Ct. App. 1979).

<sup>117</sup> *Id.* at 853.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 854.

required the court to consider the arguably conflicting provisions of Kentucky Revised Statutes [KRS] section 389.040,<sup>120</sup> which it construed in favor of established precedent.<sup>121</sup> Since the *Blackaby* decision, KRS section 389.040 has been repealed<sup>122</sup> and replaced by KRS section 389A.035.<sup>123</sup> This new provision expressly requires a public commissioner's sale authorized by order of the circuit court in all instances where an interest in the land "may be possessed by persons unborn or not immediately ascertainable . . ."<sup>124</sup> Therefore, a private sale authorized by the court would still be improper under KRS section 389A.035 as it was in *Blackaby*. Fiduciaries and real estate practitioners should be aware that sales of land made in violation of this statutory provision could result in title problems.

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<sup>120</sup> KRS § 389.040(1) (1972) had long been construed to require a judicial sale, while KRS § 389.040(2) (1972) appeared to authorize a private sale approved by the court.

<sup>121</sup> *Trimble v. Trimble*, 262 S.W.2d 381 (Ky. 1953); *Vittitow v. Keene*, 95 S.W.2d 1083 (Ky. 1936). Both cases had held that a judicial sale was required to transfer real property limited with a contingent future interest.

<sup>122</sup> Ch. 87, § 10, 1980 Ky. Acts 168.

<sup>123</sup> Ch. 87, § 7, 1980 Ky. Acts 167. This act created an entire new chapter, KRS ch. 389A (fiducial and judicial sales of real estate), which includes procedures for sale or division of realty in which two or more persons share title, but an interest therein may be possessed by persons unborn or not immediately ascertainable. KRS § 389A.035 (Cum. Supp. 1980). Requirements are set out for investment or distribution of the proceeds from the sale.

All laws which previously governed fiducial and judicial sales of real property, *i.e.* KRS §§ 386.090, 389.010-.060 (1972), were repealed. Ch. 87, § 10, 1980 Ky. Acts 168.

Unfortunately, various sections of KRS ch. 389 (sales of realty of persons under disability) were amended in three subsequent acts of the 1980 session. Ch. 160, 1980 Ky. Acts 412; ch. 188, § 284, 1980 Ky. Acts 585; ch. 396 §§ 111-115, 1980 Ky. Acts 1245. All amendments but one constitute mere technical changes in terminology to conform to other parts of KRS. The import of the one substantive amendment is also embodied in the new KRS ch. 389A. Nevertheless, these largely technical amendments, being later in time, had the effect of reenacting most of KRS ch. 389.

These various legislative enactments appeared to provide alternative sections with regard to sales of real property belonging to certain classes of persons under disability. Obviously, it was not the intent of the legislature to enact parallel provisions and KRS ch. 389A should be used for all applicable fiducial and judicial sales. *See* KRS § 446.130 (1975). This problem should be corrected by the 1982 general assembly.

<sup>124</sup> KRS § 389A.035 (Cum. Supp. 1980).

## II. PRIVATE LAW DEVICES FOR LAND USE CONTROL<sup>125</sup>

Historically, restrictions on the use of real property were not viewed with judicial favor.<sup>126</sup> These restrictions interfered with the rights of property owners and, therefore, were strictly construed against the party seeking to enforce them.<sup>127</sup> Over the past three decades, however, the Kentucky courts have shifted from a rule of strict construction to one of strict enforcement. The modern view is that restrictive covenants are to be regarded more as a protection to the property owner and the public than as an undesirable restraint on the use of the property.<sup>128</sup> Reasonable restrictions placed on the use of property in unambiguous language will be strictly enforced, but a restrictive meaning will not be read into ambiguous language.<sup>129</sup> The following cases are illustrative of the current judicial attitude in Kentucky.

### A. Residential Subdivisions

In *Highbaugh Enterprises, Inc. v. Deatrck and James Construction Co.*,<sup>130</sup> the court of appeals again refuted the concept that restrictive covenants should be strictly construed against the party seeking their enforcement. Defendants were homeowners in a subdivision with deed restrictions requiring that plans for various improvements be submitted to the de-

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<sup>125</sup> Two noted authorities have recently published excellent articles on the subject of restrictive covenants, equitable servitudes and reciprocal negative easements: Kratovil, *Building Restrictions—Contracts or Servitudes*, 11 J. Mar. J. Prac. & Proc. 465 (1978); Stoebeck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861 (1977).

<sup>126</sup> See *Meyer v. Stein*, 145 S.W.2d 105 (Ky. 1940).

<sup>127</sup> E.g., *Parrish v. Newbury*, 279 S.W.2d 229, 233 (Ky. 1955); *Norris v. Williams*, 54 A.2d 331, 332-33 (Md. 1947).

<sup>128</sup> See, e.g., *Hayes v. Marshall*, 501 S.W.2d 269 (Ky. 1973); *McFarland v. Hanley*, 258 S.W.2d 3 (Ky. 1953); *Highbaugh Enterprises, Inc. v. Deatrck & James Constr. Co.*, 554 S.W.2d 878 (Ky. Ct. App.), *discretionary review denied*, (Ky. 1977). But see *North Cherokee Village Memb. v. Murphy*, 248 N.W.2d 629, 630 (Mich. Ct. App. 1977) (covenants to be strictly construed against those claiming enforcement right and any doubt to be resolved in favor of property's free use); *Boiling Springs Lakes Div. v. Coastal Services Corp.*, 218 S.E.2d 476 (N.C. Ct. App. 1975) (adherence to the rule of strict construction).

<sup>129</sup> *Hayes v. Marshall*, 501 S.W.2d 269, 272 (Ky. 1973).

<sup>130</sup> 554 S.W.2d 878 (Ky. Ct. App.), *discretionary review denied*, (Ky. 1977).

veloper for his approval.<sup>131</sup> Defendants, who sought to build a concrete parking pad on the front part of their lot, submitted a landscaping plan to the developer who rejected it. Refusing to alter their plans, defendants proceeded with construction of the pad and the developer sought an injunction in the circuit court.<sup>132</sup>

The circuit court denied the injunction, but the court of appeals reversed, reasoning that a parking pad is so “integrally connected” with the landscaping on the lot that it fell within the provision requiring the developer’s prior approval for all landscaping.<sup>133</sup> Although the restrictions were silent on parking facilities, the court was willing to recognize them as landscaping so as to assist the developer in carrying out his general scheme for the subdivision.<sup>134</sup>

*Adams v. Marshall*<sup>135</sup> involved the interpretation of a restrictive covenant requiring the exterior of all residences to be of masonry construction. Holding that “canyon stone”<sup>136</sup> qualified as masonry in conformance with the covenant, the Supreme Court rejected the argument “that ‘canyon stone’ did not exist as a product in 1956 when the deed restriction was executed, and that by masonry construction the parties meant construction of brick or natural stone.”<sup>137</sup> If the restriction contemplates only products in existence at the time of its creation, the Court reasoned, it must contain language to that

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<sup>131</sup> 554 S.W.2d at 879.

<sup>132</sup> *Id.* The lower court was unwilling to go beyond the literal wording of the covenants, which were silent on parking facilities.

<sup>133</sup> *Id.* at 880.

<sup>134</sup> Although no Kentucky case has yet enunciated the distinction, it appears that the courts are eager to enforce a servitude consistent with a developer’s general scheme, but more reluctant to enforce a servitude where it tends to hinder a general scheme of development. Compare *First Sec. Nat’l Bank & Trust Co. v. Peter*, 456 S.W.2d 46 (Ky. 1970) (upholding a reciprocal negative easement) with *Bellemeade Co. v. Priddle*, 503 S.W.2d 734 (Ky. 1973) (refusing to recognize a reciprocal negative easement); compare *Franklin v. Moats*, 273 S.W.2d 812 (Ky. 1954) (upholding a restriction as to residential use despite an assertion of changed conditions) with *Stortz v. Siebenaler*, 490 S.W.2d 728 (Ky. 1973) (invalidating a restriction as to residential use because of changed conditions).

<sup>135</sup> 554 S.W.2d 359 (Ky. 1977).

<sup>136</sup> “[C]anyon stone’ is a product made of cement and a blend of aggregates cast under high pressure in molds resulting in a rough, stone-like appearance.” *Id.* at 359.

<sup>137</sup> *Id.*



effect.<sup>138</sup> *Adams* confirms indications in previous cases that the Court will not interpret covenants retrospectively, but will instead construe restrictive covenants according to their meaning at the time of the controversy.<sup>139</sup>

*Chapman v. Bradshaw*<sup>140</sup> addressed the problem of various restrictive covenants pertaining to construction in a subdivision, but which did not expressly prohibit mobile homes. The Court concluded that mobile homes were prohibited, stating that the use of the word "constructed" in the restriction "refers, in ordinary parlance, to a building permanently attached to the realty . . ." The Court continued: "Clearly, a 'house trailer' violates the requirement that 'any building . . . that is constructed upon this land shall have a solid foundation.'" <sup>141</sup>

## B. Commercial Developments

### 1. Cases Arising Under Common Law

With only rare exceptions,<sup>142</sup> the law makes no distinction between covenants on commercial property and covenants on residential property. The consequences, however, of covenants on commercial property may be more significant because of the magnitude of many commercial undertakings. *Humana, Inc. v. Metts*<sup>143</sup> is illustrative. Metts acquired a ninety-five

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<sup>138</sup> *Id.* at 360.

<sup>139</sup> *Marshall v. Adams*, 447 S.W.2d 57 (Ky. 1969); *Pulliam v. Wiggins*, 580 S.W.2d 228 (Ky. Ct. App. 1978), *discretionary review denied*, 585 S.W.2d 409 (Ky. 1979); *Humana, Inc. v. Metts*, 571 S.W.2d 622 (Ky. Ct. App.), *discretionary review denied*, 585 S.W.2d 400 (Ky. 1978). This construction is a significant departure from earlier cases in which the Court sought to ascertain the intent of the parties in light of surrounding circumstances at the time the restriction was created. See *Ashland-Boyd County Health Dep't v. Riggs*, 252 S.W.2d 922, 925 (Ky. 1952). Kentucky's construction is not generally accepted by the other courts. See *Boiling Springs Lakes Div. v. Coastal Services Corp.*, 218 S.E.2d 476, 478 (N.C. Ct. App. 1975); 20 AM.JUR.2D *Covenants, Conditions, and Restrictions* § 186 (1965).

<sup>140</sup> 536 S.W.2d 447 (Ky. 1976).

<sup>141</sup> *Id.* at 448.

<sup>142</sup> The law provides for more stringent treatment of covenants in restraint of trade. *Pulliam v. Wiggins*, 580 S.W.2d 228, 231 (Ky. Ct. App. 1978), *discretionary review denied*, 585 S.W.2d 409 (Ky. 1979).

<sup>143</sup> 571 S.W.2d 622 (Ky. Ct. App.), *discretionary review denied*, 585 S.W.2d 400 (Ky. 1978).

acre commercial tract and immediately sold twenty acres to Humana. The deed from Metts to Humana restricted the property to professional office use, hospital and extended care nursing home facilities. Humana constructed a hospital and medical center on the premises. The medical center contained two optical dispensaries, a pharmacy and a doctors' exercise club.<sup>144</sup> No other deeds from Metts to subsequent purchasers contained any restrictions.<sup>145</sup>

Metts and the subsequent purchasers brought an action against Humana to enjoin operation of the optical dispensaries, pharmacy and exercise club. Two principal issues were resolved on appeal. First, the court held that the purchasers whose deeds contained no mention of restrictions had standing to enforce the covenants in the Metts-Humana deed.<sup>146</sup> In arriving at this decision the court inquired into whether the covenant was designed to protect only Metts or to protect the remaining property. The court found that the purpose of the covenant was to protect the remaining property; thus, it "runs with the land" and would be enforceable by any successor in interest.<sup>147</sup>

Second, and more important, the court held that the optical dispensaries, pharmacy and doctors' health club were prohibited by the restriction of the property to "professional of-

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<sup>144</sup> *Id.* at 623.

<sup>145</sup> *Id.* at 626.

<sup>146</sup> At first blush, this appears to be a moot issue. Since Metts was a plaintiff, he could enforce the covenants and his vendees did not require standing. A careful reading of the case, however, suggests that Metts may have been an involuntary plaintiff. It is possible that Metts was willing to release Humana on the covenants. *See id.* at 624-25.

The sales agreement between Metts and Humana set out the restricted use to be made of the land, and these restrictions were repeated in the deed. The agreement also contained the following sentence not in the deed: "No other use shall be made of the subject property without the express written consent of Metts." *Id.* at 624. The implication was that Metts could unilaterally lift the restrictions, notwithstanding the objections of Metts' subsequent purchasers. The court properly applied the doctrine of merger to reject this argument: "The terms, conditions, provisions and restrictions of the contract for the purchase were merged into the deed of conveyance. Any conflict between the two must be construed in favor of the latter. There is no authority given in the deed for anyone to grant relief from the restrictions." *Id.* at 625.

<sup>147</sup> *Id.* at 625-26. *See* Annot., 51 A.L.R.2d 556 (1973) (who may enforce restrictive covenant).

office use."<sup>148</sup> The court reasoned: "It is not for the Court to ascertain what the parties meant to say. It is for the Court to determine what the parties meant by what they did say."<sup>149</sup>

Although in keeping with the court's recent decisions that covenants will be strictly enforced according to their terms,<sup>150</sup> the holding is surprising because the ordinary meaning of "professional office use" today includes pharmacies and similar facilities as "ancillary medical services."<sup>151</sup> Moreover, the decision violates the principle that covenants made in restraint of commerce should be given the least restrictive interpretation.<sup>152</sup> Thus, the doctors' club should have been excluded, but the other facilities should have been allowed to remain. The lesson of *Metts* is that the courts will not supply provisions that the parties may have intended but inadvertently omitted.

*Pulliam v. Wiggins*<sup>153</sup> presents an interesting comparison to *Metts*. Whereas *Metts* involved a servitude on one small tract for the benefit of the larger whole, *Pulliam* involved a servitude on the entire area for the benefit of one small tract. *Wiggins* and others purchased land for development as a shopping center, and subsequently conveyed one lot to *Pulliam* through a ground lease.<sup>154</sup> *Pulliam* drafted the lease, which contained a provision that *Pulliam* was to build a drive-in restaurant and that neither the lessors, nor their heirs, assigns or nominees were to lease, assign or sell any other prop-

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<sup>148</sup> 571 S.W.2d at 627.

<sup>149</sup> *Id.* at 626. *Accord*, *Marshall v. Adams*, 447 S.W.2d 57, 60 (Ky. 1969).

<sup>150</sup> *E.g.*, *Hayes v. Marshall*, 501 S.W.2d 269 (Ky. 1973).

<sup>151</sup> 571 S.W.2d at 627 (Wilhoit, J., concurring in part and dissenting in part). Indeed, the recognition of ancillary services in a professional office building is so pervasive than many zoning ordinances which contain a "professional office" designation expressly allow them as "accessory uses." *See, e.g.*, LEXINGTON-FAYETTE URBAN COUNTY, KY., ZONING ORDINANCE RESOLUTION sch. sheet 2 of 5 (1975). *But see* *North Cherokee Village Memb. v. Murphy*, 248 N.W.2d 629, 630 (Mich. Ct. App. 1977) (rejecting references to analogous statutory provisions for the purpose of interpreting restrictive covenants).

<sup>152</sup> Although the court recognized the principle in one paragraph of its opinion, it seemed unable to stray from the narrow meaning for the covenant in question. 571 S.W.2d at 626.

<sup>153</sup> 580 S.W.2d 228 (Ky. Ct. App. 1978), *discretionary review denied*, 585 S.W.2d 409 (Ky. 1979).

<sup>154</sup> *Id.* at 229.

erty owned by them in that area for a similar type business. The lessors reserved the right to one "McDonald type restaurant" to be located anywhere on the property, and to other restaurants with inside service in the shopping center proper.<sup>155</sup>

After Pulliam had built his restaurant, Wiggins deeded Pulliam's lot in fee to Wylie, who later sold it to Pulliam. Each conveyance was made subject to the foregoing provision. Wiggins then announced that he intended to build a free standing Bonanza Steak House, and Pulliam sued to enjoin Wiggins.<sup>156</sup>

Since Pulliam had acquired the fee to his own leasehold, Wiggins maintained that the lease (with its restrictions) had merged into the greater estate and had been extinguished.<sup>157</sup> The court recognized the rule of merger,<sup>158</sup> but refused to apply it to defeat the covenant which Pulliam clearly intended to be preserved throughout the transactions.<sup>159</sup>

Next, the court, in determining the meaning of "shopping center proper," vigorously applied the principle of narrow construction of agreements in restraint of trade.<sup>160</sup> Moreover, it properly observed "that a contract must be construed more strongly against the party who prepared it."<sup>161</sup> Thus the court found the shopping center proper to be any part of "the developed area, reachable by motor vehicle . . . by established roads and parking areas," and Wiggins was allowed to build

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<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 229-30.

<sup>157</sup> *Id.* at 230.

<sup>158</sup> *Id.* (citing *Larmon v. Larmon*, 191 S.W. 110, 112 (Ky. 1917)). The doctrine of merger has its roots in the Rule in *Shelley's Case* and, as it relates to *Pulliam*, means that when the same person comes into ownership of a leasehold estate and the underlying remainder in fee simple at the same time, the leasehold is merged into the fee simple, destroying all incidents of the leasehold including the restrictive covenants.

<sup>159</sup> The court stated: "[T]here can be no merger when it is contrary to the intention of the parties." 580 S.W.2d at 230. *Accord*, 28 AM.JUR.2D *Estates* § 328 (1966); 31 C.J.S. *Estates* § 124, at 226-27 (1964). *See also* KRS § 381.110 (1972) (abolishing the destructibility rule).

<sup>160</sup> 580 S.W.2d at 231. *Cf. Snyder's Drug Stores, Inc. v. Sheehy Properties, Inc.*, 266 N.W.2d 882 (Minn. 1978) (narrow construction of restrictive covenant which would prohibit lessor from letting any property for restaurant similar to one operated by lessee).

<sup>161</sup> 580 S.W.2d at 231.

the Bonanza Steak House.<sup>162</sup> Although there were several indications that Pulliam intended the term "shopping center proper" to embrace only the main building of a conventional strip shopping center or mall,<sup>163</sup> it is also interesting to note that the construction of the provision urged by Pulliam would have allowed restrictions against restaurants which were not considered as competition in the first place.<sup>164</sup>

*Pulliam* confirms two principles which have guided courts in arriving at decisions relating to covenants. First, while professing to examine conditions that existed when the covenant was created, courts will examine the meaning of the covenant in light of conditions as they existed at the time of the controversy.<sup>165</sup> Second, courts will look more favorably upon a covenant that, in benefitting a large area, places a burden on a relatively small area, rather than one which has the opposite effect.<sup>166</sup>

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<sup>162</sup> *Id.*

<sup>163</sup> The restriction permitted the lessor (Wiggins) "to have other restaurants . . . located in the shopping center proper." *Id.* at 231, 239 (emphasis added). A construction consistent with that imposed by the court would have permitted Wiggins to build other restaurants located on the shopping center proper.

<sup>164</sup> Under Pulliam's construction of the covenant, restaurants without drive-in service would have been prohibited, while the language of the covenant could easily be interpreted to exclude only fast food restaurants with drive-in service. As the court points out, "[t]he restriction involved herein is one designed to either eliminate drive-in competition or limit other types of food establishments in the same shopping complex." *Id.* at 231. The court simply opted for the least restrictive interpretation.

<sup>165</sup> *Cf. Adams v. Marshall*, 554 S.W.2d 359 (Ky. 1977) (holding that canyon stone complies with covenant requiring masonry construction, when canyon stone was unknown at the time of the covenant's creation).

The covenant in *Pulliam* was originally made in 1967 when the fast food industry was in its infancy. 580 S.W.2d at 229. Free standing fast food stores were seen infrequently, unlike the present pattern where restaurants, branch banks and auto service stores, etc., occupy the road frontage with a shopping mall set further back behind these units. It was much easier in 1978 to conceive of the "shopping center proper" as including highway frontage than it would have been in 1967.

In addition, the court noted that appellant's "testimony is quite uncertain as to what the developers of the center represented to him could comprise the future shopping center, and if he was unsure of the situation [at the time the covenant was created], we certainly cannot provide the facts necessary to sustain his position." *Id.* at 231.

<sup>166</sup> *Cf. Humana, Inc. v. Metts*, 571 S.W.2d 622 (Ky. Ct. App.), *discretionary review denied*, 585 S.W.2d 400 (Ky. 1978) (the burdened property was the smaller part of the whole).

## 2. *Leasehold Covenants and Kentucky's Consumer Protection Act*

A case of first impression in Kentucky, *Mendell v. Golden-Farley of Hopkinsville, Inc.*<sup>167</sup> questioned the statutory legality of covenants contained in a shopping center lease which restrict competition. Golden-Farley leased space for a men's store in a shopping mall. In an addendum to the lease, the mall owners agreed not to rent additional space for the purpose of selling "medium to better" men's or boys' clothing.<sup>168</sup> Six years into the ten year lease, the mall let space to another company for a men's store which competed directly with Golden-Farley. As a result of this action Golden-Farley sought and obtained a restraining order against the mall owners in circuit court.<sup>169</sup>

The only serious defense raised was that the restriction in the lease should not be enforced because it violated KRS section 367.175, a part of the Consumer Protection Act.<sup>170</sup> Observing that the wording of this statute parallels sections one and two of the Sherman Anti-Trust Act,<sup>171</sup> the court turned to federal decisions for guidance. The United States Supreme Court has construed the Sherman Act as prohibiting "those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable."<sup>172</sup>

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<sup>167</sup> 573 S.W.2d 346 (Ky. Ct. App.), *remanded for issuance of mandate*, 573 S.W.2d 61 (Ky. 1978).

<sup>168</sup> *Id.* at 347-48. Not affected by this restriction were five large anchor tenants (J. C. Penney Co., Walgreen Drug Co., Montgomery Ward, F. W. Woolworth Co., and Malone & Hyde Supermarket) to whom space had already been leased.

<sup>169</sup> *Id.* at 348.

<sup>170</sup> KRS §§ 367.110-300 (Cum. Supp. 1980). KRS § 367.175 provides:

(1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this Commonwealth shall be unlawful.

(2) It shall be unlawful for any person or persons to monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce in this Commonwealth.

KRS § 367.175 (Cum. Supp. 1980).

<sup>171</sup> 15 U.S.C. §§ 1-7 (1976).

<sup>172</sup> 573 S.W.2d at 349 (quoting from *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959)).

Applying these standards, the court concluded that the enactment of KRS section 367.175 did not materially change Kentucky common law with respect to the validity of restrictive covenants in leases and thus the restriction was upheld.<sup>173</sup>

*Mendell* indicates that Kentucky courts will continue to examine the validity of restrictive covenants in restraint of trade by applying common law principles.<sup>174</sup> Therefore, it would appear that anti-trust theories must be pursued in federal court.<sup>175</sup>

### III. COMMON LAW DEDICATION

In *Herron v. Boggs*,<sup>176</sup> a developer filed a subdivision plat, with a portion designated "PARK." The plat was shown to all purchasers and all lots were sold by reference to it. After selling all the lots, the developer constructed a residence in the park. Three years later, the lot owners filed suit asking for injunctive relief for removal of the residence.<sup>177</sup>

The Kentucky Supreme Court granted the lot owners the requested relief, stating: "When [the developer] recorded the plat and sold lots in accordance with the plat, this constituted a dedication of the streets and the PARK to the public and thereby divested [him] of legal title to the area."<sup>178</sup> The plat became incorporated by reference as a part of the deeds to the individual lots; thus, the park became an appurtenance to each lot.<sup>179</sup>

*Herron* is consistent with a long line of Kentucky cases,<sup>180</sup> some of which have implied that the mere filing of a plat con-

<sup>173</sup> 573 S.W.2d at 349.

<sup>174</sup> See generally Annot., 97 A.L.R.2d 4 (1964); see also Annot., 1 A.L.R.4th 942 (1980).

<sup>175</sup> The extent to which the federal courts will tolerate shopping center lease restrictions in restraint of trade is still an unsettled question. See generally *Harold Friedman, Inc. v. Thorofare Markets, Inc.*, 587 F.2d 127 (3d Cir. 1978); Note, *The Antitrust Implications of Restrictive Covenants in Shopping Center Leases*, 86 HARV. L. REV. 1201 (1973).

<sup>176</sup> 582 S.W.2d 643 (Ky. 1979).

<sup>177</sup> *Id.* at 643-44.

<sup>178</sup> *Id.* at 644.

<sup>179</sup> *Id.* (quoting *Cassell v. Reeves*, 265 S.W.2d 801, 802 (Ky. 1954)).

<sup>180</sup> See, e.g., *South Covington & C. St. Ry. v. Newport, L. & A. Turnpike Co.*, 62 S.W. 687 (Ky. 1901).

stituted an irrevocable dedication of the streets and open areas.<sup>181</sup> In *Herron*, however, the owner sold lots with reference to the plat, thereby creating an expectation in the purchasers. Therefore, it is impossible to determine whether *Herron* represents a retreat from earlier cases whereby both filing of a plat and reliance thereon would be required before courts would find a dedication.<sup>182</sup>

In *Kemper v. Cooke*,<sup>183</sup> a street was platted and filed in a rural subdivision plat in 1968. It was opened as a passage through the subdivision in 1970. In 1976, owners of property abutting the street barricaded one of its outlets, rendering it useless except to subdivision residents.<sup>184</sup> A member of a church which was located near the barricade, but outside the subdivision, sought an injunction to remove the obstruction, alleging injury because the closing of the street required him to take a longer route to his church.<sup>185</sup>

The court of appeals denied the church member relief because the street in question had never been accepted by the fiscal court as part of the county road system. Therefore, the court concluded, it could not be kept open for use by the general public, and further, the county was not required to accept responsibility for the street's maintenance.<sup>186</sup>

As the developer had clearly dedicated the street for public purposes, it no longer belonged to any individual. It had not, however, attained the status of required public maintenance. Neither did it have to be maintained for the public by the abutting owners. Therefore, they were free to maintain the road in any way they mutually saw fit, including barricad-

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<sup>181</sup> *E.g.*, *Fayette County v. Morton*, 138 S.W.2d 953 (Ky. 1940); *Martin v. Hampton Grocery Co.*, 76 S.W.2d 32 (Ky. 1934). This is clearly a minority position. *See* 3 AMERICAN LAW OF PROPERTY § 12.134, at 476 (A.J. Casner ed. 1952).

<sup>182</sup> This distinction would be relevant in situations where a developer desires to alter his plans after filing a plat but before selling any lots.

<sup>183</sup> 576 S.W.2d 263 (Ky. Ct. App. 1979).

<sup>184</sup> *Id.* at 265.

<sup>185</sup> *Id.* at 264-65. The suit was originally brought on behalf of the church by its trustees, but these parties withdrew early in the case. There is dictum implying the outcome may have been different had the church as a whole stayed in the case and proved damage to its property because of the barricade. *Id.* at 266.

<sup>186</sup> *Id.* at 265.



ing one end.<sup>187</sup> *Kemper* indicates that, in the absence of any statute to the contrary, the general public has no right to enjoyment of a passageway not maintained by a governmental unit.<sup>188</sup>

#### IV. EASEMENTS APPURTENANT

Easements may arise in a variety of ways.<sup>189</sup> During the survey period, however, there were significant cases involving only two of the methods whereby easements are created: estoppel and implied grant or reservation.

##### A. *Easements by Estoppel*

An easement by estoppel may be described as a license which has become irrevocable because of expenditures made by the licensee, coupled with acquiescence of the licensor.<sup>190</sup> These conditions were present in *Holbrook v. Taylor*<sup>191</sup> wherein Taylor used an old haul road running across the hilly woodlands of Holbrook's property to move materials and equipment to Taylor's lot. With Holbrook's permission, Taylor widened the road, put in a culvert and graveled it. Taylor continued to use the road for five years without objection from Holbrook.<sup>192</sup>

The Kentucky Supreme Court held that Taylor's license

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<sup>187</sup> *Id.* at 265-66.

<sup>188</sup> The court's reasoning is sound and its conclusion generally correct except that the street had been open from 1970 to 1976, a period of more than five years. KRS § 178.025(1) (Cum. Supp. 1980) provides: "Any road, street, highway or parcel of ground dedicated and laid off as a public way and used without restrictions by the general public for five (5) consecutive years, shall conclusively be presumed to be a public road." The holding, therefore, could not have been based on the right of abutting property owners to barricade the street. The case was correctly decided on its facts because the court also concluded that the plaintiff lacked standing to maintain the action.

<sup>189</sup> Easements may arise by grant, reservation or exception, covenant, agreement, dedication, prescription, implied grant or reservation, or estoppel. 2 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 330 (J. Grimes 1980 repl.).

<sup>190</sup> See *Holbrook v. Taylor*, 532 S.W.2d 763, 765 (Ky. 1976); *Bob's Ready to Wear, Inc. v. Weaver*, 569 S.W.2d 715, 720 (Ky. Ct. App. 1978); 2 AMERICAN LAW OF PROPERTY § 8.116 (A.J. Casner ed. 1952).

<sup>191</sup> 532 S.W.2d 763 (Ky. 1976).

<sup>192</sup> *Id.* at 766.

had achieved the status of an easement by estoppel. The Court stated that where a party acquires a license to use the property of another, and with the knowledge and acquiescence of the licensor makes expenditures connected with its use, then "the license becomes irrevocable and continues for so long a time as its nature calls for."<sup>193</sup>

In *Bob's Ready to Wear, Inc. v. Weaver*,<sup>194</sup> the court applied easement by estoppel to grant access to the back door of a store building across an adjacent parking lot.<sup>195</sup> *Bob's*, however, developed the principle that an easement by estoppel is not an easement of unlimited duration. The owner of the dominant estate is entitled to rely on the easement's continued existence only for as long as the servient estate can practically support the intended use granted by the license. Although the owners of the parking lot were estopped to revoke the store's license of access to the back door, the owners were not forever required to use their property as a parking lot to support the easement. The court stated: "If the . . . property should cease to be used as a parking lot open to members of the public, then the [store's] license should also cease."<sup>196</sup>

## B. Easements by Implication

### 1. Implied Reservation of Easement

"The term 'easement by implication' includes both easements of necessity and so-called *quasi*-easements."<sup>197</sup> In *Carr v. Barnett*,<sup>198</sup> Barnett conveyed five acres of a fifteen acre tract of land to Carr. The remaining ten acres were landlocked, as all the road frontage was conveyed with the five acres. Because there was no reservation of an easement in the

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<sup>193</sup> *Id.* at 765.

<sup>194</sup> 569 S.W.2d 715 (Ky. Ct. App. 1978).

<sup>195</sup> *Id.* at 720. For additional facts of this case, see text accompanying notes 204-205 *infra*.

<sup>196</sup> *Id.* at 721. Of course, the servient owner's cessation of the property's present use is subject to the usual requirement of good faith. *Id.*

<sup>197</sup> *Id.* at 718 n.1. See generally Note, *Implied Easements of Necessity Contrasted with Those Based on Quasi-Easements*, 40 Ky. L.J. 324 (1952); Note, *Reservation of Easements by Implication*, 22 Ky. L.J. 313 (1934).

<sup>198</sup> 580 S.W.2d 237 (Ky. Ct. App. 1979).

deed, the court held that there had been an implied reservation of an easement across Carr's land.<sup>199</sup>

An easement may be implied in favor of the grantor or the grantee. When the grantee seeks an easement across his grantor's land, it is only required that the easement be "reasonably necessary."<sup>200</sup> But when the grantor seeks an implied reservation of an easement, the standard is that the easement be "strictly necessary."<sup>201</sup> Since Barnett, as the grantor, had no means of access other than across Carr's land, he met the higher "strictly necessary" standard that applied to him.

## 2. *Implied Grant of Easement*

In *Bob's Ready to Wear, Inc. v. Weaver*,<sup>202</sup> it was the grantee who sought an easement by implication. Bob's store and Weaver's restaurant were located in adjacent downtown buildings sharing a common wall. Until 1971, the two buildings and a parking lot behind them all shared common outside ownership. In 1971, the store and restaurant owners each bought the building occupied by them. Bob's store made substantial improvements to the back of its building, putting in a new rear entrance from the parking lot and new display windows. In 1976, Weaver purchased the parking lot and closed off the rear entrance to Bob's store by erecting a chain link fence on the common boundary.<sup>203</sup>

The court of appeals affirmed a lower court ruling that Bob's store was not entitled to an easement by implication across the parking lot.<sup>204</sup> Of several factors listed by the court for determining whether the parties have intended to create an easement,<sup>205</sup> all were favorable to Bob's store except that of

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<sup>199</sup> *Id.* at 240.

<sup>200</sup> *Bob's Ready to Wear, Inc. v. Weaver*, 569 S.W.2d at 719.

<sup>201</sup> *Carr v. Barnett*, 580 S.W.2d at 240.

<sup>202</sup> 569 S.W.2d 715 (Ky. Ct. App. 1978).

<sup>203</sup> *Id.* at 717-18.

<sup>204</sup> *Id.* at 720.

<sup>205</sup> Among the factors bearing upon the intention of the grantor and grantee are the following: (1) whether the claimant is the grantor or the grantee of the dominant tract; (2) the extent of necessity of the easement to the claimant; (3) whether reciprocal benefits accrue to both the grantor and grantee; (4) the manner in which the land was used prior to conveyance;

whether reciprocal benefits accrue to both the grantor and grantee. The court recognized that any benefits accruing to Weaver would cease if he wanted to make any other use of the parking lot. This factor, combined with the absence of any absolute necessity for the easement caused the court to "conclude that the trial judge did not err in refusing to adjudge [Bob's store] an easement by implication."<sup>206</sup>

### C. *Intensification of the Easement's Use*

*Smith v. Combs*<sup>207</sup> examined the rights of the parties when the dominant estate is transformed from a single tract into a subdivision. This intensified use of the easement imposes a much greater burden on the servient estate. The court of appeals surveyed prior case law<sup>208</sup> and formulated a three part test for use in determining whether the additional burden is unreasonable in any given case.

First, under the test, extending a roadway easement to land not a part of the original dominant tract constitutes an unreasonable burden.<sup>209</sup> Second, whether the intensified use of the *original* dominant tract constitutes an unreasonable burden is a question of fact, unless, third, the intensified use was contemplated by the parties when the easement was created, in which case it cannot be held unreasonable.<sup>210</sup>

### D. *Interference with Use of the Easement*

#### 1. *Obstructing the Passway*<sup>211</sup>

*Stewart v. Compton*,<sup>212</sup> one of the most useful property

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and (5) whether the prior use was or might have been known to the parties to the present litigation.

*Id.* at 719.

<sup>206</sup> *Id.* at 720.

<sup>207</sup> 554 S.W.2d 412 (Ky. Ct. App. 1977).

<sup>208</sup> *Delph v. Daly*, 444 S.W.2d 738 (Ky. 1969); *McBrayer v. Davis*, 307 S.W.2d 14 (Ky. 1957). See generally Annot., 10 A.L.R.3d 960 (1966) (right of owners of parcels into which dominant tenement is or will be divided to use right of way).

<sup>209</sup> 554 S.W.2d at 413-14.

<sup>210</sup> *Id.* at 414.

<sup>211</sup> See generally Annot., 52 A.L.R.3d 9 (1973) (right to maintain gate or fence across right of way).

<sup>212</sup> 549 S.W.2d 832 (Ky. Ct. App. 1977).

cases decided during the survey period, involved the passway to a cemetery across part of a farm. The servient owner took title to the farm with knowledge of the easement, and with an express reservation in the deed for the passway. When the owner placed a locked gate across the passway, the dominant owners sought an injunction to have the lock removed.<sup>213</sup>

The court of appeals held that since the passway was reserved as an open or free passway for use without hindrance, the lock created an unreasonable burden on the easement. Requiring the owners of the easement to use keys was an unreasonable burden, especially when there was no discernible reason for locking the gate.<sup>214</sup> The court further held that the easement owners were entitled to a reasonable amount of space in which to turn their vehicles around.<sup>215</sup>

## 2. *Relocating the Passway*

Not only did the servient owner lock the gate in *Stewart*, he also bulldozed the existing passway and moved its location.<sup>216</sup> In upholding his right to do so, the court stated: "[T]he owner of a servient estate may change the location of a free passway easement so long as [he] does not change the beginning and ending thereof and it does not result in a material inconvenience to the rights of those entitled to use the [easement]."<sup>217</sup>

*Stewart* contains a useful principle the application of which can result in increasing the value of burdened property to its owners.<sup>218</sup> Because the only limitation on moving passways to more convenient locations is that the relocation not be unreasonable or burdensome, servient owners will be able,

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<sup>213</sup> *Id.* at 832-33.

<sup>214</sup> There was no dispute over the owner's right to maintain a gate, but only his right to keep it locked. *Id.* See generally *Herndon v. McKinley*, 586 S.W.2d 294 (Ky. Ct. App. 1979).

<sup>215</sup> 549 S.W.2d at 833.

<sup>216</sup> *Id.* at 832.

<sup>217</sup> *Id.* at 833.

<sup>218</sup> See M. FRIEDMAN, *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* § 4.9(m) (3d ed. 1975).

in many cases, to ameliorate the effects of a burdensome easement by relocating it.<sup>219</sup>

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<sup>219</sup> Of course, the principle is not applicable when the location of the easement is specified in the instrument creating it. *Newberry v. Hardin*, 161 S.W.2d 369 (Ky. 1942).

