Denver Law Review

Volume 40 | Issue 1 Article 8

1963

Vol. 40, no. 1: Full Issue

Denver Law Center Journal

Vol. 40, no. 1: Full Issue

DENVER LAW CENTER JOURNAL

INCORPORATING DICTA

VOLUME 40

1963

PUBLISHED BI-MONTHLY BY

The Denver Bar Association

The Colorado Bar Association

The University of Denver College of Law

DENVER LAW CENTER JOURNAL

INCORPORATING DICTA

VOLUME XL JANUARY-FEBRUARY, 1963 NUMBER 1

FEATURED THIS ISSUE:

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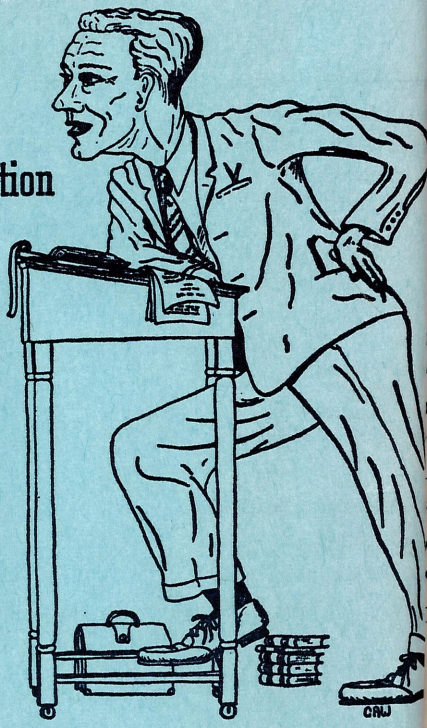

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Volume XL, No. 1 **January-February, 1963**

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Member National Conference of Law Reviews.

ADVERTISING AGENT: *DENVER LAW CENTER JOURNAL* Advertiser, College of Law, 200 West 14th Avenue, Denver 4, Colo., ALpine 5-3441, ext. 644.

SUBSCRIPTIONS AND CONTRIBUTIONS: Mail contributions or orders for subscriptions or back issues to *DENVER LAW CENTER JOURNAL* Business Editor, University of Denver College of Law, 200 West 14th Avenue, Denver 4, Colorado. $1.00 per copy, $5.00 per year, $6.50 per year outside United States. Draw checks payable to *"DENVER LAW CENTER JOURNAL."*

The submission to the editors of articles of interest in the profession is invited. The opinions expressed herein, unless otherwise indicated, are not necessarily those of the Associations, the College of Law, or the Editors.

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With this issue, Volume 40, number 1, the traditional name DICTA is changed to the DENVER LAW CENTER JOURNAL. Since 1923, DICTA and its predecessor **The Denver Bar Association Record** have been serving the Bench and Bar of Colorado with commentary and analysis of the developments in Colorado law.

The new University of Denver Law Center now houses the Denver Bar Association, the Colorado Bar Association and the University of Denver College of Law, the cooperating publishers of this journal, which fact has given rise to the new name.

The editors suggest, for the sake of uniformity, that the journal be cited Denver L.C.J.

The Denver Bar Association, the Colorado Bar Association and the University of Denver College of Law invite your submission of articles for publication in the journal and express our appreciation for the continued support of our three thousand subscribers in this country and abroad.

— *The Editors*

HOMESTEAD VS. MECHANICS' LIEN

By DAVID W. KNAPP*

I. HOMESTEADS (HISTORY AND PRINCIPLES)

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

Thus spoke Senator Benton in advocating in the United States Senate the adoption of a general homestead policy.[1] The homestead is defined by Black as being, "technically, and under the modern homestead laws, an artificial estate in land, devised to protect the possession and enjoyment of the owner against the claims of his creditors, by withdrawing the property from execution and forced sale, so long as the land is occupied as a home."[2] On the other hand Tiffany tells us that while the homestead frequently has the characteristics of an estate, it is difficult to conceive how the right of an owner of land to hold such land exempt from liability for debts can be in any sense an "estate."[3] Regardless of the difficulty of precise characterization of the homestead, the need for such laws has been recognized[4] and their beneficial objectives jealously protected in those states granting such rights.

The desirability of such protection for the homeowner was recognized by the framers of the Colorado Constitution when they provided the general assembly with authority to pass liberal homestead and exemption laws.[5] This protection of the homeowner was made real by the Legislature when they enacted the predecessor of what is now Article 3 of Chapter 77 of the Colorado Revised Statutes.[6] This, of course, was only a step in the right direction. The ultimate protection and its extensiveness had to be determined by the supreme court by interpretation of the statutory provisions.

In laying down a guide for subsequent interpretation of the statutes the supreme court stated, in an early case,[7] the two governing principles underlying all homestead legislation. These principles were declared to be,

> "*First,* the beneficient design of protecting the citizen householder and his family from the danger of miseries of destitution consequent upon business reverses, or against calamities arising from other causes; and, *second,* the sound public policy of securing the permanent habitation of the family, and cultivating the local interest, pride, and affec-

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* Recent graduate, University of Denver College of Law.

1 Thirty Years in the Senate, 103-104; see Thompson, Homestead and Exemption Laws, §1 (1878).

2 Black, Law Dictionary (4th ed. 1951).

3 2 Tiffany, The Modern Law of Real Property 1121 (1903).

4 Forty-six states presently have provisions either in their constitutions or in their statutes. See appendices A and B.

5 Colo. Const. art. XVIII, § 1.

6 Colo. Rev. Stat. §§ 77-3-1 to 77-3-11 (1953).

7 Barnett v. Knight, 7 Colo. 365, 3 Pac. 747 (1884).

tion of the individual, so essential to the stability and prosperity of a government."[8]

In that same case the court went farther in laying down a sound basis for giving full effect to the statutory provisions for the homestead by saying "homestead exemption is entirely the creature of statute, but the statute is not in derogation of the common law, for at common law the creditor had no right to sell the debtor's land, (Thomp. Homest. & Ex., Sec. 2, and note;) and the rule is fully established that the statutory provisions are to be liberally construed for the purpose of giving effect to the principles above named."[9] Through the years, since *Barnett v. Knight*, the Colorado Supreme Court has continued to recognize these fundamental principles and has further strengthened the position of the homestead by declaring that the statute in no way rests upon the principles of equity and does not in any way yield thereto.[10]

Two other declarations by the court have placed the homestead in an almost insurmountable position with regard to claims by creditors. First, the court has stated that "the policy of the State is to preserve the home to the family, even at the sacrifice of just demands, for the reason that the preservation of the home is deemed of paramount importance."[11] Second, in the response to a question whether the homestead was vitiated when the designation thereof as a homestead was for the purpose of preventing the creditor from collecting his debt, the court held and has repeatedly affirmed that such purpose and the consequent result of such designation are warranted by the statute.[12]

Thus, it is seen that the Colorado Supreme Court has fully recognized the importance of the homestead and has constantly striven for its fullest protection.

II. Mechanics' Liens (History and Principles)

The mechanics' lien is also based on strong underlying public policy. At common law, no lien upon land was recognized.[13] Therefore, at present, the only liens which can be imposed upon land, apart from equitable liens proper and mortgages, are those authorized by statute, known as "statutory liens."[14] A lien is defined by Black as "a charge or security or encumbrance upon property."[15] Tiffany describes the mechanics' lien as "a lien on land and on the fixtures and improvements thereon, created by statute, to secure the compensation of persons who, under contract with the owner or some person authorized in his behalf, contribute labor or materials to the improvement of the land."[16] This definition leads inevitably to the basic purpose behind the mechanics' lien. The object and purpose of the mechanics' lien statute as stated by Lane "is to secure to the mechanic and materialman who, by their labor and material, have directly contributed to enhance the value of property, the security of a lien thereon to the extent they have thus

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8 *Id.* at 370, 3 Pac. at 748.
9 *Id.* at 370, 3 Pac. at 748-49.
10 McPhee v. O'Rourke, 10 Colo. 301, 15 Pac. 420 (1887).
11 *Id.* at 307, 15 Pac. at 423.
12 *Id.* at 306, 15 Pac. at 422.
13 2 Tiffany, The Modern Law of Real Property 1296 (1903).
14 *Ibid.*
15 See note 2 *supra*
16 See note 13 *supra* at 1297.

added to its value."[17] The Colorado Supreme Court aptly stated the purpose of the mechanics' lien when it said, "The manifest object is to prevent wrong to the mechanics by alienation or incumbrances during the progress of the work. Subsequent alienations or incumbrances are not prevented, but made subordinate to the right of the mechanics who, at the time, were engaged in working and continued afterward to work under previous employment by the vendor."[18]

The statutory proceedings to enforce such rights as are granted under the mechanics' lien laws are in their nature equitable and were administered by the Chancery side of the court at the time such was in being.[19] Thus, in considering the objects and purposes of the mechanics' lien laws, the underlying public policy seems to be made self-evident. The legislature was attempting to alleviate the plight of the laborer and materialman and to prevent the property owner from perpetrating a wrong upon them. That this policy is deserving of serious consideration and that these laws should be construed liberally in order to advance their purposes and objects and to favor those who have the right to invoke their aid was made quite clear early in Colorado judicial history.[20]

Thus, we have considered two entirely separate statutory rights granted by the Colorado legislature and the policies, purposes and objectives advanced by them. The questions that remain are: First, whether the rights granted by these statutes will come into conflict, and when? Second, if and when that occurs, which one will be superior and why?

III. THE PROBLEM

Conceivably, two problems could arise in connection with the application of these two statutory provisions. In order to understand these problems better, two fact situations will be posed to illustrate how they might arise.

A. In the first situation, let us suppose that H, home owner, owns a home which he has, according to the statute, designated as a homestead. Subsequently, he decides to place an addition on his house.[21] In order to do this, H hires C, contractor, to do the work and buys the material for the addition from M, a materialman. For various possible reasons, either C or M, or both, have not been paid.[22]

B. In the second situation, nearly the same facts appear but the time sequence will be changed slightly. In this instance, let us assume that H has not designated his home as a homestead until after the work was started and material furnished but before the completion of the job and before execution on any judgment.

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17 Lane, Mechanics' Liens in Colorado 3 (1948).

18 Mellor v. Valentine, 3 Colo. 255 (1877), citing Phillips, Mechancis' Liens, Sec. 228-229 (2d ed. 1883).

19 The San Juan and St. Louis Mining and Smelting Co. v. French, 6 Colo. 214 (1882).

20 Maker v. Shull, 11 Colo. App. 322, 52 Pac. 1115 (1898); Cornell v. Conine-Eaton Lumber Co., 9 Colo. App. 225, 47 Pac. 912 (1896).

21 Presumably the problem could not arise where the work accomplished was the entire construction of the house since it is necssary in Colorado to occupy the homestead. However, this type of factual situation and problem has arisen in other states where the homestead was declared before the mechanics' lien was perfected or where mere intent was sufficient to establish the homestead and occupancy was not a requisite. Also, of course, there is a stated exception in favor of the vendor's lien.

22 In some states whether the unpaid person is C or M seems to be very critical. However, in Colorado it appears that it would make little difference with the possible exception of the equities being greater in one case than the other. Sometimes, non-payment of M is caused by insolvency of C.

In either case above, C or M, or both, could presumably avail themselves of the proceedings for foreclosure and sale of the property under the mechanics' lien laws. This of course is assuming that they have complied with the statutory requirements of notice, filing, etc. It also seems possible, however, from the strict wording of the homestead statutes that H could prevent the sale of his house by reason of its designation as a homestead.[23]

Here, it will be observed, the problem has arisen. H is entitled, according to the statute, to his homestead exemption. Similarly, C and M are entitled to satisfaction of their judgments for mechanics' liens.

[23] It should probably be noted here that in order to make the problem really exist it will have to be assumed that the value of the property, even after the addition, does not exceed the statutory limit of $5,000. It might also be worthy of mention at this point that a problem can arise with regard to additions concerning the actual sale. Supposedly, the lien exists only on that part of a house on which the work was done.

Whether the second problem can arise must, of course, depend upon the solution to the first problem. If the homestead is not superior to the mechanics' lien when it is filed before the work was done or material furnished, *a fortiori*, the homestead could not be superior in the second case. However, if the homestead in the first case is superior to the mechanics' lien, then the question arises whether it is superior in all cases, *e.g.*, in problem 2.

IV. ANALYSIS OF THE FIRST PROBLEM

A. The Homestead

1. The Constitutional Provisions

The Colorado Constitution provides that "The general assembly shall pass liberal homestead and exemption laws."[24] Exactly what this means or indicates concerning a possible solution to the present problem is difficult to determine. The constitutional provision has seldom been discussed in Colorado cases. In *Wright v. Whittick*,[25] it was held that this provision does not designate what shall constitute a homestead but that the statute must be examined to determine such matters. It has also been held that homestead laws are not in derogation of the common law and that they should be liberally construed.[26] Thus, it seems that the constitutional provision for the homestead exemption is somewhat meager and offers little aid in an analysis of the problem. An investigation into the constitutional history of this section has proved fruitless. However, it must be borne in mind that at least the framers of the Colorado Constitution felt the homestead was of sufficient importance to warrant specific mention of it.

2. Statutory Provisions.

The Colorado statute provides that "every householder in the State of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value the sum of five thousand dollars, exempt from execution and attachment, arising from any debt, contract or civil obligation,entered into or incurred after the effective date of this section."[27] Other sections of the homestead laws declare the method for claiming the exemption,[28] the fact that it must be occupied,[29] the rights of widows,[30] the method of levy when the value exceeds the five thousand dollar limit,[31] the fact that the homestead is not valid against a vendor's lien,[32] and other matters not directly concerned with this problem.

It is interesting to note that there is a specific exception to the homestead exemption, namely, the vendor's lien, and that exception is the sole stated exception. Therefore any other exception must necessarily be implied.

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24 Colo. Const. art. XVIII, § 1.
25 18 Colo. 54, 31 Pac. 490 (1892).
26 Edson-Keither & Co. v. Bedwell, 52 Colo. 310, 122 Pac. 392 (1913); Martin v. Bond, 14 Colo. 466, 24 Pac. 326 (1891).
27 Colo. Rev. Stat. § 77-3-1 (1953).
28 Colo. Rev. Stat. § 77-3-2 (1953).
29 Colo. Rev. Stat. § 77-3-3 (1953).
30 Colo. Rev. Stat. § 77-3-4 (1953).
31 Colo. Rev. Stat. § 77-3-6 (1953).
32 Colo. Rev. Stat. § 77-3-7 (1953).

In looking at the statute declaring a right to homestead, a few words and phrases stand out and might possibly indicate a solution to the problem. Note that the homestead is exempt from "execution and attachment." There are two different theories in regard to the operation and effect of the homestead statute upon the liens of judgments.[33] One theory is that no lien attaches at all, and the other is that the lien attaches but is in abeyance so long as the requirements of the homestead statute are complied with. The first theory is the one that has been adopted by the Colorado Supreme Court.[34] From this it could be reasoned that no lien will attach regardless of how it arose, whether it was by obtaining a judgment or by complying with the mechanics' lien laws.

It should also be noted that the statute declares the homestead to be exempt from "any debt, contract, or civil obligation." This particular wording was discussed in an early Colorado case,[35] and as might be suspected the language was held to be sufficiently broad and comprehensive to embrace any and all forms of indebtedness. This would appear to exclude any argument that the mechanics' lien is a peculiar type of obligation which will defeat the operation of the homestead exemption statute. One more thing regarding the homestead statutory provisions must be noted in any discussion on this topic. Nowhere in the homestead laws of Colorado is there stated an exception in favor of the mechanics' lien. This will be discussed in greater detail when the laws of other states are examined. The most logical conclusion that can be drawn at this point, however, is that the statutory construction theory of *"expressio unius est exclusio alterius"* applies and that the expression of an exception in favor of only the vendor, and of no others, precludes any other exception from being implied.

At this point it may seem to some to be ridiculous even to consider the possibility that a mechanics' lien might be superior to and operate against a prior recorded homestead. This does not appear to be so ridiculous, however, when one considers the statements of supreme courts of several other states, to the effect that homesteads and exempted property under homestead laws are liable the same as other property, the law deeming it more equitable to protect the man who puts his labor or money into the property than to preserve it for the family.[36]

B. *The Mechanics' Lien*

1. *Constitutional Provisions.*

There is no provision for a mechanics' lien in the Colorado Constitution. Any possible indication as to a solution of this problem, based upon the absence of a constitutional provision for mechanics' liens seems tenuous to say the least. In a problem such as this, however, every point should be considered; and it seems that possibly the framers of the Colorado Constitution, while feeling that the homestead was of sufficient importance to require a specific provi-

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[33] Woodward v. People's Nat'l Bank, 2 Colo. App. 369, 31 Pac. 184 (1892).
[34] Barnett v. Knight, 7 Colo. 365, 3 Pac. 747 (1884).
[35] See note 33 *supra*.
[36] See, e.g., Tyler v. Jewett, 82 Ala. 93, 2 So. 905 (1887); McAnally v. Hawkins Lumber Co., 109 Ala. 397, 19 So. 417 (1896); Anderson v. Seamans, 49 Ark. 475, 5 S.W. 799 (1887); Murray v. Rapley, 30 Ark. 568 (1881); Parsons v. Pearson, 9 Wash. 48, 36 Pac. 974 (1894).

sion in the Constitution, felt that the mechanics' lien was not of the same importance.

2. *Statutory Provisions.*

Basically the Colorado statutes give the mechanic, materialman, etc., a lien upon property upon which they have bestowed labor or for which they have furnished materials equal to the value of such labor or material.[37] One statutory provision which seems to have a possible connection with the instant problem is the section regarding priority of lien and attachment.[38] Some of the more important provisions of this section are that:

(1) All liens established by virtue of the mechanics' lien statutes relate back to the time of the commencement of the work or the furnishing of the materials.
(2) All such liens have priority over any and every lien or encumbrance subsequently intervening, and,
(3) Nothing in the mechanics' lien laws should be construed as impairing any valid encumbrance already existing at the time the lien relates back to.

The first and second of these have greater application to the second of the posed problems. In the first problem the time of attachment of the mechanics' lien is not important; whether it will attach at all is the important consideration.

The third point, however, seems to be of some importance when one considers that courts sometimes classify the homestead exemption as a lien or encumbrance on the property.[39] Therefore, if one considers the homestead as a lien,[40] it seems it could be argued that the mechanics' lien could not impair that lien. Of course, it could also be argued that the legislature did not intend this type of lien but rather the conventional type of lien. At any rate this does not appear to offer a clear-cut answer.

Other provisions of the mechanics' lien statute which might offer some indication of a solution are those sections relating to the procedure to perfect such liens and to satisfy such judgments. One section prescribes a procedure for summons, hearing, etc., wherein an actual judgment is rendered establishing such lien.[41] Another section prescribes that satisfaction of these judgments shall be obtained in the manner provided for sales of real estate on execution issued out of any court of record.[42] The importance of these provisions is that they seem to tie in the idea that an actual judgment must be rendered and that foreclosure of such follows the same rules as other judgments. Therefore, it seems arguable that a judgment of a mechanics' lien stands in no better position than any other judgment and thus must be subject to a valid homestead exemption.

The mechanics' lien laws, like the homestead laws, contain no exception in favor of the homestead. Whether the absence of an exception in the mechanics' lien statutes carries the same import

37 Colo. Rev. Stat. § 86-3-1 (1953).
38 Colo. Rev. Stat. § 86-3-6 (1953).
39 *E.g.* Wallace v. First Nat'l Bank, 125 Colo. 584, 246 P.2d 894 (1952); Union Nat'l Bank v. Wright, 78 Colo. 346, 242 Pac. 54 (1925), where it was held that in estate proceedings, the homestead is a lien on the home to which an heir or devisee succeeding to the title takes subject.
40 This appears questionable since, as was pointed out before, the homestead seems to defy accurate classification for all purposes.
41 Colo. Rev. Stat. § 86-3-13 (1953).
42 Colo. Rev. Stat. § 86-3-14 (1953).

as the absence of an exception in the homestead statutes seems open to question. Here again we have various words, phrases, etc., that seem either to favor or to disfavor the superiority of the mechanics' lien over the homestead. Again, there is no clear-cut answer.

C. *The General Rule*

The general rule for the situation posed in problem No. 1 is easily found but actually is of little help. It was accurately stated as far back as 1918, when it was declared that "the right to a mechanics' lien upon a homestead is governed almost exclusively by a statutory or constitutional provision, or both. The contemporary constitutional and statutory provisions should therefore be consulted in any investigation of this question."[43] Some authorities have been content merely to state the general rule and then give some examples of constitutional or statutory provisions and their effects on the decision. A typical example of this is a statement to the effect that "under some constitutional and statutory provisions property held exempt from ordinary debts as a homestead is not subject to a mechanics' lien . . ." and next it is stated, "on the other hand, under other constitutions and statutes, such homestead property is subject to a mechanics' lien the same as other property . . . ."[44] A few authorities go farther than this and declare not only the standard general rule regarding the constitutional and statutory provisions but attempt to formulate a rule for situations in which it is not clearly expressed in the constitution or statutes whether there is an exception of one or the other. These authorities are, however, not only few in number, but seem to be fairly evenly divided as to what the rule should be. William M. Rockel in his treatise on mechanics' liens says, "Homesteads and exempted property under homestead laws are liable the same as other property, the law deeming it more equitable to protect the man who puts his labor or money into the property, than to preserve it for the family."[45] He further states that "the intent to exempt this property from the operation of the mechanics' lien law must be expressly declared by the statute or the constitution."[46] Another authority says "where a lien is given on 'all buildings' and there is nothing in the homestead or other acts exempting it, the property will be liable to this lien."[47]

43 Annot., 1918D L.R.A. 1055.
44 57 C.J.S. *Mechanics' Liens* § 14 (1948).
45 Rockel, Mechanics' Liens 22 (1909).
46 *Id.* at 10.
47 Phillips, Mechanics' Liens § 183a (2d ed. 1883).

The contrary opinion has been declared by other authorities, however, equally confident of their correctness. After stating the general rule as explained above, the author of an annotation on this subject said "where there is a general exemption of homesteads in order that the homestead be subject to a mechanics' or materialmans' lien, there must be some provision taking such liens out of the exemption; in the absence of such a provision the homestead is not subject to the lien."[48] This author was not a voice alone, for we find others expressing this same truism. "Where the statute creating the homestead exemption contains no exception in favor of mechanics, there can be no mechanics' lien on a homestead."[49]

Upon final analysis of the views of these authorities on this subject little can be said but that they are very definitely in conflict. Further analysis, which will be accomplished later in this article, of the cases upon which these authorities base their opinions will perhaps draw them closer together. Even then, however, complete accord appears impossible.

D. Other States

A brief discussion of the constitutional and statutory provisions of other states seems to be in order at this point.[50] Twenty-eight states have a constitutional provision for a homestead exemption or something similar.[51] Of those twenty-eight, eighteen have very specific provisions regarding the homestead. These provisions include the value, size, exactly what the homestead is or is not exempt from and various other details regarding the homestead. Seven states have a general provision which designates that the legislature shall recognize the right of a debtor[52] or that the legislature shall provide for the exemption of a reasonable amount of real property.[53] Two other states have the same provision as Colorado.[54]

Of these same twenty-eight states, seventeen have a limitation of some sort imposed on the exemption. This limitation is either in the same provision or in an accompanying one. Ten of these states have specific exceptions in favor of the mechanics' and materialmens' liens. Six have an express exception in favor of only mechanics or laborers. However, on occasion courts have implied the exception for the materialmen in these provisions.[55] One state merely has a provision stating that the legislature can provide for waiver, alienation, and encumbrance of the homestead.[56] Neither of the states which have similar provisions to Colorado's have exceptions in their constitutions.

Forty-four states have some kind of a statutory provision for the homestead exemption. Again, these do not always call the exemption a homestead by name but rather may merely designate it as an exemption for real property. Thirty-four of these states have an express exception in favor of the mechanics' and materialmen's liens. This exception is sometimes in the homestead section and

48 See note 43 *supra*.
49 Boisot, Mechanics' Liens 136 (1897).
50 For a detailed analysis of the provisions of the states, see Appendices A and B.
51 Some states do not call the exemption a homestead, but merely call it an exemption of real property.
52 See, e.g., Indiana, Appendix A.
53 See, e.g., Maryland, Appendix A.
54 Montana and Illinois.
55 See, e.g., Anderson v. Seamans, 49 Ark. 475, 5 S.W. 799 (1887).
56 See, e.g., Ga., Appendix A.

sometimes in the mechanics' lien section.[57] In those states which do not expressly except the materialman, the courts have usually implied such an exception.[58] Four states which do not have a statutory exception in favor of the mechanics' liens have a constitutional exception. One state has an exception stated in the mechanics' lien laws running in favor of the homestead.[59] Both states which have a provision similar to that of Colorado, have a statutory exception for the mechanics' lien.

Of the forty-six states which have a homestead or similar provision in either the constitution or statutes, there are only five which do not have a stated exception in either the constitution or statutes.[60] Decisions in these states which might be relevant to a solution to this problem will be discussed in the next section.

It is difficult to say whether these statistics indicate any actual solution to the problem. The statistics do seem, at least, to point out the advisability of enacting a statute declaring that the exception either does or does not exist. It also seems possible to reason that since so many states have exceptions in favor of the mechanics' liens, apparently they felt it was necessary to enact a statute to that effect and that otherwise the mechanics' lien would not be superior to the homestead. South Dakota seemed to feel the opposite was necessary, *i.e.*, that the mechanics' lien was not superior. In view of South Dakota's case history on this point, which will be discussed later, this is understandable and does not detract from the idea that if there is going to be an exception, either the constitution must be amended or a law passed to that effect.

E. Cases and Reasoning

A study of the cases on this problem necessarily includes consideration of the applicable constitutional and statutory provisions. It would be helpful, of course, if some state had the exact or even similar constitutional and statutory provisions as Colorado. Unfortunately this is not the case.

As was pointed out in the preceding section, some states have detailed constitutional provisions for the homestead exemption.[61] In some of those provisions is a stated exception in favor of persons with liens for improvements.[62] There seems to be no question in such a situation but that there is a legitimate exception in favor of the mechanics' lien.

In other states, however, there is no stated exception in the constitution. In some of these states the legislatures have attempted to provide such an exception by statute.[63] It appears that whenever this was questioned the statutory exception was held invalid.[64] An attempt to enact this type of legislation brought about an interesting sequence of events in South Dakota. Originally the homestead in South Dakota was specifically stated to be subject to a mechanics' lien. Later the homestead law was amended, and the South Dakota Supreme Court held that the amendment, being repugnant

57 See, e.g., Vt., Appendix B, "This chapter shall apply to homesteads."
58 See, e.g., Bonner v. Minnier, 13 Mont. 269, 34 Pac. 30 (1893).
59 S. D., S.D.C. 39-0702 (1939).
60 Colo., N. Y., Mo., Utah and Mass.
61 See, e.g., Fla., Appendix A.
62 *Ibid.*
63 S.D., Ill., Minn., Ind., Md., Wisc. and Utah have attempted this.
64 This question was raised in Minn., S.D., and Utah.

to the clause subjecting homesteads to mechanics' liens, by implication repealed the clause.[65] Even later the homestead laws were again amended so that the homestead was to be subject to the mechanics' lien. This was in turn questioned, and the court followed the earlier case and held this provision to be unconstitutional and void.[66] Subsequent efforts to amend the constitution were unsuccessful. Finally the South Dakota Legislature, apparently convinced that any further efforts to subject the homestead to a mechanics' lien would be unsuccessful, decided to clarify the whole situation and passed a statute declaring that the mechanics' lien does not extend to nor affect the homestead.[67]

Minnesota was somewhat more successful in dealing with the problem. Like South Dakota, the Minnesota Supreme Court in *Coleman v. Ballandi*[68] declared that any change in the homestead laws would have to come by constitutional amendment. Unlike South Dakota, the Minnesota Legislature was able to enact such an amendment.[69]

A third state where the question arose was Utah. There, in *Volker-Scowcroft Lumber Co. v. Vance*,[70] the court held a statute which proposed to subject the homestead to a mechanics' lien to be unconstitutional and void. These appear to be the only states where such legislation has been questioned.

Another approach that has been applied successfully in a few instances is to subject the homestead to a mechanics' lien by implication. While generally this approach has been unsuccessful, it has worked and apparently is still the law in Missouri.[71] This same theory was applied in Kentucky prior to the enactment of a statute subjecting the homestead to the operation of the mechanics' lien. *In Robards v. Robards*,[72] the court said, "Assuming that the allegations of appellant in regard to her claim of homestead were sufficient, we do not think she was entitled to it as against the claim of appellee. Having induced him to improve the land, and then (as he contended) violated the contract to convey, she cannot defeat his lien for the enhanced value of the land by her claim of homestead." It appears somewhat questionable whether the court was applying a principle of implied exception or estoppel. This approach was also successful in a South Carolina case where a homestead was held to be subject to execution for a mechanics' lien even though the statute granting the right to enforce such a lien was not passed until after the creation of the lien.[73]

The cases holding such an exception to be implied seem to be decidely in the minority. An Oregon court in holding that it would not imply such an exception said that "if the homestead laws contain no exception in favor of debts created in making improvements, the court can make none; and the homestead is liable only for such

65 O'Leary v. Croghan, 42 S.D. 210, 173 N.W. 844 (1919), where the court held that any change in the homestead law would have to come by constitutional amendment.
66 Home Lumber Co. v. Heckel, 67 S.D. 429, 293 N.W. 549 (1940). It is interesting to note that in this case the homestead was asserted against the builder of the house. The fact that S.D. requires only intent to occupy, if manifested to the builder, made this possible.
67 S. D., S.D.C. 39.0707 (1939).
68 22 Minn. 144 (1875).
69 Minn. Const. art. I, Sec. 12.
70 32 Utah 74, 88 Pac. 896 (1907).
71 Kansas City Granite v. Jordan, 316 Mo. 1118, 295 S.W. 763 (1927).
72 27 Ky. L. Rep. 494, 85 S.W. 718 (1905).
73 Allen v. Harley, 3 S.C. 412 (1862).

a lien when the exemption is waived in favor of it, which must be by the signature of the husband and wife to the contract."[74] Other states have followed this reasoning. South Dakota, while holding one of the statutes unconstitutional and void, went further and refused to imply the exception.[75] Michigan, before it enacted a statutory exception, refused to imply one in *Burtch v. McGibbon*.[76]

Other states have applied a limited form of this implication theory. That is, in several states there were stated exceptions, but only in favor of mechanics and laborers. The question arose when a materialman claimed a lien on the homestead. The courts seem to be fairly well split on this question. In a Montana case, the court held the materialman to be impliedly included in the exception.[77] A California court held otherwise than in the above Montana case, holding that their statute was not as broad as the Montana statute and did not include one furnishing material.[78] In states where only a statutory homestead provision exists, there seems to be no difficulty in enacting another statute excepting the mechanics' liens.[79]

Other theories have emerged in various cases regarding the homestead as a subject of the mechanics' lien. It has been held that the equity of a mechanic is similar to that of a vendor.[80] This theory was advanced by Thompson in his work on homesteads and exemptions, where he said that there is no difference in principle between a debt due to A, who has provided me with the land on which I have erected my building, and a debt due to B, who has furnished the materials to build it, and a debt due to C, whose labor has built it.[81] Other courts have used the estoppel principle to hold the homestead subject to a mechanics' lien.[82] Still others require the signature of both the husband and the wife.[83]

F. Colorado Cases

McPhee v. O'Rourke[84] seems to be the only Colorado case in which both the homestead and mechanics' lien were mentioned in

74 Davis v. Low, 66 Ore. 599, 135 Pac. 314 (1913).
75 Fallihee v. Wittmayer, 9 S.D. 479, 70 N.W. 642 (1897).
76 98 Mich. 139, 56 N.W. 1110 (1893).
77 Bonner v. Minnear, 13 Mont. 269, 34 Pac. 30 (1893).
78 Richards v. Shear, 70 Cal. 187, 11 Pac. 607 (1886).
79 There are presently 12 states which have no constitutional exception for the mechanics' lien but do have both a statutory provision for the homestead and a statutory exception in favor of the mechanics' lien.
80 Hill v. LaCrosse & Mil. R.R., 14 Wis. 315 (1861).
81 Thompson, Homestead and Exemption Laws, Sec. 312 (1878).
82 Jensen v. Griffin, 41 S.D. 30, 168 N.W. 764; 46 S.D. 55, 190 N.W. 319 (1922).
83 See Mich. Compiled Laws of 1948 Sec. 26.282.
84 McPhee v. O'Rourke, 10 Colo. 301, 15 Pac. 420 (1887).

the same case. The only difficulty is that there was actually no mechanics' lien filed. In this case McPhee, the materialman, furnished materials used in improvements on the property. McPhee did not comply with the mechanics' lien laws and hence had no mechanics' lien. He did bring suit on the debt for the materials and obtained a judgment prior to the filing of a homestead. One of the questions before the court was whether the act of designating the property as a homestead should operate against a debt for materials used in improvements on the property before it was so designated. To this the court answered, "it is sufficient to say that there is no proviso in the statute against such operation. By failing to take the steps necessary to secure a lien upon the premises, under the provisions of our mechanics' lien act the right to subject the premises to such debt was lost." It must be noted, however, that a mechanics' lien was *not* filed, and any statement regarding the filing of a mechanics' lien is necessarily *dictum*. It must also be noted that in the *McPhee* case the homestead was filed prior to attachment. Whether the court was hinting that a mechanics' lien would be superior regardless of time or that, in this case, it would be superior since it would have been prior to the homestead seems to be questionable. The question of whether it really would have been prior in time will be discussed in the analysis of the second problem. At any rate, exactly why the filing of a mechanics' lien would have made McPhee's position better does not seem clear.

Other Colorado cases have dealt with various types of liens attaching to the homestead. The general rule usually applied is that "in a conflict between a homestead entry claimant and another lienor, the controlling factor, as we perceive the revelation, is that if the lien which the homestead entryman would supplant precedes in time of record and is specific and definite as to the property involved, it holds its preference."[85] This, of course, is the same rule consistently applied by the Colorado Supreme Court when considering the superiority of a judgment lien over the homestead. That is, until there is an actual levy, the lien is not specific and will not operate against a homestead which was filed after judgment but prior to levy.[86] The real question here, however, seems never to have been raised. That is, even if the homestead is declared long prior to the supplying of labor and materials, will the mechanics' lien be superior by reason of implied exception, estoppel, equity, etc., or are the mechanic and materialman on the same footing as the other creditors?

Other decisions in Colorado relate primarily to the question of priority in time. The question of the equities of particular liens does not seem to have been raised. Thus far the only lien given priority based on its nature is the vendor's lien, and that is done by statute.[87] This in itself may provide argument for the superiority of the homestead. That is, had the legislature felt the mechanics' lien claimants were entitled to greater rights than other lien claimants they would have so provided.

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85 Bean v. Eves, 92 Colo. 339, 20 P.2d 544 (1933).
86 Barnett v. Knight, 7 Colo. 365, 3 Pac. 747 (1884).
87 Colo. Rev. Stat. § 77-3-7 (1953).

G. *Conclusion on Problem No. 1*

In coming to some conclusion on this problem, it is perhaps wise to consider some of the arguments raised earlier in this paper. There seems to be nothing in the wording of the statutes which would, beyond any question, dictate an answer. Both statutes have provisions which seem possibly to exclude the other. The homestead applies to all debts, contracts, and civil obligations. This would seem to include mechanics' liens. The mechanics' lien laws do not except the homestead from its operation. However, the mechanics' lien must come to judgment and attach the same as other judgments. Therefore, why should it be different from other judgments? The general rule as mentioned earlier offers little help.

Cases from other states, however, seem to offer some help; but it must be remembered that none of the other states have the same constitutional and statutory provisions as Colorado. Some have implied the exception for a mechanics' lien, and some have not. Those states where the exception could not be implied and could not even be enacted into the statutes probably carry little weight, as the constitutional provision in each case was very specific and explicit. As was stated, any change would have to come by constitutional amendment.

Colorado cases seem to be of little, if any, help. The *McPhee* case could perhaps be used in argument for both sides. However, it seems to be a better argument for the superiority of the homestead if filed prior to the furnishing of materials.

The statistics of what other states have done also seems to carry some weight for the homestead. However, this could be discounted somewhat by South Dakota's precedent of excepting the homestead from the operation of the mechanics' lien and also because many states have exceptions in their constitution and were merely following the mandate of the constitution when passing an exception statute.

Then, of course, arguments, and seemingly strong arguments, can be made from the policies and purposes underlying both statutes. On the mechanics' lien side, estoppel often enters the picture. Implied exception usually arises here also. On the homestead side there is the age-old and very strong principle of preserving the family home. Another consideration that perhaps warrants mentioning is that the homestead entryman is often not the villain in the picture. More often than not, the small contractor, who is the homeowner's agent by reason of our mechanics' lien law, is the person who was paid by the homeowner and suddenly found himself without funds. In such a case, which of the two innocent parties should bear the loss? To this writer, the equities and arguments appear to be in favor of the homestead.

V. Analysis of the Second Problem

A. *Constitutional and Statutory Provisions*

These provisions are, of course, the same. Some of the particular sections of the statutes will be more important, but the inquiry is directed to the same two statutory rights.

B. New Elements

Two new elements come into play at this point. First, there is the relation back theory of the mechanics' lien. That is, the Colorado statute provides that all liens established by virtue of the mechanics' lien laws shall relate back to the time of the commencement of work under the contract, or if the contract be not in writing to the time of the commencement of the work upon the structure or improvement.[88] As far as the materialman is concerned it has been held that the date of the lien relates back to the time the first of the materials were furnished.[89] The other new element that comes into play is the judicial construction of the homestead law to the effect that the homestead is valid against judgment liens if entered before the lien becomes specific, *i.e.*, before a levy of an execution or attachment.[90]

These new elements in conjunction with the assumption that the homestead is superior to the mechanics' lien, if filed before the mechanics' lien is perfected and foreclosed on, bring about the new problem. At what point in time will the designation of the land as a homestead defeat the operation of the mechanics' lien? More specifically, does the relation back theory cause the mechanics' lien to defeat a homestead entry which was recorded subsequent to the commencement of the work but before actual levy on the property?

Here again the particular wording of the statutes is important. It appears from the wording of the mechanics' lien statutes that the lien would attach as of the date when the work was commenced or the material was furnished and would operate against the homestead. However, there still seems to be some question due to the fact that the statute says that the mechanics' lien relates back to that date and "shall have priority over any and every lien or encumbrance subsequently intervening."[91] Does it then relate back only as against other liens or also for the purpose of defeating a possible claim of homestead?

C. The General Rule

The general rule appears to be highly in favor of the mechanics' lien in a problem such as this. Very positive statements have been made to this effect. In 18 Ruling Case Law, in a discussion on the homestead as a subject of the mechanics' lien, the author said, "Some of the states allow the right to a lien, while others deny it; but even under the rule of absolute exemption an existing mechanics' lien or one which is inchoate by virtue of a contract to supply materials, etc., cannot be defeated by the subsequent acquisition of a homestead in the property."[92]

In Corpus Juris it is stated that "while in some jurisdictions the rule is otherwise, or at least subject to limitations or modifications, the general rule is that the exemption cannot be claimed as against valid liens which have attached to the premises before they are impressed with the homestead character, whether such liens

88 Colo. Rev. Stat. § 86-3-6 (1953).
89 Meller v. Valentine, 3 Colo. 255 (1877).
90 Sterling Nat'l Bank v. Francis, 78 Colo. 204, 240 Pac. 945 (1925); Edson-Keith Co. v. Bedwell, 52 Colo. 310, 122 Pac. 392 (1912); Weare v. Johnson, 20 Colo. 363, 38 Pac. 374 (1894); Woodward v. People's Nat'l Bank, 2 Colo. App. 369, 31 Pac. 184 (1892).
91 Colo. Rev. Stat. § 86-3-6 (1953).
92 18 R.C.L. 888.

are obtained by contract or operation of law."[93] This article goes on to say that the rule has been applied in case of liens created by mechanics' liens.[94] As a further indication of the superiority of the mechanics' lien it is stated in Corpus Juris Secundum, that "the question whether particular property is a homestead, with respect to such a lien, is generally determined as of the time of the making of the contract under which the labor was performed or the materials were furnished. . . ."[95] In light of some of the Colorado decisions this, in itself, practically answers the question.

D. Other State Decisions

The case law is almost universally behind the rule that subsequent acquisition of a homestead will not defeat a mechanics' lien. This rule was announced in *Evans v. Jensen*,[96] where the court declared that notwithstanding the constitutional provision that the "legislature shall provide by law for selection by each head of a family an exemption of a homestead . . . from sale on execution," a pre-existing mechanics' lien is not affected by the subsequent acquisition of a homestead right in the property. In *Davies-Henderson Lumber Co. v. Gottschalk*,[97] the theory of relation back was used as an alternative basis for the decision in favor of the mechanics' lien. In that case the defendant argued that, as the law stood at the time the material was furnished, a claim for material could not attach to a homestead. The court held that a complete answer to this contention was that the lien must be held to relate to the time of furnishing the material, and at that time the homestead was not in existence.

One case stands out strongly in favor of the homestead in this type of situation, but it stands nearly alone. The court in this case appears to base its opinion primarily on the procedure required to foreclose on a mechanics' lien. In declaring the homestead to be superior, the court said "it is still necessary to foreclose such a lien by suit in which a decree is rendered as in other suits for such purposes. The decree thus rendered is not different from others in its effect upon the property, and there being no exception in the homestead laws in favor of such determination, it affects them in the

93 29 C.J. *Homesteads* § 202 (1922).
94 *Id.* at Sec. 202.
95 57 C.J.S. *Mechanics' Liens* § 14 (1948).
96 51 Utah 1, 168 Pac. 762 (1917).
97 81 Cal. 641, 22 Pac. 860 (1889).

same manner as in other judgments or decrees. The operation of the statute under consideration is not to impair the lien, but only to suspend its execution, and then only at the claim of the owner of the homestead."[98]

Another case which speaks for the homestead is *Walsh v. McMenomy*.[99] In this case work was done and material was furnished. Subsequently, but before judgment, a homestead was declared. At that time California had excepted mechanics and laborers from the homestead exemption but not materialmen. However, by statute the materialman's lien related back. In this case the court held that a subsequent acquisition of a homestead would defeat the materialman's lien. As was mentioned before, these cases seem to constitute a definite minority.

E. Colorado cases

Colorado cases shed some light on this problem, and seem to favor the mechanics' lien. Some weight, however, is cast in the direction of the homestead by cases speaking of the purpose of the designation of a homestead. It has been held that the causing of "homestead" to be entered in the margin was not for "the purpose of giving notice and securing protection to those dealing with the householder and extending credit to him."[100] Therefore it seems arguable that the mechanic is not warranted in relying on the debtor's declining to avail himself of the homestead privilege. However, later in the same case the court held that "the householder is in ample time if he records the election before a lien *attaches* in favor of his creditor."[101] (Emphasis supplied.)

The last statement quoted along with the statement of the court in *Trich v. Norton*[102] that "the lien of the mechanic or materialman begins with the commencement of the work or the furnishing of the material under his express or implied contract with his employer, and attaches upon whatever estate the latter may have at the commencement of such work, or the furnishing of materials, . . ." seems to make the position of the homestead claimant nearly untenable.

Other cases however still raise some question. For example, it has been held that in order to declare priority of a lien over the homestead entry, the land must have been *subjected to* the lien prior to the assertion of the homestead.[103] The question is, what does the court mean by "subjected to"?

The case which seems to establish the superiority of the mechanic in a problem like this is *McPhee v. O'Rourke*.[104] This case was discussed to a certain extent in the analysis of the first problem. To review the facts briefly the more important points are that no mechanics' lien was filed, judgment was obtained for material furnished, and a homestead was filed subsequent to the time of furnishing the material. The critical words were uttered regarding the question of whether a homestead should operate against a claim for material used in improvements before the property was designated

98 Johnson v. Tucker, 85 Ore. 646, 167 Pac. 787 (1917).
99 74 Cal. 356, 16 Pac. 17 (1887).
100 Barrett v. Knight, 7 Colo. 365, 3 Pac. 747 (1884).
101 *Id.* at 369, 3 Pac. at 748.
102 10 Colo. 337, 15 Pac. 680 (1887).
103 Howell v. Burch Warehouse & Transfer Co., 100 Colo. 247, 67 P.2d 73 (1937).
104 McPhee v. O'Rourke, 10 Colo. 301, 15 Pac. 420 (1887).

as a homestead. The court's reply was in the affirmative, saying that "by failing to take the steps necessary to secure a lien upon the premises, under the provisions of our mechanics' lien act, the right to subject the premises to such debt was lost." The question which was raised earlier regarding this statement was whether it was indicating that a mechanics' lien would be superior to a homestead whenever the homestead was filed or whether it was indicating that in this case it would be sufficient since the relation back theory would cause the lien to ante date the designation of the homestead. However, it seems that whatever the court was indicating is of little concern regarding this problem since either construction would cause the homestead to be subject to the mechanics' lien whenever the homestead was subsequently acquired.

The only thing that detracts from the overwhelming weight of this case in favor of the mechanics' lien in the second problem is that the statement quoted was *dictum* since no mechanics' lien was ever filed. However, this would not seem likely to detract much.

F. Conclusion on Second Problem

Various points have been raised to favor either the mechanics' lien or the homestead. The strongest points for the homestead seem to be that:

1. The statute and the cases say that the mechanics' lien relates back for the purpose of establishing priority of the lien over other *liens* and *encumbrances*. This leaves the question of whether the homestead is a lien or encumbrance.
2. The purpose of making a marginal entry is not to give a potential creditor notice and, any creditor deals with the debtor knowing that the debtor can avail himself of the homestead privilege any time before *actual* and *specific* levy of an execution or attachment.
3. As stated in the Oregon case[105] the mechanics' lien must be foreclosed on in the same manner as other decrees. Therefore, it could be argued that as against a homestead the mechanics' lien is the same as any other judgment.

The points which seem to favor the mechanics' lien are:

1. Most of the authorities flatly state that subsequent acquisition of a homestead will not defeat the mechanics' lien.
2. The majority of the states have held the mechanics' lien superior in such cases.
3. The Colorado cases seem to indicate that the mechanics' lien actually *attaches* as of the date of commencement of work and furnishing of materials.
4. The *McPhee* case[106] seems to establish that, for whatever reason, the homestead would not be superior.

To this writer not only the reasoning but the equities seem to favor the mechanic in a case such as this.

V. Conclusion

It has been the purpose of this article to bring to light unsolved questions which seem to exist regarding two statutory rights. It may be asked why these questions have not been raised before.

105 See note 98 *supra*.
106 See note 104 *supra*.

There are several possible reasons. One reason might be that in order for either of these problems to arise it takes a particular factual situation which might not often occur. There has to be a low valuation on the house since the homestead exemption only extends to $5,000.00. Also, it would have to be an addition rather than the original construction. Another possible reason is that there is often not enough money involved to warrant an appeal. Finally, it seems likely that if much money is involved, bank financing would be required and this would nearly always include a written waiver of the homestead exemption.

Whatever the reason the questions seem never to have reached the Colorado Supreme Court. If and when they do, it appears that at least the first of the two problems will require a great deal of "balancing of the equities."

APPENDIX A

CONSTITUTIONAL PROVISIONS

State	*General Provision For Homestead*	*Specific Provision For Homestead*	*Exceptions*
Ala.	.....	Art. 10, §§205, 206	Excepts mechanics' liens on premises. Art. 10, §207
Ark.	.....	Art. 9, §3	Excepts laborers' or mechanics' liens. Case law says lumber furnished gives mechanics' lien and is excepted. Art. 9, §3
Ariz.	.....	.....	.....
Calif.	.....	Art. 17, §1	.....
Colo.	Art. XVIII, §1	.....	.....
Conn.	.....	.....	.....
Del.	.....	.....	.....
Fla.	.....	Art. X, §1	Art. X, §1, mechanics' liens.
Ga.	.....	Art. IX, §1	Art. IX, §1 gives Gen. Assembly authority to provide for waiver, encumbrance, alienation.
Hawaii	.....	.....	.....
Idaho	.....	.....	.....
Ill.	Art. IV, §32	.....	.....

State	General Provision For Homestead	Specific Provision For Homestead	Exceptions
Ind.	.....	Provision for exemption of a reasonable amount of real property. No actual homestead provision.	.....
Iowa	.....	.....	.....
Kansas	.....	Art. XV, §9	Art. XV, §9, Mechanics' liens.
Ky.	.....	.....	.....

State	*General Provision For Homestead*	*Specific Provision For Homestead*	*Exceptions*
La.	.....	Art. XI, §1	Laborers' liens Art. XI, §2
Maine	.....	.....	.....
Md.	.....	Art. III, §44 — Legislature to provide for exemption of reasonable amount of property from execution.	Mechanics' liens Art. III, §44
Mass.	.....	.....	.....
Mich.	.....	Art. XIV, §2	.....
Minn.	.....	Same as Maryland. To be determined by law. Art. I, §12	Both laborers' and materialmen's liens Art. I, §12
Miss.	.....	.....	.....
Mo.	.....	.....	.....
Mont.	Art. XIX, §4, same as Colo.	.....	.....
Nebr.	.....	.....	.....
Nev.	.....	Right of debtor to be recognized by law (reasonable amount of property) Art. I, §14	Art. IV, §30
N. H.	.....	.....	.....
N. J.	.....	.....	.....
N. M.	.....	.....	.....
N. Y.	.....	.....	.....
N. C.	.....	Art. X, §1	Laborers' liens Art. X, §1
N. Dak.	.....	Right of debtor be recognized by law. Art. XVII, §208	Laborers' and materialmen's Art. XVII, §208
Ohio	.....	.....	.....
Okla.	.....	Art. XII, §§1, 3	Art. XII, §§2, 3, work on premises
Ore.	.....	.....	.....
Penn.	.....	.....	.....
R. I.	.....	.....	.....
S. C.	.....	Art. III, §28	Art. III, §28 For erection or making of improvements.
S. D.	.....	Right of debtor to be recognized by law. Art. XXI, §4	.....

State	*Homestead Provision*	*Exception For Mechanics' Lien*	*The Exception Includes Materialmen*
Tenn.	.....	Homestead in value in all of $1,000 to be exempt. Art. XI, §II	Debts contracted for improvement. Art. XI, §II
Tex.	.....	Art. XVI, §51	Debts for work and materials in constructing home. Art. XVI, §50
Utah	.....	Art. XXII, §1	.....
Vt.	.....	.....	.....
Va.	.....	Real and personal property to value not exceeding $2,000 to be exempt. Art. XIV, §190	Laborers' or mechanics' liens. Art. XIV, §190
Wash.	.....	Legislature to protect by law certain portion of homestead. Art. XIX, §1	.....
W. Va.	.....	Homestead to be exempt. Art. VI, §48	Debts for erection of improvements. Art. VI, §48
Wis.	.....	Right of debtor to be recognized by law. Art. I, §17	.....
Wyo.	.....	Homestead to be exempt from forced sale. Art. XIX, §1	Art. XIX, §1

APPENDIX B
STATUTORY PROVISIONS

Ala.	Title 7, §625	Title 7, §627	Yes
Ariz.	Title 33, §1101	Title 33, §33-1103 as amended, Laws of 1959. Only if mechanics' lien attached before property was claimed as a homestead.	Yes
Ark.	Provides details for claiming.	.....	.....
Calif.	C.C. §1240	C.C. §1241	Yes

State	Homestead Provision	Exception For Mechanics' Lien	The Exception Includes Materialmen
Colo.	C.R.S. 77-3-1	----------	----------
Conn.	----------	----------	----------
Del.	----------	----------	----------
Fla.	§222.01	----------	----------
Ga.	Title 51, §51-101	Title 51, §51-101	Yes
Idaho	Chap. 10, §55-1001	Chap. 10, §55-1005	Yes
Ill.	Chap. 35, §1	Chap. 82, §3 Lien Chapter	Yes
Ind.	Chap. 35, §2-3501 Real estate exemption.	Chap. 35, §2-3515	Yes
Iowa	Chap. 561, §1-20 Details for constitutional provision.	Chap. 561, §21 (3)	Yes
Kansas	Chap. 60, Art. 35, §3501	Chap. 60, Art. 35, §3501	Yes
Ky.	Chap. 427, §427.-060	Chap. 427, §427.-060	Yes
La.	Title 20, §1 Details of claiming.	----------	----------
Maine	Chap. 112, §68	Chap. 112, §71	Yes
Md.	----------	----------	----------
Mass.	Chap. 188, §1	----------	----------
Mich.	Title 27, §27.1572	Title 26, §26.282 Requires contract in writing by both husband and wife.	Yes
Minn.	Chap. 510, §510.01	§510.01	Yes
Miss.	Chap. 3, §317	Chap. 3, §327	Yes
Mo.	Title 35, §513.475	----------	----------
Mont.	Title 33, §33-104	Title 33, §33-105	By case law.
Nebr.	Chap. 40, §40-101	Chap. 40, §40-103	----------
Nev.	Chap. 115, §115-010	Chap. 115, §115-040	Yes
N. H.	Chap. 480, §4	Chap. 480, §4 (II)	Yes
N. M.	Chap. 24, §24-6-1	Chap. 24, §24-6-1	Yes
N. J.	----------	----------	----------
N. Y.	----------	----------	----------
N. C.	----------	----------	----------
N. D.	Chap. 47, §47-18-01	Chap. 47, §47-18-01 (1)	Yes
Ohio	Title 23, §2329.73	Title 23, §2329.72	Yes
Okla.	Title 31, §1	Title 31, §5 (3)	Yes
Ore.	Title 2, §23.240	Title 2, §23.260	Yes
Penn.	----------	----------	----------
R. I.	----------	----------	----------

State	*Homestead Provision*	*Exception For Mechanics' Lien*	*The Exception Includes Materialmen*
S. C.	Title 34, §34.1	Title 34, §34-62	Yes
S. D.	Chap. 51-17, §51-1701	Exception in favor of homestead in mechanics' lien Chapter. §39.0702	.....
Tenn.	Chap. 3, §26.301	Chap. 3, §26-307	Yes
Tex.	§3833	§3839 — must be in writing.	Yes
Utah	Title 28, Chap. 1, §28-1-1	.....	.....
Vt.	Title 27, §101	Title 9, §1927 Mechanics' lien Chapter says provisions of this chapter shall apply to homesteads.	.....
Va.	Title 34, §34-4	Title 34, §34-5 (2)	Yes
Wash.	§6.12.010	§6.12.010	Yes
W. Va.	Chap. 38, Art. 9, §3911	Chap. 38, Art. 9, §3913	Yes
Wis.	Chap. 272, §272.20	Chap. 272, §272.20	Yes
Wyo.	Title 1, Chap. 21, §1-498	(Mechanics' Lien Chapter) Title 29, Chap. 2, §291-24	Yes
Alaska	§22-1-6	Laws of 1957, Chap. 61	Yes
Hawaii	§233-64	§233-64	Yes

OWNERSHIP OF STREETS AND RIGHTS OF ABUTTING LANDOWNERS IN COLORADO

By MARSHALL DEE BIESTERFELD*

Streets, highways and roads are designed to allow free, continuous, convenient passage across the land of others. The passage is a necessity. Strips of land are placed under control and supervision of public authorities who are given the duty of keeping the roadways unobstructed for the good of the public.

The abutting landowner is peculiarly situated in that he not only uses the streets in common with the general public but also uses the specific portion of the street abutting his land as an easement of access. A natural place to lodge limited control over the actions of the public authorities is in the abutting landowner; the courts have done just this. They have given the abutting landowner special rights.

Fine distinctions have been pronounced as to the nature of the title in the public and in the abutting landowner. Elimination of these has been suggested,[1] but a definite tendency of the court has been to uphold the importance of the distinctions. Colorado has, upon occasion, been unique in its decisions, and for this reason alone the subject is worthy of inspection.[2]

I. ESTABLISHMENT OF STREETS

Public streets can come into existence in several ways. The object is to place land in the possession and control of public authorities so that it can be maintained and kept free from obstruction. The two most common methods[3] by which streets come into the hands of the authorities are statutory dedications and common law dedications. Other methods are prescription, condemnation or purchase. The latter two methods are considered outside the scope of this article.[4]

A. Statutory Dedication

Early Colorado statutes required for a successful statutory dedication, an accurate plat signed, acknowledged and filed with the county clerk and city clerk. That plat had to be recorded by the county clerk with his certificate. Fulfilling these requirements would vest the streets in the city, in trust for public uses.[5]

Those have been repealed and streets become vested in the city through the procedures for incorporation which include presenting a petition with an accurate plat, holding an election, making return of election to the court and electing officers.[6]

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* Senior student, University of Denver College of Law.

1 10 McQuillin, Municipal Corporations § 30.37 (3d ed. 1950) quoting from Lewis, Eminent Domain.

2 All cases were read and are noted in text or footnotes that are digested in West's Colorado Digest under Municipal Corporations, Key Numbers 646 through 698. Certain other cases pertinent to this paper may be found under the topics Dedication and Highways.

3 11 McQuillin, Municipal Corporations § 33.01 (3d ed. 1950).

4 An act of Congress is also a method of creating a public highway: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Rev. Stat. § 2477 (1875), 43 U.S.C. § 932 (1958).

5 These statutes can be found in Colo. Stat. Ann. c. 163, §§ 152 to 159 (1935).

6 Colo. Rev. Stat. §§ 139-1-1 to 139-1-9 (1953), as amended, Colo. Rev. Stat. §§ 139-1-3,5 (Supp. 1960). See Colo. Rev. Stat. § 120-1-1 (1953) for dedications as county highways.

The Colorado Supreme Court has often said that a statutory dedication will be successful only if in strict compliance with the statutes.[7] A statutory dedication will fail, at least against a purchaser of the land without notice, where the plat and notes do not describe the road as running through the land purchased.[8] A dedication has failed because the acceptance did not get the required number of votes in the city council.[9] Lack of acknowledgment of the plat can invalidate the statutory dedication.[10] As will be discussed *infra*, the ownership of the street is altered by these failures.

A statutory dedication operates by way of grant. A common law dedication operates by way of *estoppel in pais*.[11] The dedication must be express when statutory and can be either express or implied when at common law. The statutory dedication will usually vest an estate in some type of fee simple,[12] whereas the common law dedication gives the public an easement.

Often the failure of a statutory dedication will result in a valid common law dedication because of the relative simplicity of the latter.[13] However, neither may result. An individual prevailed when he purchased without notice of the existence of a road because recording mistakes made the statutory dedication invalid. The evidence did not show any public travel along the line of the road, and the purchaser had done nothing from which to imply an intent to dedicate.[14]

B. Common Law Dedication

A frequent act that results in a common law dedication is selling lots with reference to a plat. The Colorado Supreme Court has several times[15] recognized the rule as stated in Angell on Highways:

> In this country there is quite a large class of cases in which dedication has been inferred from the sale of land, described by reference to a map or plat, in which the same is designated as laid off into lots, intersected by streets and alleys. It may be stated as a general rule, that where the owner of urban property, who has laid it off into lots, with streets, avenues and alleys intersecting the same, sells his lots with reference to a plat, in which the same is so laid off, he adopts such map by sales with reference thereto, his acts will amount to a dedication of the designated streets, avenues and alleys to the public.[16]

Correctly speaking, however, Colorado follows the general rule that the sale of lots with reference to a plat is only an offer to dedicate; the acceptance by the city is necessary to complete the dedication, and the grantee of the lots has no right against the city

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7 City of Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034 (1906); John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895); City of Denver v. Clements, 3 Colo. 472 (1877).

8 Lieber v. People, 33 Colo. 493, 81 Pac. 270 (1905).

9 City of Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034 (1906).

10 Town of Center v. Collier, 26 Colo. App. 354, 144 Pac. 1123 (1914).

11 City of Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034 (1906); City of Denver v. Clements, 3 Colo. 472 (1877).

12 Brell v. Town of Ovid, 88 Colo. 198, 293 Pac. 961 (1930) concerns a dedication under present statutes.

13 See note 7 *supra*.

14 See note 8 *supra*.

15 John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895); Ward v. Farwell, 6 Colo. 66 (1881); City of Denver v. Clements, 3 Colo. 472 (1877).

16 Angell, Highways § 149 (3d ed. 1886).

until that acceptance.[17] This is not a universal rule. Some jurisdictions hold that the grantee has rights against the city in that this method of dedication is completed with the sale. The rule's justification rests in the reliance of the grantee upon the representation that streets are present.[18] In every case the grantee has a private easement he can enforce against the grantor.[19]

A common law dedication can arise by offering either expressly or impliedly to dedicate certain land to the public for street purposes. More controversy naturally arises over the issue of implied dedication. In *Starr v. People*,[20] the court set down rules to govern the finding of an implied dedication:

> In an action of this kind a dedication may be implied:
>
> 1. When it is satisfactorily proved that it was the owner's intention to set apart the land occupied as a road, to the use of the public *as a highway*, and that there has been an acceptance by the public of the land for such use;
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> 2. The evidence of intent must consist of such acts or declarations by the owner as clearly and unequivocally indicate his purpose to make the dedication, or such conduct on his part as equitably estops him from denying such intention;
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> 3. The acts and declarations of the owner connected with the matter of the alleged dedication may be given in evidence in his favor;
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> 4. The line of the road must be certain and definite; a general privilege or license by the owner to cross his lands, without reference to any special route, will not suffice;
>
> 5. *User* of the road by the public for a considerable length of time without objection by the owner of the land may increase the weight of the evidence, if any there be, arising from *acts or declarations* of the owner indicating his intent to dedicate. But *mere user*, without such acts or declarations, unless for a period of time corresponding to the statutory limitation of real actions, cannot be held sufficient to vest the easement in the public, as by prescription.[21]

In *Mitchell v. City of Denver*,[22] even though the city, six or seven years before the trial, had graded the street and put up sign posts and street names, there was no implied dedication because of lack of evidence of intent where the owner had platted the area but had reserved the strip in question for private use for itself, its successors and assigns.

The Colorado court, in the *Starr* case,[23] refused to find an implied dedication where the road passing through the placer mining claim was used by the public. The line of the road was moved several times as the owner "washed" the gravel for mineral, and the public authorities made some repairs but without being so induced by the owner, and the owner had refused to allow any road to be used except as might be convenient to him at the time.

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17 John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895); City of Denver v. Clements, 3 Colo. 472 (1877).
18 11 McQuillin, Municipal Corporations § 33.45 (3d ed. 1950).
19 11 McQuillin, Municipal Corporations § 33.24 (3d ed. 1950); Note, 12 Syracuse L. Rev. 88 (1960).
20 17 Colo. 458, 30 Pac. 64 (1892).
21 *Id.* at 460, 30 Pac. at 65.
22 33 Colo. 37, 78 Pac. 686 (1904).
23 Starr v. People, *supra* note 20.

In *Christianson v. Cecil*,[24] the court found an implied dedication where the original owner made statements that he intended it to be a public alley. The city cut the curb, cleaned the alley and ribbed the sidewalk crossing, and the line of the alley was definite and had been used for more than twenty years.

To prevent the municipality from being burdened indiscriminately with the preservation of streets whenever an individual should see fit to dedicate a portion of his land for use as streets, the courts require that the offer must have been accepted by the city before the dedication is complete.[25] This acceptance theoretically takes place when it is in the public interest to possess and control the street. During the time after the offer and prior to acceptance, the city is not bound to any duties in connection with the land and acquires no rights or interest therein.[26] The landowner is free to withdraw his offer of dedication unless some public or private rights have intervened.[27] The owner can revoke the offer merely by conveying the same land to another.[28] Conversely the city may lose its right to accept by the doctrine of *estoppel in pais*.[29] In *John Mouat Lumber Co. v. City of Denver*,[30] the case was remanded on the question of the city having been estopped where it appeared the city had never, in the twenty years since the offer of dedication, accepted, repaired or improved the streets dedicated, and at the same time the area had been fenced and a house built.

Whenever a street or highway is abandoned or vacated it is no longer public property. The public officials are not responsible for its repair, and being private property, it must be rededicated according to all the rules applying to dedications before it will again become a street.[31]

C. *Prescription*

Another method that has arisen in Colorado cases by which land becomes a public street is prescription or adverse user.[32] Traditional elements are needed to establish prescription. In addition, Colorado has a statute allowing a road to become a public highway if used adversely for twenty years.[33] Under this statute the elements necessary are that the user "must have been adverse, that is, under claim of right; the line of road must have been reasonably definite and certain; there must have been an unqualified intention to set apart a line for the road, and the use must have been more than mere permissive use."[34] Prescription cannot be established by an "indefinite and indiscriminate use of a wide extent of country at the whim or caprice of the traveler."[35] Continuous public use for

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24 109 Colo. 510, 127 P.2d 325 (1942).

25 Hand v. Rhodes, 125 Colo. 508, 245 P.2d 292 (1952); Trine v. City of Pueblo, 21 Colo. 102, 39 Pac. 330 (1895); John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895); City of Denver v. Denver & S.F.Ry., 17 Colo. 583, 31 Pac. 338 (1892). If the city accepts, the acceptance must be subject to any pre-existing rights of way. City of Denver v. Denver & S.F.Ry., 17 Colo. 583, 31 Pac. 338 (1892); City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693 (1884).

26 Hand v. Rhodes, 125 Colo. 508, 245 P.2d 292 (1952); Board of County Comm'rs v. Warneke, 85 Colo. 388, 276 Pac. 671 (1929).

27 11 McQuillin, Municipal Corporations § 33.60 (3d ed. 1950).

28 Trine v. City of Pueblo, 21 Colo. 102, 39 Pac. 330 (1895).

29 John Mouat Lumber Co. v. City of Denver, 21 Colo. 1, 40 Pac. 237 (1895).

30 *Ibid.*

31 Hand v. Rhodes, 125 Colo. 508, 245 P.2d 292 (1952).

32 Hecker v. City & County of Denver, 80 Colo. 390, 252 Pac. 808 (1927); Mitchell v. City of Denver, 33 Colo. 37, 78 Pac. 686 (1904).

33 Colo. Rev. Stat. § 120-1-1(3) (1953).

34 Lieber v. People, 33 Colo. 493, 499, 81 Pac. 270, 271 (1905). *Accord*, Olson v. People, 56 Colo. 199, 138 Pac. 21 (1914); Starr v. People, 17 Colo. 458, 30 Pac. 64 (1892).

35 Friel v. People, 4 Colo. App. 259, 260, 35 Pac. 676, 677 (1894).

the full length of time must be present.[36] Wire gates across a private road so that travelers must open and close them will prevent that road from becoming a public highway under this statute.[37]

Recently the court quoted this statute in justification of a decision.[38] The statute seems to add little to the case; the requirements of the statute are the same as at common law.

Some land was levied upon for taxes and the county became the tax sale certificate holder. With the county's permission, the road in question was then constructed across a portion of this land and was continuously used by the public from 1938 to 1960. In 1945 a treasurer's deed to some of the land was issued to some of the plaintiffs and in 1956 one was issued to the remaining plaintiffs. These plaintiffs, in 1960, claimed ownership of the street area and the right to hold it free from the easement.

The court held: (1) the county's tax sale certificate was only a lien and the county was thus not the true owner from which permission could be obtained to negative the adverse nature of the use; (2) the treasurer's deeds of 1945 and 1956 did not convey a title free from adverse use; and (3) the use fulfilled the requirements to establish a public highway under the statute.

The true owner had, in effect, lost his land and would lose nothing more from adverse use across it. Even though the original owner retained record title, the county was the party most interested in preserving the parcel of ground in order to realize payment for delinquent taxes. Prescription will not ripen against the govern-

36 Goerke v. Town of Manitou, 25 Colo. App. 482, 139 Pac. 1049 (1914).
37 Martino v. Fleenor, 365 P.2d 247 (Colo. 1961).
38 Town of Silver Plume v. Hudson, 15 Colo. Bar Ass'n Adv. Sh. 157 (1963).

ment;[39] neither should this adverse use operate toward a ripened easement where the county was the preserving party for at least seven years.

Furthermore, Colorado has said that adverse possession will be interrupted by a treasurer's deed.[40] The court distinguished this case on the basis that here was an easement established by the public. The court did not elaborate. A tax deed traditionally passes title free from all other interests. Although a majority hold that an easement is not extinguished, other cases have held that easements established after the land is assessed are extinguished by the tax deed because the government is entitled to drive proceeds on the land as it was assessed and not on land as it is later burdened with an easement.[41] Here the land as levied upon was free from easement or adverse use.

The fact that the street was constructed and plainly used so that any grantee in 1945 or 1956 should have had sufficient notice of the easement, lends some support to the court, but it announced no helpful principle of decision. The outcome is that the bare fact situation of adverse use as a road by the public prior to issuance of a treasurer's deed will result in a decision favorable to the adversing public.

The result cannot be criticized. The court refused to allow private individuals, who could have known of the road, to take the only main access from the east into the mountain town of Silver Plume.

II. TITLE

A. Common Law Easement

At common law a presumption exists that only an easement is created when a street is dedicated to the public unless there is some statement to the contrary. The reasoning is that an easement is the greatest privilege needed by the public to be able to pass freely over the street. Colorado is in line with this common law rule when the dedication is by common law rather than by statutory proceedings.[42]

The 1906 case of *City of Leadville v. Coronado Mining Co.*[43] was disposed of in a manner consistent with the rule of the creation of an easement. A statutory dedication had failed but a common law dedication resulted from the failure. This type of resulting common law dedication was not differently treated from any intended common law dedication; that is, it resulted in conveying an easement only. A published opinion in 1901 upon the same *Coronado Mining* case on an earlier appeal[44] had included much dicta that the fee passed. The reasoning in that case was that by the attempted statutory dedication the dedicator must of necessity have intended a fee to pass, therefore his intention would govern in the resulting

39 17A Am. Jur. *Easements* §68 (1957)
40 Jacobs v. Perry, 135 Colo. 550, 313 P.2d 1008 (1957); Harrison v. Everett, 135 Colo. 55, 308 P.2d 216 (1957).
41 See 17A Am. Jur. *Easements* § 169 (1957).
42 Hecker v. City & County of Denver, 80 Colo. 390, 252 Pac. 808 (1927); City of Leadville v. Coronado Mining Co., 37 Colo. 234, 86 Pac. 1034 (1906); City of Denver v. Clements, 3 Colo. 472 (1877).
43 37 Colo. 234, 86 Pac. 1034 (1906).
44 29 Colo. 17, 67 Pac. 289 (1901).

common law dedication. Upon the later appeal the court stated that the dicta was not controlling.

B. *Statutory Fee*

When statutory proceedings are proper, a "fee" vests in the city by virtue of statute. An early statute provided:

> Upon the filing of any such map or plat, the fee of all streets, alleys, avenues, highways, parks, and other parcels of ground reserved therein to the use of the public, shall vest in such city or town, if incorporated, in trust, for the uses therein named and expressed; or if such town be not incorporated, then in the county, until such town shall become incorporated, for the like uses.[45]

1. Qualified Fee—In Trust. In *Olin v. Denver & R. G. R. R.*,[46] the court declared that the city held title to the street solely for street purposes and that the nature of the title was a qualified fee. The fee would terminate when the land was no longer used for street purposes.

The statute that now vests the fee in the city, found in the article providing for incorporation, reads:

> All avenues, streets, alleys, parks, and other places designated or described as for public use on the map or plat of any city or town, or of any addition made to such city or town, shall be deemed to be public property, and the fee thereof be vested in such city or town.[47]

The first opinion in the same *Coronado Mining* case as discussed above made much of the absence of the words "in trust" in the later statute quoted here. The writer of the opinion thought that a successful statutory dedication passed a fee simple absolute to the city unburdened by the trust. The thought was that under the new statute the streets would no longer be held as a qualified fee, as a fee simple on special limitation. With that interpretation, it was easy to conclude that the mining under the street could be legal only with permission from the city.

As mentioned earlier, that opinion lost most of its vitality when the second appeal decision was announced and the court refused to follow the opinion of the first appeal. Some credit must be given for the realization of the impact in the changed wording, but as late as 1942 the court had reiterated the presence of a trust for the people.[48]

2. Absolute Fee in Surface. The remarks as to the words "in trust" undoubtedly had some influence upon *City of Leadville v. Bohn Mining Co.*,[49] another case decided in 1906. This case deserves special discussion. It should be borne in mind that because of the change in the statute that had been noticed, the contention was strong that the vested fee must be a fee simple absolute.

The mining company was extracting minerals from under an area of the city. The mining was at a depth of four hundred or five

45 This can be found in Colo. Stat. Ann. c. 163, § 156 (1935).
46 25 Colo. 177, 53 Pac. 454 (1898). Further effect upon the title at time of vacation will be considered *infra*.
47 Colo. Rev. Stat. § 139-1-7 (1953).
48 City of Colorado Springs v. Weiher, 110 Colo. 55, 129 P.2d 988 (1942).
49 37 Colo. 248, 86 Pac. 1038 (1906). The New Mexico Supreme Court has said that its identical statute would have to be interpreted as in this Colorado case. Phillips Mercantile Co. v. City of Albuquerque, 60 N.M. 1, 287 P.2d 77 (1955).

hundred feet and would in no way interefere with the ordinary uses of the city streets. The city, however, claiming it owned a fee simple absolute in the streets, brought suit to restrain further mining and recover damages for the ores already taken. The city had acquired its rights from a good statutory dedication. Clearly the mining company could not be allowed to keep the minerals under the theory that there had been merely a common law dedication which passes only an easement. Here some sort of fee was definitely in the city by virtue of the statute: "All avenues, streets . . . described as for public use on the map or plat of any city or town . . . , shall be deemed to be public property and the fee thereof be vested in such city or town."[50] The court felt the question presented was: What constitutes a street as contemplated in the statute?

The court used as it basis the traditional definition that the street included the surface and so much land below the surface as was necessary for ordinary municipal uses such as storm drains, sewers, or gas pipes. It was this area and this area only the fee of which was vested in the city. The city, therefore, could never restrain the use of the subsoil so long as it did not interfere with the ordinary uses of the street. Either by common law easement or by statutory fee the city is allowed to exercise dominion over the surface and some fifteen feet below the surface.

In review, the city has an easement from a common law dedication. It has a fee from a statutory dedication. That fee is in so much of the surface and ground as can legitimately be used for street purposes. Some doubt exists whether the fee is a fee simple absolute or whether it is a fee simple on a special limitation because it is held in trust for street purposes and will terminate and revert to the abutting owners if it should ever cease to be used as a street. A statute governs the vesting when the street ceases to be used as a street, so that this point of the discussion may be academic.[51]

III. Use

The public authorities are vested with a street for the sole purpose of providing free, unobstructed, continuous passage over the land. Incidental uses may be made if in the public interest and for public purposes. Municipalities, for instance, can use the subsurface of the street for sewer pipes, gas pipes and water mains because these are municipal government uses for the general public, and streets are especially suitable for such installation.[52]

The authorities can authorize certain types of use of the street; they can regulate the use and the users.[53] The city can grant the privilege of special use and demand compensation therefor which is deemed to be in the nature of rentals.[54]

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50 See note 47 *supra*.

51 Colo. Rev. Stat. § 120-1-12 (1953).

52 A county highway within city limits retains its character as county highway but is under supervision and control of the town. Morrison v. Town of Lafayette, 67 Colo. 220, 184 Pac. 301 (1919).

53 See Russell v. Aragon, 146 Colo. 332, 361 P.2d 346 (1961) (public authority may abate nuisance summarily if not capricious, unreasonable or negligent); Heckendorf v. Town of Littleton, 132 Colo. 108, 286 P.2d 615 (1955) (town can regulate curb cuts, but not so as to deny or unduly hamper ingress, egress); City & County of Denver v. Trailkill, 125 Colo. 488, 244 P.2d 1074 (1952) (city cannot prohibit reasonable business on streets; can regulate); Staley v. Vaughn, 92 Colo. 6, 17 P.2d 299 (1932) (Denver has power under charter to regulate vehicular traffic); Willison v. Cooke, 54 Colo. 320, 130 Pac. 828 (1913) (no power in municipality to require consent of owners in same block before one can erect a store building); Colorado & S. Ry. v. City of Fort Collins, 52 Colo. 281, 121 Pac. 747 (1911) (city can require railway to operate with due care for public travel).

54 City & County of Denver v. Stenger, 295 Fed. 809 (8th Cir. 1924).

Anyone may use the public streets in conducting his business so long as it does not tend permanently to obstruct passage. This right is subject to the power of the people to make restrictions upon use. Such a restriction is found in a revocable license needed to operate a bus line.[55] Any franchise, a privilege not enjoyed by others in common, and granted in perpetuity, must come from the sovereign, the state, or the city acting under a piece of sovereignty delegated to it.[56]

The Colorado Supreme Court has spoken of the power of a municipality and the purpose of streets in these words:

> The incorporating act . . . created a trust for the holding of the fee simple title of, and to, all streets and alleys of the town, which thereby became vested in the town, in these simple words, "which shall hold the same for the use of the public." This means, that any attempted regulation of the use of the streets or sidewalks, by the town or city, must be for the benefit of the whole public, for travel, the intended purpose of their dedication as such, and only such structures should be maintained in the street and sidewalk areas as are necessary to meet public requirements and use. Many reasons might be presented why a city might obstruct, or even close, a street or sidewalk temporarily in the interest of public use or welfare, but it can never authorize a permanent encroachment by private individuals, and the latter can never successfully set up a claim of right to encumber the public streets or walks. It then follows that the city cannot grant the exclusive use of the streets or sidewalks, or any part thereof, to private persons for their use or gain, for such would be in direct violation of its only right to accept public streets at all.[57]

The Colorado Constitution provides:

> Private property shall not be taken or damaged, for public or private use, without just compensation. Such compensation shall be ascertained by a board of commissioners. of not less than three freeholders, or by a jury, when required by the owner of the property, in such manner as may be prescribed by law, and until the same shall be paid to the owner, or into the court for the owner, the property shall not be needlessly disturbed, or the proprietary rights of the owner therein divested.[58]

A. Injunction Against Use

Abutting landowners who do not own the fee in the street, as in the case of many city streets, do not have an interest that entitles

55 See City of Denver v. Girard, 21 Colo. 447, 42 Pac. 662 (1895).

56 People *ex rel.* Foley v. Stapleton, 98 Colo. 354, 56 P.2d 931 (1936); Denver & Swansea Ry. v. Denver City Ry., 2 Colo. 673 (1875); Ward v. Colorado E. R.R., 22 Colo. App. 332, 125 Pac. 567 (1912). The Colorado Constitution has a restrictive provision: "No franchise relating to any street, alley or public place of said city and county shall be granted except upon the vote of qualifying taxpaying electors." Colo. Const. art. XX, § 4. See McPhee & McGinnity Co. v. Union Pac. R.R., 158 Fed. 5 (8th Cir. 1907); Berman v. City & County of Denver, 120 Colo. 218, 209 P.2d 754 (1949). A city which grants a franchise when it has no authority will later be estopped to deny its power when it has specifically recognized the grant after the power has been delegated to it. City of Denver v. Mercantile Trust Co., 201 Fed. 790 (8th Cir. 1912).

57 Wood v. People *ex rel.* Stonebraker, 96 Colo. 431, 433, 43 P.2d 1001, 1002 (1935).

58 Colo. Const. art. II, § 15.

them to successfully enjoin the use or vacation of a street,[59] although they may later have an action for recovery of compensation in the form of damages. Another view noticed in a recent case is that a court of equity cannot interfere with the vacation of a street by public officials except for fraud or plain abuse of power.[60]

Probably an injunction could not be obtained even where the abutting owner held the fee because the constitution speaks of being "needlessly disturbed." The court would probably hesitate to find needless disturbance in a city council's decision unless a plain abuse of power appeared. In contrast, where the use of the streets is under no valid authority, the obstruction or use then constitutes a public nuisance and can be enjoined by an individual who suffers special injury from it.[61]

The general public seems to be able to bring suit to cause the removal of any obstruction of the free passage on streets and sidewalks. The citizen and taxpayer can compel the city to observe its duty to remove them.[62]

B. Compensation for Damages

1. Rights of Abutting Owner. Without the aid of the constitution, the Colorado Supreme Court, in *Colorado Central R. R. v. Mollandin*,[63] would not allow recovery for injuries to property from the use of the street because the fee was in the city and the city has complete control over the use of the street. Mollandin, the plaintiff, was more successful in the federal court[64] where he urged the state constitution as a basis of recovery. That court said the *Colorado Central* case was not controlling, and that the use of the street was a right of property in the plaintiff that, if not taken, was definitely damaged under the provision in the constitution. The same distinction can be made in later Colorado cases where the constitution was always used.

The abutting landowner, even when the fee is in the city, is said to have a peculiar interest in the street. He holds an easement

59 City of Colorado Springs v. Crumb, 364 P.2d 1053 (Colo. 1961); Albi Mercantile Co. v. City & County of Denver, 54 Colo. 474, 131 Pac. 275 (1913); Haskell v. Denver Tramway Co., 23 Colo. 60, 46 Pac. 121 (1896); Denver, U. & P. Ry. v. Toohey, 15 Colo. 297, 25 Pac. 166 (1890); Denver, U. & P. Ry. v. Barsaloux, 15 Colo. 290, 25 Pac. 165 (1890); Denver & S. F. Ry. v. Domke, 11 Colo. 247, 17 Pac. 777 (1888).

60 City of Colorado Springs v. Crumb, 364 P.2d 1053 (Colo. 1961).

61 Ward v. Colorado E. R.R., 22 Colo. App. 332, 125 Pac. 567 (1912); Denver & Swansea Ry. v. Denver City Ry., 2 Colo. 673 (1875).

62 People *ex rel.* Stonebraker v. Wood, 90 Colo. 506, 10 P.2d 331 (1932). Colo. Rev. Stat. § 139-76-2 (1953) imposes the duty to keep the streets open and in repair.

63 4 Colo. 154 (1878).

64 Mollandin v. Union Pac. Ry., 14 Fed. 394 (C.C.D.Colo. 1882).

which is an incorporal hereditament and is property. For wrongful interference with it, the Colorado court allows compensation.[65] The general rule can be stated: Where the adjacent owner is denied free use of the street for ingress and egress and the value of his premises is diminished, it is a damage for which there should be compensation under the constitution.[66] But it is *damum absque injuria* where it is occasioned by a reasonable improvement of the street by proper authorities for the greater convenience of the public.[67] Recovery is denied for these reasonable improvements, these reasonably anticipated uses, upon the justification that the adjacent owner contemplated, at the time he dedicated or at the time he purchased, that the city would alter the use.

2. *Uses—Anticipated—Unanticipated.* It now becomes important to determine what are "anticipated uses" and what are "unanticipated uses." In dictum in two early Colorado cases[68] the court said uses reasonably to be anticipated included the raising or lowering of the grade of the street, the laying of pavements and construction of culverts, the building and operation of a street railroad, construction of sewers and the laying of gas and water pipes. For these changes no damages will be awarded.

Unanticipated uses have included an ordinary railroad as distinguished from a local street railway,[69] a water supply ditch,[70] a viaduct,[71] an underpass,[72] and a material change of street grade.[73]

As to the use of the street for an ordinary railroad, the city may have the power to control railroads passing into the city and even the power to license the use of the streets to an ordinary railroad. This power, however, does not serve as notice to the landowner, who dedicates or buys lots next to a street, that a likely use of the street will include an ordinary railroad. Further, the ordinance granting a license to the railroad will not immunize the railroad from liability for actual injuries sustained by abutting landowners even though the ordinance is within the city's power.[74]

Despite the remark in the early case that changes in the street grade could be anticipated and therefore were not compensable, certain refinements of policy have been enunciated in later cases.

65 It is easier to award compensation under the Colorado Constitution which provides compensation where property is "taken or damaged" than under others that compensate only for property "taken." Comment, 16 Ore. L. Rev. 155 (1937).

66 Roth v. Wilkie, 143 Colo. 519, 354 P.2d 510 (1960); Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 Pac. 539 (1919); Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919); Russo v. City of Pueblo, 63 Colo. 519, 168 Pac. 649 (1917); City of Colorado Springs v. Stark, 57 Colo. 384, 140 Pac. 794 (1914); Denver & S.F. Ry. v. Hannegan, 43 Colo. 122, 95 Pac. 343 (1908); City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789 (1894); Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443 (1890); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883).

67 Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 Pac. 409 (1913); City of Pueblo v. tSrait, 20 Colo. 13, 36 Pac. 789 (1894); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883).

68 Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883). See also Harrison v. Denver City Tramway Co., 54 Colo. 593, 131 Pac. 409 (1913).

69 Mollandin v. Union Pac. Ry., 14 Fed. 394 (C.C.D.Colo. 1882); Denver & R.G. Ry. v. Bourne, 11 Colo. 59, 16 Pac. 839 (1887); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883). Mere increase in railroad traffic is within the original servitude and is not further grounds for compensation. Denver & S.F. Ry. v. Hannegan, 43 Colo. 122, 95 Pac. 343 (1908).

70 Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443 (1890).

71 Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 Pac. 539 (1919); City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789 (1894).

72 City of Colorado Springs v. Stark, 57 Colo. 384, 140 Pac. 794 (1914).

73 City of Denver v. Bonesteel, 30 Colo. 107, 69 Pac 595 (1902).

74 Denver & S.F. Ry. v. Hannegan, 43 Colo. 122, 95 Pac. 343 (1908); Denver & S.R. Ry. v. Domke, 11 Colo. 247, 17 Pac. 777 (1888); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887).

In *City of Denver v. Bonesteel*,[75] the court refused to be influenced by that early dictum where the city materially changed the grade of the street and the lot owner had made improvements in reliance upon an established grade.[76] In *Bonesteel* the court summarized the holdings of other jurisdictions:

> Some of them hold that a city is liable in damages to the abutting owner of land on a street the grade of which has been reduced from the natural surface, whether it be the one first established or for a change of a previously established grade. Others seem to restrict liability to cases where there has been a change of a previous grade, and to exempt from the operation of the constitutional provision the first reduction of grade from the natural surface.[77]

The rule that the lot owner must anticipate reasonable changes which are for the good of the public possibly is not affected greatly by the decision to allow recovery for a material change of street grade. The first establishment of grade is certainly to be anticipated. Subsequent changes would be rare and could be justifiably classed as unanticipated.

Only four years after the *Bonesteel* case the court further solidified the law as to street grade changes in the case of *Leiper v. City & County of Denver*[78] where the facts presented were that of an original change of grade from the natural surface. The court approved of *Bonesteel*, but was constrained by the same early dictum, and held that the first change of grade made in accordance with the first establishment of grade, in other words the change from the natural surface, was reasonably to be anticipated and no recovery could be had. The court concluded:

> As well said by Judge Dillon, while sensible of the apparent difficulty of defining the grounds for the distinction, we regard it as almost, if not quite, *stare decisis* in this jurisdiction, that, for the raising or lowering of the grade of a street by a municipality from the natural surface to the grade established in the first instance, the municipality is not liable to the abutting lot owner for consequential damages to his property, unless the change of grade is unreasonable, or has been negligently made.[79]

3. Extent of Access. The taking or damaging of access is a compensable injury as noted above. The injury is compensable even though the access is not wholly taken. For instance, a man should be compensated for loss of business where the street upon which he is located is no longer a commonly traveled way as a result of some obstruction set up by the city.[80]

The easement of an abutting landowner that may be taken or

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75 See note 73 *supra*.

76 When plaintiff landowner relies upon the appearance of the grade and fails to inquire as to the established grade of the street, that failure may prevent recovery. See City of Denver v. Vernia, 8 Colo. 399, 8 Pac. 656 (1885); Aicher v. City of Denver, 10 Colo.App. 413, 52 Pac. 86 (1897).

77 See note 73 *supra* at 111, 69 Pac. at 596.

78 36 Colo. 110, 85 Pac. 849 (1906).

79 *Id.* at 118, 85 Pac. at 851.

80 Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 Pac. 539 (1919). See Roth v. Wilkie, 143 Colo. 519, 354 P.2d 510 (1960); Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919); City of Denver v. Bonesteel, 30 Colo. 107, 69 Pac. 595 (1902); City of Pueblo v. Strait, 20 Colo. 13, 36 Pac. 789 (1894).

damaged by changed use or vacation extends to the full width of the street and not just to the center of the street.[81]

4. Factors Affecting Recovery—Damages. The abutting landowner who has been injured by an unanticipated use of the street is undoubtedly entitled to recover. Some care must be taken, however, to choose the proper party defendant. The plaintiff can recover against the municipality only when the new, unantipicated use is initiated for the direct safety and benefit of the public. For damage from a use which brings about a private benefit, such as allowing the railroad to use a street, the recovery may be had against only that private user on the theory that the one gaining a benefit should compensate for injury to others.[82]

An abutting landowner may be held to have impliedly assented to a use that has continued without objection from him for a long period of time.[83]

A release by the landowner of claims for damage from construction of a railroad or any other use will prevent the person releasing from later objecting to an alteration of the rails or an alteration of whatever use it is; the use has not changed.[84]

Colorado follows orthodox law in holding that a person who suffers only in kind like the rest of the citizenry from a change of use of the street cannot recover for the injury. The injury must be particular, different in kind, special, and affecting property or an appurtenance.[85]

The term "abutting landowner" is, in this area of the law, used to define a general class of persons. But it is not used so strictly as to deny recovery in a proper case to one whose property does not abut the portion of the street that has been applied to a different use. The court, in *Denver Union Terminal Ry. v. Glodt*,[86] said:

> The cases in this and in other jurisdictions, which denied a recovery to one whose property was located on another street, or on a different part of the street vacated or obstructed, were generally cases where such plaintiff or complainant was not deprived of the only reasonable means of access to his property. 13 R.C.L. 74, sec. 65. There are authorities holding that one whose property does not abut upon the street or part of the street which is vacated is entitled to compensation where all access to his property to the system of streets in one direction is cut off. 28 Cyc. 1083

81 Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919).

82 Roth v. Wilkie, 143 Colo. 519, 354 P.2d 510 (1960) (no discussion as to why private landowners abutting the vacated street were proper defendants, but presumed they benfited most); Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919) (railroad claimed that damage actually resulted from the vacation, but court said the vacation was solely to allow development of railroad); City of Colorado Springs v. Stark, 57 Colo. 384, 140 Pac. 794 (1914) (recovery against city because underpass was primarily for benefit of city traffic even though railroad built it); Denver & R.G. Ry. v. Bourne, 11 Colo. 59, 16 Pac. 839 (1887) (recovery from railroad); Denver Circle R. Co. v. Nestor, 10 Colo. 403, 15 Pac. 714 (1887) (recovery from railroad); Sorensen v. Town of Greeley, 10 Colo. 369, 15 Pac. 803 (1887) (no recovery against city where railroad destroyed flume carrying water to plaintiff's crops; Town of Idaho Springs v. Filteau, 10 Colo. 105, 14 Pac. 48 (1887) and Town of Idaho Springs v. Woodward, 10 Colo. 104, 14 Pac. 49 (1887) (no recoveries from city where flume carrying water to mining company leaked); City of Denver v. Bayer, 7 Colo. 113, 2 Pac. 6 (1883) (no recovery from city for railroad in street).

83 Denver, U. & P. Ry. v. Barsaloux, 15 Colo. 290, 25 Pac. 165 (1890); Denver & S.F. Ry. v. Domke, 11 Colo. 247, 17 Pac. 777 (1888).

84 Denver, U. & P. Ry. v. Toohey, 15 Colo. 297, 25 Pac. 166 (1890).

85 City of Colorado Springs v. Weiher, 110 Colo. 55, 129 P.2d 988 (1942); Minnequa Lumber Co. v. City & County of Denver, 67 Colo. 472, 186 Pac. 539 (1919); Gilbert v. Greeley, S.L. & P. Ry., 13 Colo. 501, 22 Pac. 814 (1889).

86 67 Colo. 115, 186 Pac. 904 (1919).

> . . . The correct rule, applicable in the instant case, is that the owner of property which does not abut on the part of the street closed is entitled to compensation, provided he is able to prove special and peculiar damage.[87]

This case found that the plaintiff's easement had been substantially impaired. It found that the plaintiff, as a result of the construction of an approach to a viaduct and the closing of certain other streets, had no access to the business district, even by going a reasonable distance out of the way, due to lack of through streets and presence of railroad tracks. The case thus came within the rule to which reference has been made that one whose property does not abut upon the street vacated is still entitled to compensation if all access to the system of streets in one direction is cut off.

The case is in this way distinguishable from *Whitsett v. Union Depot & R.R.*[88] where the plaintiff complained that the Union Depot was placed in his direct path to the business district, but nothing showed that he was cut off from the whole system of streets in that direction.

The measure of compensation for interference of ingress and egress is the actual diminution in the market value of the abutting land, for any use to which it could reasonably be put, which has resulted directly from the changed use or vacation of the street.[89]

5. Other Theories of Recovery. Even though a constitutionally compensable injury cannot be established, the city may be held liable under tort law for negligently making the change.[90]

Another theory used to recover damages for wrongful use of streets is that of public nuisance.[91] This theory also requires showing a special or peculiar injury beyond that suffered in common with the public. Nuisance might be of value where the plaintiff is otherwise estopped to question the use, but a public nuisance could be established in the "altered" use. The theory of nuisance may also be valuable when the statute of limitation period has run since the change of use occurred, but a continuing nuisance can be established, against which the statute begins to run anew each day.[92] And, as mentioned earlier, the theory of public nuisance can be the basis of a suit for injunction against the wrongful use.

IV. VACATION

The municipal authorities have the power to vacate streets when the action would be in the best interests of the public.[93] These vacations may take place in order that a changed use can be carried out, or they may take place as an independent act solely because the public no longer needs the street for passage. In either event the act must not be arbitrary.[94] Private benefit may accrue from the vacation but not at the expense of the public interests.

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87 *Id.* at 118-19, 186 Pac. at 906.
88 10 Colo. 243, 15 Pac. 339 (1887).
89 City of Denver v. Bonesteel, 30 Colo. 107, 69 Pac. 595 (1902); Town of Longmont v. Parker, 14 Colo. 386, 23 Pac. 443 (1890).
90 City of Denver v. Vernia, 8 Colo. 399, 8 Pac. 656 (1885).
91 Jackson v. Kiel, 13 Colo. 378, 22 Pac. 504 (1889).
92 Union Pac. Ry. v. Foley, 19 Colo. 280, 35 Pac. 542 (1893).
93 A deed of vacation is competent evidence when a public highway is alleged. Gromer v. Papke, 71 Colo. 440, 207 Pac. 862 (1922).
94 City of Goldfield v. Golden Cycle Gold Mining Co., 60 Colo. 220, 152 Pac. 896 (1915).

The Colorado Constitution provides:

> Section 25. Special legislation prohibited.—The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say; for granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys, and public grounds . . . .[95]

This specifically prohibits the legislature from vacating streets, but it does not prohibit delegation. By this restriction it is implied that the legislature has the power to authorize the municipality to act in such cases.[96]

A. By Private Persons

Colorado once had a statute that provided that streets could be vacated by private action with the consent of all the landowners in a town site or subdivision of not less than four blocks adjacent to each other.[97] No statute of the legislature can confer upon public or private individuals the power to vacate a street in an arbitrary manner. Any deed of abutting owners which purported to vacate the street under the authority of the statute, but which was done arbitrarily was a nullity.[98] The same principle would govern a vacation by public authorities.

While the emphasis of this study is upon city streets, in many cases streets and roads and highways are treated the same.[99] Under this statute which allowed private action of vacation, however, there was a distinction. This statute did not include within its description a "road" in any outlying area that had not been subdivided into blocks because streets and alleys exist only where the land is in blocks.[100]

B. Compensation for Damage

So that it is not overlooked, the vacation of a street will often operate to deny abutting landowners of part of their access. To the extent that there is special injury, there can be recovery the same as when the use is changed.[101]

95 Colo. Const. art. V, § 25.
96 City of Goldfield v. Golden Cycle Mining Co., 60 Colo. 220, 152 Pac. 896 (1915); Whitsett v. Union Depot & R.R., 10 Colo. 243, 15 Pac. 339 (1887).
97 This repealed statute can be found in Colo. Stat. Ann. ch. 163, § 117 (1935).
98 City of Goldfield v. Golden Cycle Mining Co., *supra* note 96.
99 Armstrong v. Johnson Storage & Moving Co., 84 Colo. 142, 268 Pac. 978 (1928).
100 Balanced Rock Scenic Attractions, Inc. v. Town of Manitou, 38 F.2d 28 (10th Cir. 1930).
101 Roth v. Wilkie, 143 Colo. 519, 354 P.2d 510 (1960); Denver Union Terminal Ry. v. Glodt, 67 Colo. 115, 186 Pac. 904 (1919).

C. Nature and Effects of Reversion

1. Early Confusion. An early case in Colorado, *Denver & S.F. Ry. v. Domke*,[102] contained surprising language, inconsistent with the common law, which caused some confusion as to the nature of the title and its effect upon vacation of the street. The court, in discussing the right of abutting landowners to enjoin the change from a street railway to an ordinary railway, said:

> As we have already seen, the fee to Willow Lane and Clark Street is by law vested in the city in trust for the use of the public. It is not, and never was, in the present plaintiffs, who are purchasers of lots subsequent to the dedication of the streets. There is no evidence to show that the grants to them included the reversionary interest or reserved rights, if any such interest or rights there be, of the dedicator in this fee. If the street should be abandoned by the municipality, or for any other reason the trust should fail, and the fee pass out of the city, it would not revert to plaintiffs. *Gebhardt v. Reeves*, 75 Ill. 301. It follows, therefore, that the increased burden mentioned would not constitute an actual taking of plaintiffs' property, though their peculiar interest in the street as abutting owners might entitle them to compensation for injuries inflicted.[103]

The court continues immediately with what would seem to be more nearly orthodox reasoning and not quite so extreme:

> Besides, it is suggested that, where such a qualified fee in the city as we are now considering exists, "the reversionary right of the owner of the fee in the surface of the street is too remote and contingent to be of any appreciable value, or to be regarded as property, which, under the constitution, is required to be paid for when its use is appropriated by the public." *Spencer v. Railroad Co.* 23 W. Va. 406, and cases cited.[104]

Later the court, in *Olin v. Denver & R.G. R.R.*,[105] took the opportunity to rid itself of the strong language to the effect that upon vacation the land would not revert to the abutting lot owners. In that case the court said that this language had been mere dicta. It proceeded to note also that the *Domke* case was probably the reason why the legislature had amended the statute in 1889 in which it provided that upon vacation, the fee vested in the abutting lot owners to the center of the street.[106]

2. Conveyance of Abutting Lots Before Vacation. To form a basis for discussion of the effect of a vacation upon the state of the title, the effect of conveyances of abutting land should be examined.

Having reasoned that the grantee of land is entitled to all the appurtment advantages, the rule has been followed that the grantee takes title to the center of the street abutting, to the extent that the

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102 11 Colo. 247, 17 Pac. 777 (1888).
103 *Id.* at 254, 17 Pac. at 780.
104 *Id.* at 254-55, 17 Pac. at 780.
105 25 Colo. 177, 53 Pac. 454 (1898).
106 Colo. Sess. Laws 1889, § 1 at 461-62.

grantor has any interest in it, unless the grant expressly excludes the street.[107]

An exception to this rule, or a further elaboration of it, is that where the abutter-grantor has only an easement in the street and the fee is vested in the public, then the interest to the center of the street is not conveyed appurtment. The conveyance goes only to the edge of the street.[108] Thus, the rule is of importance only where the fee to the street is held to be in the dedicator, and has not passed to the city, that is, where the street originated by a common law dedication.

Another situation that bears upon the application of the rule is that once a conveyance has separated the street from the lots either by describing them separately or by excluding one, then subsequent grantors can never be held to have included the street in the conveyance describing the lots only.[109]

An interesting interpretation of a deed, and the application of these rules occurred in *Skerritt Inv. Co. v. City of Englewood*.[110] A phrase in the deed read:

> [T]hat in the event said street north of the lots hereby conveyed (lots 48 and 49) and now known as Sheridan Avenue, should for any reason be vacated, or cease to be used as a public street, then the party of the second part shall have the refusal of purchasing a strip fifty feet in width on the north of the property hereby conveyed at the then market value thereof, which value shall be fixed by any court of competent jurisdiction.[111]

The phrase was held to be repugnant to the previous express unrestricted grant and therefore not operative to, in any way, overcome the presumption of conveying title to the center of the street.

3. Vesting Upon Vacation. Colorado cases have held the fee to the street to vest in the abutting landowner under the common law or by virtue of the Colorado statutes which have generally been a reenactment of the common law with slight variations in specific situations.[112]

4. Conveyance After Vacation. A recent case divided the Colorado court on the question of conveyances after vacation of a street. *Morrissey v. Achziger*[113] deserves special treatment. The area through which the street in question had run was platted and the streets therein were dedicated in 1887. In 1937, the street was vacated in front of lots 7 through 10, owned at that time by Stella Kate Cullen. Cullen died leaving the lots to one Sarah Burns who conveyed "Lots Six (6), Seven (7), Eight (8), Nine (9) and Ten (10), Block Sixteen . . . ." to the defendant Morrissey, who, in turn, conveyed to the plaintiff by a like description.

The plaintiffs brought a quiet title action over the area formerly in the street. The defendant, Morrissey, claimed that the area of the

107 Skerritt Inv. Co. v. City of Englewood, 79 Colo. 645, 248 Pac. 6 (1926); McDonald v. Kummer, 56 Colo. 153, 137 Pac. 51 (1913) (dictum); Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574 (1902) (dictum); Olin v. Denver & R.G. R.R., 25 Colo. 177, 53 Pac. 454 (1898).

108 McDonald v. Kummer, 56 Colo. 153, 137 Pac. 51 (1913) (dictum).

109 Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574 (1902).

110 79 Colo. 645, 248 Pac. 6 (1926).

111 *Id.* at 652, 248 Pac. at 9.

112 Morrissey v. Achziger, 364 P.2d 187 (Colo. 1961); Skerritt Inv. Co. v. City of Englewood, 79 Colo. 645, 248 Pac. 6 (1926); Overland Mach. Co. v. Alpenfels, 30 Colo. 163, 69 Pac. 574 (1902). The present statute is Colo. Rev. Stat. § 120-1-12 (1953).

113 364 P.2d 187 (Colo. 1961).

street was not intended to be passed to the plaintiffs. He also claimed that he should have reformation of the deed from Burns to reflect the true intent between Burns and himself that the street area was to pass.

Briefly the court said that the original abutting owner, Cullen, had been vested with the fee upon vacation of the street. This was in no way determinative of the case, however. The court held that the strip of land formerly in the street must be included in the description to be conveyed with the lot. The court said:

> Certainly a person owning contiguous tracts of land can convey one without conveying the other. A deed which accurately and correctly describes a tract of land is not subject to construction or interpretation. If the description does not express the intention of the parties, reformation is the proper remedy. To hold otherwise would create chaos and add a new and frightening chapter to the law of conveyancing.[114]

Mr. Justice Doyle, two other justices joining, said:

> I respectfully dissent! . . . [W]e are warned that "To hold otherwise would create chaos and add a new and frightening chapter to the law of conveyancing." I submit that a rule which has a settling rather than an unsettling effect on titles is not apt to create chaos. A rule which prevents properties from being disjointed and which is designed to obviate the existence of unusable rectangles of property which could only serve to haunt adjacent owners is not going to create chaos.[115]

Such was the theme of a convincing dissenting opinion. Mr. Justice Doyle thought it was important to determine the ownership of the street area. Because the street was located outside the city limits, and because no Colorado statute vests title in the county the common law must therefore govern.

Where the common law governs, the public acquires merely an easement; the fee remains in the landowner. If the fee remains in the landowner, he reasoned, then upon vacation of the street the land is freed from the public easement but none of its area is subject to any change in ownership.

Mr. Justice Doyle inquires: "what change is effected by vacation which requires that it be mentioned in a conveyance?"[116]

The law contains authority for the majority view of the court that the area formerly in the street must be described to be conveyed.[117] To support this theory it is said that after vacation the reason for the rule no longer exists; the owner is vested with title and with possession and control and thus can choose to convey it in whole or in separate tracts as he can with any land owned absolutely. "Land is never appurtenant to land," the several cases say, and one tract of land is never passed as an incident or accretion by conveyance of an adjoining tract.[118]

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114 *Id.* at 189.
115 *Id.* at 189-91.
116 *Id.* at 191.
117 Both 2 Elliott, Roads and Streets § 1192 (3d ed. 1911) and Annot., 2 A.L.R. 6, 33 (1919) quote from White v. Jefferson, 110 Minn. 276, 124 N.W. 373 (1910).
118 See the Washington cases discussed in Annot., 49 A.L.R.2d 982, 1003 (1956).

Title Standard Number 4 calls for any conveyance made after vacation to include a specific description of that area of the prior street if it is to be successfully conveyed.[119] Morrissey relied heavily on this title standard[120] and Doyle's dissent charged influence by it. The advisability of adherence to these standards is not here to be discussed except to say that they do not and should not have force of law.

The dissenting viewpoint is also supported in law and is the prevalent viewpoint of the recent cases.[121]

The question cannot escape being one of construction. The majority silently treated the land as being two tracts of land, the lot was a different tract from the street. The conveyance, under this view, became unambiguous. "Lot Seven" meant to the edge of the street.

The dissent treats the land as always having been one tract. Upon this basis the applicable rule is that all the grantor's interest is conveyed that is not reserved.

Niceties of title have been troublesome in these Colorado cases. The court, in this *Morrissey* case, has ignored the nature of the title in the street. The case fails to give importance to the state of the title in an effort to conform to local title examination practices. The case is objectionable in that the majority has ignored what has helped to standardize and give predictability to property law, that is, the concept of various types of ownership.

A slightly different problem for the court has been the enactment of statutes giving a "fee" to the city. The court has always tended toward the common law easement, with the result that the city has gained nothing by this statutory fee. For example, where a statutory dedication fails the resulting common law dedication will create an easement even though the original intent was to pass a fee. The court has also required strict compliance with the statute to complete a statutory dedication thereby limiting the number of times the city receives a fee.

Most notable of the court's tendency was the *Bohn Mining* case where the use of the subsoil for mining raised a question concerning the nature of the fee vested in the city. The "fee" suddenly became conspiciously similar to the common law easement.

Colorado has produced some interesting ramifications of this area of the law and in the process has nullified the statutory provisions as to ownership.

119 Colo. Bar Ass'n, Real Estate Standards No. 4.
120 Brief for Plaintiff in Error, Morrissey v. Achziger, 364 P.2d 187 (Colo. 1961).
121 Annot., 49 A.L.R.2d 982, 1002 (1956).

THE ABSTENTION DOCTRINE

By RONALD L. NIETO*

I. INTRODUCTION

In the last twenty-five years the federal courts have developed a doctrine by which, in appropriate cases, they may decline to exercise jurisdiction even though their jurisdiction has been properly invoked. This doctrine has been aptly termed the "abstention doctrine." The occasions that call for the application of abstention are those where the federal court is called upon to decide an issue of state law under circumstances which require it to defer its decision in favor of an adjudication by courts of the state concerned. The circumstances that would require such action by the federal courts are exceptional ones, and where abstention is employed it must serve some countervailing interest that overrides the duty of a federal court to decide a case properly before it. The purpose of this paper will be to examine the abstention doctrine and the circumstances that require its use.

II. DEVELOPMENT OF THE DOCTRINE

A. Federal Jurisdiction Could Not Be Declined

The idea that federal courts were under an imperative duty to exercise their jurisdiction in every case that properly came before them was one which the courts adhered to for many years. It probably sprang from dictum uttered by Chief Justice Marshall in an early case:[1]

> It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do, is to exercise our best judgment, and conscientiously to perform our duty.[2]

While this dictum may not have been followed uniformly,[3] it had sufficient vitality to preclude serious challenge to the scope of the federal courts' jurisdiction for a century. Not only did the courts consider it an absolute duty to exercise their jurisdiction, they gave short shrift to contentions that they should postpone such exercise until a court of another jurisdiction could decide the same issues.[4] *McClellan v. Carland*[5] well illustrates this point. The

* Senior student, University of Denver College of Law.
1 Wright, *The Abstention Doctrine Reconsidered*, 37 Texas L. Rev. 815 (1959).
2 Cohens v. Virginia, 19 U.S. (6 Wheat.) 257, 291 (1821).
3 See note 1 *supra*.
4 Chicot County v. Sherwood, 148 U.S. 529 (1893); Hyde v. Stone, 61 U.S. (20 How.) 170 (1857).
5 217 U.S. 268 (1910).

circuit court ordered a stay of the federal proceedings while the state of South Dakota instituted an action in the state court to determine an escheat to it of the estate in controversy. If the state would begin the action within a time limit set by the court, the court announced that it would extend the stay until determination of the state court action. A decision by the state court would have been res judicata in the federal proceedings. The Supreme Court reversed, saying that the circuit court had virtually abandoned its jurisdiction and turned the matter over to the state court. "This, it has been steadily held, a Federal court may not do."[6]

B. *Awareness of Conflict between Sovereignties*

Perhaps this idea persisted for so long because, until the early part of the twentieth century, conflict between the federal and state jurisdictions was not so apparent as it later became. The federal courts, under the ruling of *Swift v. Tyson*,[7] were considered to be the state courts' equals as authoritative interpreters of the state law. This sometimes resulted in two distinct lines of authority on the same point of state law,[8] and could not have been very pleasing to state authorities. In such a situation, it is easy to visualize a state policy being thwarted on occasion by a party resorting to a federal court which had a different rule of law from the state court's. This was not a direct interference with state authority and did not create the friction that could result from direct interference.

Then the Supreme Court handed down the case of *Ex parte Young*.[9] This established that the eleventh amendment[10] did not bar injunctions by a federal court against state officers acting in violation of the Constitution. Accordingly, a federal judge could restrain state activities as unconstitutional, and incident to this, he could issue an ex parte interlocutory stay pending determination of the constitutional question.[11] Subsequently, it was held that acts of state officials, though contrary to but under color of state law, did constitute state action under the fourteenth amendment.[12] These decisions greatly increased the sensitive area of federal-state conflict.

Congress was not long in reacting to these decisions. In 1910, it put into effect the statute requiring a three judge federal court to hear petitions for injunctions restraining the action of a state official.[13] This same statute provided for direct appeal from such three judge courts to the Supreme Court. Thus, by this and other enactments,[14] it can be seen that Congress did not approve of too

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6 *Id.* at 281.
7 41 U.S. (16 Peters) 1 (1842).
8 Kurland, *Toward a Co-Operative Judicial Federalism*, 24 F.R.D. 481 (1960).
9 209 U.S. 123 (1908).
10 U.S. Const. amend. XI.
11 See Note, *The Pullman Case: A Limitation on the Business of the Federal Courts*, 54 Harv. L. Rev. 1379, 1381 (1941).
12 Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278 (1913).
13 Act of June 18, 1910 § 17, 36 Stat. 557 (1910), as amended 28 U.S.C. §§ 2281, 2284 (1958). Other legislative limitations on federal court jurisdiction are prohibitions against: injunctions to stay state court proceedings except where authorized by act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments, 28 U.S.C. § 2283 (1958); enjoining assessment, levy or collection of a state tax under state law where plain, speedy and efficient remedy may be had in the courts of such state, 28 U.S.C. § 1341 (1958); enjoining operation of or compliance with an order affecting a public utility's rates made by a state administrative or rate-making body of a state where jurisdiction is based solely on diversity of citizenship or repugnance to the Constitution, and the order does not interfere with interstate commerce, and after reasonable notice and hearing, and a plain, speedy and efficient remedy may be had in state courts, 28 U.S.C. § 1342 (1958).
14 See note 13 *supra*.

great an intereference by federal courts in the affairs of the states. But the congressional scheme was far from comprehensive. It did not, and perhaps could not, cover every area of potential conflict.

The federal courts were not unaware of this problem. "Caution and reluctance" attended the consideration of cases involving local controversies where there was threat of opposition between state and federal courts.[15] This was especially true where the relief asked would be in the form of an injunction interfering with the activities of state officials.[16] It was recognized that there were some issues which should be adjudicated in the state courts, even though the federal courts had jurisdiction of the cause.[17] However, the Supreme Court still retained and exercised its power to construe state constitutions and statutes even when it expressly stated its reluctance to do so,[18] although it also recognized that the ultimate determination of the application, construction and interpretation of a state constitution[19] or statute[20] rested with the highest state court. The Supreme Court expressed its guide to be "the scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts . . . ."[21]

C. *The Erie Case*

In *Erie v. Tompkins*,[22] the Supreme Court finally repudiated the *Swift v. Tyson*[23] doctrine. Thereafter, the substantive law of the state would be controlling on state issues when decided in federal courts where jurisdiction is obtained by virtue of diversity of citizenship. Consequently, the federal courts were bound by the determinations of the state courts on state law issues. But it must be noted that this is all that the *Erie* case held. Federal courts still had the power to adjudicate issues of state law; however, they could no longer formulate their own rules of decision independently of state court rulings. The problem presented by *Erie* was the dilemma of the federal courts when the state law was not clear, either because there was no authoritative decision by the state court or because there was a conflict in state authorities.[24] In such a situation the federal court was embarrassed by the necessity of deciding the state law question by a ruling that would be the law of the case only and that might be proved wrong by a subsequent state court decision.[25] The problem can be put into focus by considering the alternatives faced by a federal court in a case where it had jurisdiction by virtue of diversity and where there are present state law issues and federal constitutional questions. Assuming a case where the state law authorities on the point at issue are unclear, the federal court is then faced on the one hand with the well known reluctance to decide a case on constitutional grounds where other grounds for decision are available, and on the other hand with a reluctance to decide the

15 Hawks v. Hamil, 288 U.S. 52, 60 (1933).
16 *Ibid.*
17 See Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929); Cavanaugh v. Looney, 248 U.S. 453 (1919).
18 Porter v. Investors Syndicate, 287 U.S. 346 (1932).
19 Glenn v. Field Packing Co., 290 U.S. 177 (1933).
20 Lee v. Bickell, 292 U.S. 415 (1934).
21 Matthews v. Rodgers, 284 U.S. 521, 525 (1932).
22 304 U.S. 64 (1938).
23 See note 7 *supra*.
24 Kurland, *supra* note 8.
25 Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

case by a declaration of state law that may subsequently prove to be wrong because of a contrary determination by the state court.

The policy of the *Erie* case seems clear. It was a recognition of the independence of the states in their own sphere of the federal-state relationship. This policy hit a barrier in those situations mentioned, due to the inferior capacity—power, not ability—of the federal courts.[26] No legislation covered this area. It remained for the courts to find their own judicial solution.

D. The Doctrine of the Pullman Case

A partial answer has come in the form of the abstention doctrine as enunciated by the Court in the *Pullman*[27] case. *Pullman* was not the first case in which the device of abstention was employed,[28] but it was in this case that it was crystallized and identified as a doctrine.

Over light passenger runs in Texas, the railroads customarily carried but one Pullman car. The one car was in charge of a porter, who was a Negro. The Railroad Commission ordered that no sleeping car was to be operated in Texas unless such car was continuously in charge of a Pullman conductor. The Pullman Company attacked the order as beyond the power of the Railroad Commission under the Texas statutes. The Pullman porters intervened as complainants alleging unconstitutionality because of discrimination against Negroes. The three judge district court found that the Texas statutes did not uphold the Railroad Commission's exercise of power and enjoined enforcement of the order. On appeal, the Supreme Court remanded the cause with directions to retain the bill pending a prompt determination of the applicability of the Texas statute by the Texas courts.

The Court found the authority for its action in the traditional discretion of a court of equity. "An appeal to the chancellor . . . is an appeal to the 'exercise of the sound discretion, which guides the determination of courts of equity.' . . . The history of equity jurisdiction is the history of regard for public consequences in employing the extraordinary remedy of the injunction."[29]

The Court found that the constitutional question presented a sensitive area of state policy that should not be entered into unless no alternative to its adjudication was open. Thus, a consideration of the state law issue was necessitated. On this subject the Court commented that a ruling by the federal court would be merely a forecast of the law, because the final authority, the Supreme Court of Texas, had not spoken on the scope of the statute. "The reign of law is hardly promoted if an unnecessary ruling of a federal court is thus supplanted by a controlling decision of a state court. The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."[30]

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26 Kurland, *Mr. Justice Frankfurter, the Supreme Court and the Erie Doctrine in Diversity Cases*, 67 Yale L. J. 187 (1957).

27 Railroad Comm'n of Texas v. Pullman Co., *supra* note 25.

28 Railroad Comm'n of Texas v. Rowan & Nichols Oil Co., 310 U.S. 573 (1940); Thomason v. Magnolia Pet. Co., 309 U.S. 478 (1940); Pennsylvania v. Williams, 294 U.S. 176 (1935); Spielman Motor Sales Co. v. Dodge, 295 U.S. 89 (1935); Matthews v. Rodgers, 284 U.S. 521 (1932); Langres v. Green, 282 U.S. 531 (1931); Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929).

29 See note 25 *supra* at 500.

30 *Ibid.*

This avoidance of friction was termed by the Court as one of the public interests having the highest claim on the discretion of the chancellor. The "contribution of the courts"[31] based on "important considerations of policy,"[32] thus emerged as the abstention doctrine. It is the Court's attempt to further harmonious relations between state and federal authority.

III. Application of The Doctrine

A. *Interwoven Federal Constitutional and State Law Issues*

The application of the abstention doctrine is most clear in those cases where state action is being challenged as contrary to the federal constitution and state law questions are present in the case.[33] An early example of this type of case is *Gilchrist v. Interborough Rapid Transit Co.*,[34] where the state question was basic to the controversy. The leading case in this area is the *Pullman* case, discussed previously.

In *Pullman* the court found that the constitutional issue touched "a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."[35] In subsequent cases the sensitivity of the state issue has not been given as great weight as the principle of avoiding an unnecessary constitutional decision.[36] What is most basic in these cases, although principles of comity are inherent in them, is that by abstaining the federal courts avoid the unnecessary adjudication of a constitutional issue. Mr. Justice Frankfurter has classified the application of the abstention doctrine in this area as a phase of the basic constitutional doctrine that federal courts will determine a constitutional issue only when no alternative is available.[37] By submitting at least the state issues to the state court, the federal courts give effect to this salutary principle. It is possible that state courts could give underlying state issues a construction that would avoid the constitutional issue altogether, or in part,[38] or the state court decision might make determination of the constitutional issue patently necessary. In any event, the constitutional doctrine will be served. The Court has indicated that the state courts may be more likely to give a statute a limiting interpretation than a federal court would.[39]

Another policy recently stated by the Court to be served by abstention is that by allowing the state courts to first consider the state issues, the federal court judgment on the constitutional issues

[31] See note 25 *supra* at 501.
[32] *Ibid.*
[33] It may be noted here that the Court has not extended abstention to cover cases involving interwoven state law and non-constitutional federal questions. No case has been found where abstention has been applied in such a situation. In at least one case, Propper v. Clark, 337 U.S. 472 (1949), the Court has refused to allow abstention where a question of non-constitutional federal law was intertwined with a state law question. The rationale behind such a result is not entirely clear. There is evidently no rule requiring a federal court to avoid a decision based on non-constitutional federal grounds where other grounds are available, but it is conceivable that considerations of comity between state and federal authority could be very strong. Perhaps abstention will be applied in this class of case in the future. The principle of comity seems as applicable here as in other situations.
[34] See note 28 *supra*.
[35] See note 25 *supra* at 498.
[36] E.g., City of Meridian v. So. Bell Tel. & Tel. Co., 358 U.S. 639 (1959); Shipman v. DuPre, 339 U.S. 321 (1950); Spector Motor Serv. Inc. v. McLaughlin, 323 U.S. 101 (1944).
[37] Burford v. Sun Oil Co., 319 U.S. 315, 336 (1943) (dissenting opinion).
[38] Spector Motor Serv. Inc. v. McLaughlin, *supra* note 36.
[39] Harrison v. NAACP, 360 U.S. 167 (1959).

will be based on "a complete product of the State."[40] Evidently, it is believed that having a state court interpretation will shed greater light on the constitutional problem.

The state law issues must be unsettled ones in this area. If there is no reasonable doubt about the construction, interpretation or application of the state law in question,[41] the federal court will not abstain from deciding the issues.[42] There may be no reasonable doubt either because the state issue has already been settled by the state court or because there is no ambiguity that calls for an interpretation.[43] Abstention is not, however, proper simply because there are unsettled issues of state law.[44] If a state court ruling could not possibly aid in the constitutional adjudication, the federal court cannot require a prior state court determination.[45] The Supreme Court recently made this point very clear in a case where the district court had made a finding only that the state law was unclear.[46] The Court stated that reference to the state courts should not "automatically" be made.[47]

In cases involving a constitutional determination the method of disposition has generally been to retain the case on the federal court docket and refer the parties to the state courts for an adjudication of the state issues. The earliest abstention cases were disposed of by dismissing the action, thereby causing the entire controversy to be tried in the state courts.[48] For a period of time the Court struck upon a compromise between retention and dismissal. The federal court would decide the state issue but would provide for a further decree on order in case of a change in circumstances or a decision of the state court contrary to that of the federal court on the state issue.[49] It was in the *Pullman* case that the Court first employed the device of retention[50] and it has continued to do so in constitutional cases with great regularity. In one case since *Pullman* the Court has directed a dismissal in a constitutional case but no distinguish-

40 *Id.* at 178; *accord*, Metlakatla Indian Community v. Egan, 363 U.S. 555 (1960).
41 Harrison v. NAACP, *supra* note 39 at 177.
42 Turner v. City of Memphis, 369 U.S. 350 (1962); Toomer v. Witsell, 334 U.S. 385 (1948).
43 Chicago v. Atchison, T. & S. F. R.R., 357 U.S. 77 (1958).
44 Doud v. Hodge, 350 U.S. 485 (1956).
45 Public Util. Comm. of Ohio v. United Fuel Gas Co., 317 U.S. 456 (1943).
46 See NAACP v. Bennett, 178 F. Supp. 188 (E.D. Ark. 1959).
47 NAACP v. Bennett, 360 U.S. 471 (1959).
48 Cavanaugh v. Looney, 248 U.S. 453 (1919); Gilchrist v. Interborough Rapid Transit Co., *supra* note 28.
49 Lee v. Bickell, 292 U.S. 415 (1934); Glenn v. Field Packing Co., 290 U.S. 177 (1933); Wald Transfer & Storage Co. v. Smith, 290 U.S. 602 (1933).
50 See note 25 *supra* at 501.

ing reason for its disposition of the case in this manner is apparent.[51] Retaining the case seems to imply that the parties are to present only the state questions to the state courts and return to the federal courts for a determination of the federal questions. This is the logical, if time consuming, method of procedure. But this procedure has been placed in doubt by the Court's decision in *Government & Civic Employees Organizing Comm. v. Windsor*.[52] There the parties had, at the direction of the federal district court, obtained a state supreme court determination that the questioned state act did apply to the plaintiffs, but the parties did not present the constitutional objections to the state court. The litigants returned to the federal courts where they adjudicated the constitutional issue. On appeal the Supreme Court, *sua sponte*, held that abstention should have again been employed as the parties had not given the state court the opportunity to consider the act in the light of the constitutional objections, which might have made a difference in the state court's decision. If the parties had done this, they probably could not have had the constitutional questions decided by the lower federal courts.[53] They would have recourse to the Supreme Court, but that is no more than they would have had if they had applied to the state courts originally. It is not clear just how much of the controversy should be presented to the state court, but in light of the *Windsor* case, it would appear to be risky not to present the constitutional questions.

B. *Diversity Actions*

Cases in which the jurisdiction of the federal courts is based on diversity of citizenship have presented difficulties to the Court. The leading case in this area is *Meredith v. Winter Haven*.[54] This was a diversity case which put into question state constitution and statute provisions which were unsettled. The district court's dismissal of the action without prejudice was reversed by the Supreme Court. "But we are of the opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision."[55] For abstention to be proper there must be exceptional circumstances present in any case, but this is especially true in a diversity case. The purpose of diversity jurisdiction is to allow the litigants a federal forum if they so desire, and "denial of that opportunity by the federal courts merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act."[56] *Erie* did not release federal courts from the duty of deciding uncertain state law in diversity cases, but rather placed on them a greater responsibility for determining and applying state law in all such cases.[57]

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51 Stainback v. Mo Hock Ke Lok Po, 336 U.S. 368 (1949).
52 353 U.S. 364 (1957).
53 England v. Board of Med. Examiners, 194 F. Supp. 521 (E.D. La. 1961).
54 320 U.S. 228 (1943).
55 *Id.* at 234.
56 *Id.* at 234-235.
57 *Id.* at 237.

Meredith was followed by the federal courts very closely.[58] There was no indication that its holding was questioned until 1959 when the Court handed down its decision in *Louisiana Power & Light Co. v. City of Thibodaux*.[59] This was a diversity case where the power of a city to expropriate the property of a private company was put into question. A state statute seemed to give the city authority for its actions but a decision of the state's attorney general held otherwise. The district court stayed proceedings to allow for a state court adjudication on the interpretation of the statute. The Court of Appeals reversed. No constitutional questions were presented to the Supreme Court, but it upheld the district court's decision. The case set off speculation that it might be interpreted as warranting abstention in a diversity case simply because the state law was unsettled or unclear.[60] But the limiting factors of the case seem to preclude such a wide interpretation of the case. Eminent domain, the opinion pointed out, is "intimately involved with sovereign prerogative."[61] This "special nature" of eminent domain was apparently relied upon to justify the decision reached.[62] Thus it would seem that the case could be classified as one in which an exceptional circumstance was present—thereby making the case a proper one for the application of the doctrine of abstention.

But at the same time the *Thibodaux* case was decided the Supreme Court also passed on *County of Allegheney v. Frank Mashuda Co.*[63] This was also an eminent domain case based on diversity jurisdiction. Here the Court reversed the district court's judgment of dismissal. The mere fact that it was an eminent domain case was not sufficient to require the application of abstention. The only distinguishing characteristic of the cases is that in *Allegheney County* the state law was clear whereas in *Thibodaux* the state law was unsettled. Perhaps the holdings in these cases can be reconciled by construing them together to mean that abstention will be appropriate in an eminent domain case where the state law is unsettled. Subsequent developments do not warrant reading into the cases a holding that abstention will be applied in a diversity case simply because the state issues are uncertain. Numerous cases have been reported since *Allegheney County* and *Thibodaux* in which the federal courts have held it to be their duty to decide unsettled state law issues in diversity cases. Moreover, two recent diversity cases in which the Court has ordered abstention involved considerations of federal constitutional questions,[64] thereby demonstrating that abstention will be proper in a diversity case only if it serves some countervailing interest.

C. *Actions Involving Interference With State Affairs*

The principal consideration of the Supreme Court in applying the doctrine of abstention to a variety of cases is a reluctance to interfere with the administration by a state of its own affairs. Re-

58 *E.g.*, Lumbermen's Mut. Cas. Co. v. Elbert, 348 U.S. 48 (1954); Estate of Spiegel v. Commissioner, 335 U.S. 701 (1949).

59 360 U.S. 25 (1959).

60 Note, *Abstention: An Exercise in Federalism*, 108 U. Pa. L. Rev. 226 (1959); Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 Colum. L. Rev. 749 (1959).

61 See note 59 *supra* at 28.

62 *Ibid.*

63 360 U.S. 185 (1959).

64 United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960).

fusal to exercise its jurisdiction in this type of case is a recognition by the federal courts that avoidance of federal-state conflict is a countervailing interest justifying abstention.

1. *Bankruptcy Proceedings*

One of the first situations in which abstention was held to be properly employed on grounds of comity was that of bankruptcy and receivership proceedings. In *Pennsylvania v. Williams*[65] the Supreme Court found that the district court did have jurisdiction to appoint a receiver for the liquidation of a state savings and loan business. The state had provided adequate liquidation procedure under a state official who had requested the district court to allow him to administer the liquidation. The Supreme Court ruled that the district court should have turned the assets of the corporation over to the state official. "The question is not the ordinary one of comity between a federal and a state court"[66] where each asserts jurisdiction over the property and no special reasons are advanced for relinquishing jurisdiction. "It is in the public interest that federal courts of equity should exercise their discretionary power with proper regard for the rightful independence of state governments in carrying out their domestic policy."[67]

Thompson v. Magnolia Petroleum Co.[68] involved a question of title to real property in a bankruptcy proceeding. The district court determined the fee title to be in the bankrupt and the court of appeals reversed. The Supreme Court ruled that the district court should not have decided the issue since the parties could have received an authoritative determination in the state court.

> A court of bankruptcy has an exclusive and non-delegable control over the administration of an estate in its possession. But the proper exercise of that control may, where the interests of the estate and the parties will best be served, lead the bankruptcy court to consent to submission to state courts of particular controversies involving unsettled questions of state property law and arising in the course of bankruptcy administration.[69]

In neither *Pennsylvania* nor in *Thompson* were there constitutional questions present. The cases were apparently based on the rationale that it is more conducive to a harmonious federal-state relationship to allow the states to handle state problems.

2. *Specialized, Complicated Regulatory Systems*

Another area in which the Court has given special emphasis to principles of comity is that involving state administrative and regulatory bodies. *Burford v. Sun Oil Co.*[70] involved a challenge to an order of the Texas Railroad Commission concerning the spacing of oil wells. The Commission's power to provide for the spacing of wells was part of the state's conservation program. Although a constitutional question was present in the case, the Court did not give much weight to that factor. Nor did it make much of an issue of the

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65 294 U.S. 176 (1935).
66 *Id.* at 183.
67 *Id.* at 185.
68 309 U.S. 478 (1940).
69 *Id.* at 483.
70 319 U.S. 315 (1943).

uncertainties in the state law. The Court did give great weight to the fact that the order attacked was part of a complicated regulatory scheme concerning state policies, and that the state legislature had provided that all orders of the Commission could be challenged in a particular district court of the state, thereby giving that court special opportunity to develop an expertness in the field. The court also noted that intervention by the federal court would increase the hazard of creating uncertainties in the state law.

The second principal case in this area is *Alabama Pub. Serv. Comm'n v. Southern Ry.*[71] The railroad desired to abandon several passenger trains between cities in the state, but before it could do so it was required to obtain a permit from the Commission. The Commission refused to allow such a permit. Instead of appealing to the state courts, the railroad brought a suit in the federal district court alleging the Commission's order amounted to confiscation of its property in violation of the fourteenth amendment. The district court held the Commission's order to be invalid and enjoined it from enforcing the order. The Supreme Court determined that the federal courts should refrain from interfering and ordered the district court to dismiss the action. Again there was a federal constitutional question present but the Court did not base its decision on it. It based its decision on the wisdom of avoiding interference in a matter "primarily the concern of the state."[72] There was an adequate state court review of the administrative orders so the intervention of the federal court was not necessary to provide protection for the federal rights asserted. No mention is made of a presence or absence of unsettled state questions. The Court apparently deemed the presence of unsettled state issues as not a necessary requirement to justify abstention. Unlike the *Burford* case, the subject matter of regulation in the *Alabama* case does not appear to require any special expertise. Consequently, a finding that the administrative body's order deals with a highly complicated area of regulation does not appear to be a sine qua non to justify abstention.

When the federal courts are dealing with an order of a state regulatory body in an area primarily of local concern, it seems to be settled that principles of comity will be decisive of the case without regard to federal constitutional questions. Whether or not there are unsettled state issues involved is immaterial.

3. *State's Enforcement of Criminal Law*

It is a general rule of equity that a federal court will not prevent the enforcement of a state's criminal statutes even though they may be unconstitutional.[73] This is especially true if the only action threatened is a prosecution in the state courts of an alleged violation of state law, for the disputed questions can be presented to the state court.[74] Interpretation of the state legislation is primarily the function of the authorities.[75] Consequently, interference with the processes of a state's criminal law "can be justified only in most exceptional circumstances, and upon clear showing that an

71 341 U.S. 341 (1951).
72 *Id.* at 345.
73 Spielman Motor Sales Co., Inc. v. Dodge, 295 U.S. 89 (1935).
74 Beal v. Missouri Pac. R.R., 312 U.S. 45 (1941).
75 Albertson v. Millard, 345 U.S. 242 (1953).

injunction is necessary in order to prevent irreparable injury."[76] There is always the opportunity to appeal an adverse constitutional decision by the state courts to the Supreme Court so that the federal rights of the parties will be protected.

4. *Collection of State Taxes*

In the area of state taxation the federal courts have a guide from Congress in its legislation prohibiting injunctions against the assessment, levy or collection of a state tax under specific circumstances.[77] The *Great Lakes Dredge & Dock Co. v. Huffman*[78] case did not fall within the prohibition of the statute, but the Court determined that the policy of not interfering with a state's fiscal policy was of such importance that it would not entertain a declaratory judgment action to adjudicate the tax statute's constitutionality where adequate relief could be obtained in the state courts.[79] The question of the validity of a state tax is one which the state courts are peculiarly fitted to answer and the federal courts should not attempt an adjudication unless absolutely necessary.[80]

In cases where abstention finds its jusification primarily in principles of comity, the procedure followed by the courts is to dismiss the action rather than retain it. This is in accord with the raitonale requiring abstention in these cases, for if the courts refrain from acting so as not to interfere with the administration by a state of its own affairs, there is no motive to retain the case. The reason the federal court would abstain in the first place is because it should not involve itself with the states' affairs. Whether or not the state law is settled in these cases is immaterial. The problem of interpreting uncertain state law does not present itself once the court determines it should have nothing to do with the case.

IV. Current Status of The Doctrine

The present status of the doctrine in the great majority of cases, those dealing with constitutional questions, seems to be fairly well settled. The criteria for determining whether to abstain are that obtaining a state court adjudication on the state questions will avoid an unnecessary constitutional determination and that the state questions actually be unsettled. Of course, principles of comity are implicit in these cases, but the Court places its reliance mainly on avoidance of unnecessary constitutional decisions. Whether a new criterion has been established in *Harrison v. NAACP*,[81] which would require a decision by a federal court on the constitutionality of a state enactment to be based on "a complete product of the State,"[82] remains to be seen. The decision of the Court in a later case, *Metlakatla Indian Community v. Egan*,[83] seems to rely on this principle, but the case can also be explained on the grounds of avoidance of an unnecessary constitutional decision.

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76 Beal v. Missouri Pac. R.R., *supra* note 74 at 50.
77 28 U.S.C. § 1341 (1958).
78 319 U.S. 293 (1943).
79 See Matthews v. Rodgers, 284 U.S. 521 (1932).
80 United States v. City of New York, 175 F.2d 75 (2nd Cir. 1949); *but cf.*, United States v. Bureau of Revenue of State of New Mexico, 291 F.2d 677 (10th Cir. 1961).
81 360 U.S. 167 (1959).
82 *Id.* at 178.
83 363 U.S. 555 (1960).

In the cases having avoidance of unseemly conflict between state and federal authorities as their basis, the criteria are not quite so clear. This is because the Court has taken an *ad hoc* approach to the subject, allowing abstention only in the situations of bankruptcy, taxes, criminal law, and administrative decisions. Within this area, it is apparently immaterial whether the state law is unsettled or not, since the court's main purpose in abstaining is to avoid conflict. The Supreme Court has not laid down clear guidelines for the lower courts to follow in this area. For example, what is matter of primarily local concern, and when is it proper to abstain in tax cases? Although the Court has determined that abstention in a tax case can be proper, it has not set out sufficient guides as to when it is so.

Originally, the Court found its authority to abstain from the exercise of its jurisdiction in the discretion of a court of equity.[84] All of the cases in which abstention had been employed were cases addressed to the federal court as a court of equity. Then in the *Thibodaux*[85] case the Court authorized abstention in a case at law.[86] "These prior cases have been cases in equity, but they did not apply a technical rule of equity procedure. They reflect a deeper policy derived from our federalism."[87] This language of the Court was somewhat diluted, however, by the emphasis placed on the special nature of eminent domain proceedings. In two subsequent cases the court has strengthened the force of its holding by applying abstention when the actions were at law and did not involve any special type of proceedings.[88] These last two cases seem to resolve any doubt left by *Thibodaux* in establishing that abstention may be employed in a case at law as well as in equity.[89]

There has been some doubt that the doctrine of abstention would be applicable in cases involving civil rights.[90] *Harrison v.*

84 Meredith v. Winter Haven, 320 U.S. 228 (1943); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

85 360 U.S. 25 (1959).

86 An "eminent domain proceeding is deemed for certain purposes of legal classification a 'suit at common law.'" *Id.* at 28.

87 *Ibid.*

88 United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962); Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960).

89 See Williams v. Hot Shoppes, Inc., 293 F.2d 835 (D.C. Cir. 1961); Chicago B. & Q. R.R. v. City of North Kansas City, 276 F.2d 932 (8th Cir. 1960); Beach v. Rome Trust Co., 269 F.2d 367 (2nd Cir. 1959).

90 See Note, *Federal Jurisdiction—Doctrine of Equitable Abstention Applied to Civil Rights Cases*, 20 La. L. Rev. 614 (1960).

NAACP[91] has laid this doubt to rest, for that case involved the interpretation of a state's statutes said to infringe upon the plaintiff's civil rights. The Court ordered the lower court to abstain, indicating that the same criteria used in any other constitutional question case should be considered in a civil rights case involving the constitutional validity of a state statute.

An interesting recent use of abstention principles is found in cases dealing with apportionment of representatives to state legislatures. In several of these cases the lower federal courts have stayed the actions to allow the state legislatures a reasonable opportunity to take corrective action before the federal courts would interfere.[92]

V. Conclusion

The doctrine of abstention has a useful position in the judicial process. It has the capability, wisely used, of greatly reducing conflict between state and federal authorities. By providing a cushion in areas where state and federal authority clash, the federal courts have made a significant contribution to greater harmony between the two realms of sovereignty. In addition, abstention has presented a method whereby advantage can be taken of the respective expertise of the feedral and state courts in the dual court system that we have.[93] State courts are considered to be experts in state law, and the federal courts are considered to be the authorities on federal questions. The principal difficulty with the abstention doctrine is the problem of delay. The Court has indicated that considerations of delay, cost and inconvenience to the parties are not to be weighed heavily when the courts are "concerned with the much larger issue as to the appropriate relationship between federal and state authorities functioning as a harmonious whole."[94] That delay can become a serious problem is witnessed by the *Spector Motor Serv. Inc. v. McLaughlin*[95] and *Government and Civic Employees Organizing Comm. v. Windsor*[96] cases. The *Spector* case was kept in litigation for a decade,[97] and in the *Windsor* case, after five years in the courts, no decision was reached.[98] The *Windsor* case itself indicated some measure of solution to the problem by requiring all issues in the case to be presented to the state court. This, however, runs up against the argument that such a procedure effectively denies federal jurisdiction altogether.

A solution to this problem has been presented by the state of Florida. The Florida legislature has given the Supreme Court of Florida authority to accept and give instructions on questions of state law certified to it by any appellate court in the federal system.[99] The federal courts have apparently taken advantage of this provision only once,[100] but it seems that this is an excellent answer to the problem of delay.

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91 360 U.S. 267 (1959).
92 Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962); Sims v. Frink, 205 F. Supp. 245 (M.D. Ala. 1962); Wesberry v. Vandiver, 206 F. Supp. 276 (N.D. Ga. 1962).
93 See Kurland, *Toward a Co-Operative Judicial Federalism*, 24 F.R.D. 481 (1960).
94 Chicago v. Fieldcrest Dairies, Inc., 316 U.S. 168, 172 (1942).
95 323 U.S. 101 (1944).
96 353 U.S. 364 (1957).
97 See note 93 *supra*.
98 Wright, *The Abstention Doctrine Reconsidered*, 37 Texas L. Rev. 815 (1959).
99 Fla. Stat. Ann. § 25.031 (1959).
100 Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960).

CASE COMMENTS

WORLD COURT – CAMBODIA V. THAILAND – BOUNDARY DISPUTE

By CHRISTOPHER R. BRAUCHLI*

On June 15, 1962, the International Court of Justice rendered a decision[1] resolving a boundary dispute between Cambodia and Thailand concerning the question of which of the two countries had territorial sovereignty over the Temple of Preah Vihear. This Temple is situate on a promontory belonging to the Eastern sector of the Dangrek range of mountains which in a general way constitutes the boundary separating Cambodia and Thailand. The dispute arose out of a boundary settlement entered into by France[2] and Siam[3] between 1904 and 1908. The settlement evolved in the following manner: February 13, 1904, a treaty was entered into by Siam and France which, *inter alia*, defined that part of the boundary between Siam and French Indo-China encompassing the Temple. Article 1 of the treaty stated that the boundary would be marked by the water shed line. Article 3 of the treaty provided, in addition, that delimitation of the frontier between the two countries would be carried out by mixed commissions composed of officers appointed by Siam and French Indo-China, and should relate among other things to the frontier "determined" by Article 1. After the mixed commission had completed its survey of the border as provided in Article 3, the French, at the request of the Siamese who lacked adequate technical facilities, agreed to prepare maps of the frontier as the final stage of the delimitation. The maps were completed in 1907 and copies furnished to the Siamese government. The maps thus prepared placed the Temple of Preah Vihear on the French Indo-China side of the border and the dispute between Cambodia and Thailand arose from the fact that the Thais asserted that had the water shed line designated in Article 1 been followed, the Temple would clearly have been in Thai territory. After lengthy argument by both sides, the court concluded that the boundaries shown in the map were controlling and awarded the Temple to Cambodia. The court ruled that it was unnecessary to decide whether placement of the boundary in such a way as to effect a departure from the water shed line was so insignificant as to fall within the discretionary powers of the mixed commission and further held that it was unnecessary to decide whether Article 1 or Article 3 of the treaty should control. It held instead that the governments involved

* Associated with the Denver firm of Gorsuch, Kirgis, Campbell, Walker and Grover; Member C.B.A. Committee on World Peace Through Law, and the Committee on International Courts of the A.B.A. Section on International and Comparative Law. Mr. Justice Leonard v. B. Sutton is chairman of the C.B.A. Committee on World Peace Through Law. A function of this Committee is to bring to the attention of the Bar and laity of Colorado present instances of effective world and international law in order to foster understanding of the rule of law among nations.

1 Case concerning Temple of Preah Vihear (Cambodia v. Thailand), Merits, Judgment of June 15, 1962: International Court of Justice Reports 1962, p. 6.

2 Before Cambodia obtained its independence in 1953, it was a part of French Indo-China.

3 Siam became known as Prathet-Thai or Thailand subsequent to May 11, 1949.

had the authority to adopt departures from Article 1 of the treaty if they saw fit so to do and concluded that Siam and subsequently Thailand had in fact adopted the boundaries set forth in the treaty.[4] In support of its holding, the court traced events since the maps were initially given to the Siamese government and concluded from an examination of these matters that Siam had had ample opportunity since the initial publication of the maps to dispute their validity insofar as placement of the Temple was concerned but had never done so.[5] The court held that when the parties by treaty provided both the water shed would govern and that there would be a delimitation of the boundary line by a mixed commission, they must have regarded the water shed line as sufficiently certain to be relied upon without any further delimitation. The court pointed out that for fifty years Thailand had enjoyed stable frontiers through accepting the benefits the treaty of 1904 conferred upon it and stated that Thailand could not now, having claimed and enjoyed the benefits of the settlement, deny that it had consented to it. The court further concluded that the acceptance of the map by the parties caused the map to enter the treaty settlement and was evidence of the interpretation the two governments gave to the delimitation required by Article 3 of the treaty.

It should be noted that Thailand did not willingly submit itself to the jurisdiction of the World Court. In 1961, it submitted preliminary objections to that body stating that it had never accepted the compulsory jurisdiction of the International Court of Justice.[6] The court ruled against Thailand, stating that through its actions prior to the dispute it had indicated a willingness to be subject to the jurisdiction of the court. Although Thailand accepted this ruling and proceeded with its presentation of the case on the merits, it took certain steps after the final decision was announced which are as noteworthy as the decision itself, and reflect its dissatisfaction with having been compelled to submit to the court's jurisdiction. It boycotted meetings of the Southeast Treaty Organization (SEATO) for approximately one month after the decision was rendered;[7] it cut off trade with Poland, as reason therefore stating that the court which had decided against it was headed by a Polish judge: and finally, it recalled its ambassador to France, the apparent reason for this move being that two French lawyers were on the Cambodian legal team.[8] It is to be hoped that this reaction

4 The award in favor of Cambodia was nine to three, two judges not participating. It is interesting to note that in the majority opinion no authority is cited for the decision rendered by the court in contrast to the concurring and dissenting opinions which cite considerable authority both in support of and in contravention of the court's decision.

5 Among other things, the court pointed out that in 1946 a Franco-Siamese conciliation commission was set up to make recommendations in regard to any complaints or proposals for revisions Thailand might wish to make as to, among other things, the frontier settlements of 1904 and 1907. The commission met in 1947 and although Siam made complaints about the frontier line in a number of regions, no mention was made of the region wherein the Temple is situate. The court further observed that in 1949 and on numerous occasions thereafter, notes were filed by the government of France and later by the government of Cambodia to the Siamese and Thai governments requesting that the keepers or "police" placed by Siam and Thailand in the Temple be withdrawn. None of these notes was answered and the court concluded that although Thailand was willing to place such keepers in the Temple it was unwilling to deny at the diplomatic level the claim of the French and later the Cambodians that the Temple belonged to Cambodia.

6 Article 36.2 of the Statute establishing the World Court provides as follows: "The state parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a. The interpretation of a treaty. . . ."

7 N.Y. Times, July 19, 1962, p. 2, col. 3.

8 N.Y. Times, June 23, 1962, p. 2, col. 1. The author wrote both the Polish and French embassies in Washington, D. C. to inquire whether normal relations have been resumed but no replies had been received from either of these embassies as of the date this article was prepared.

to the decision of the World Court will not set a precedent to be followed by other nations against whom decisions are rendered. It is almost too obvious to warrant mention that if it became a practice for countries to threaten or take retalliatory action against countries who have judges on the court or counsel arguing before the court, it's efficacy would be sharply curtailed. The judicial objectivity of the court could rapidly give way to politically inspired decisions designed to curry favor with one of the parties to a dispute. Under the present set-up there is little which can be done to prevent this type of action and it can only be hoped that other countries accepting the jurisdiction of the court will avoid using political pressures to influence the court or to retalliate for unfavorable decisions.[9]

DAMAGES – PERSONAL INJURIES – PER DIEM ARGUMENT TO BE ALLOWED

In an action for damages for bodily injuries, the trial court refused to allow plaintiff's counsel to suggest a per diem argument to the jury on the elements of past and future pain and suffering. On appeal, seeking a reversal and remand for a new trial on the issue of damages only, *Held:* Inasmuch as both the total amount claimed and the plaintiff's life expectancy may be argued in Colorado, so also may counsel illustrate the mathematical process of computing the gross amount sought for pain and suffering by reducing it to the units by which it is endured, *i.e.*, segments of time. *Newbury v. Vogel*, 15 Colo. Bar Ass'n. Adv. Sh. 11 (1963).

The propriety of using a per diem or time segment theory in counsel's closing argument was of first impression in the principal case, although it has been the subject of decision and discussion in

9 Keeping in mind Thailand's reaction to this decision the recent suggestion that World Court judges should be made world citizens rather than citizens of individual countries assumes new meaning and it is possible that in the future this will be the most desirable step to take to avoid the perils to the efficacy of the court seen by the author as a result of actions such as those taken by Thailand. The world citizenship proposal has been advanced in a preliminary draft plan for changes in the International Court of Justice submitted by Eberhard P. Deutsch to the American Bar Association Committee on Peace and Law Through United Nations.

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numerous other jurisdictions.[1] The authorities appear to be divided among (1) those who hold the argument is proper;[2] (2) those who declare it to be a matter within the discretion of the trial court;[3] and (3) those who refuse to allow it.[4]

Pennsylvania has stood opposed to any argument equating dollars with pain and suffering since 1891.[5] Most of the jurisdictions, however, which have refused to allow use of the per diem argument rely on recent decisions in which the courts have held that such arguments have no foundation in evidence and invade the province of the jury.[6]

Those in opposition have also stressed that defendant's counsel, in attempting to mitigate such evaluations, necessarily lends support to plaintiff's implication that pain and suffering may be given a precise value[7] and that intensity of pain must vary.[8] It is urged that such arguments would lead to "monstrous" verdicts,[9] would mislead the jury,[10] and might, if reduced to a logical conclusion, result in evaluating pain and suffering at a "penny per heartbeat," or the like.[11] There are at least nine jurisdictions which categorically refuse to allow per diem argument on these and other grounds.[12]

Those jurisdictions which have either held the argument to be proper, or to be within the discretion of the trial court, rely heavily on *Ratner v. Arrington*,[13] a 1959 Florida case, in which the court rhetorically asked why, if it is proper to argue for a given total, is it not likewise proper to illustrate how the plaintiff arrived at that figure.

Of those jurisdictions which have considered the point, at least eleven have left it within the discretion of the trial court,[14] and at least the same number have simply allowed it, albeit with some

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1 Annot., 60 A.L.R.2d 1347 (1958, Supp. 1960, 1962, 1963).

2 Newbury v. Vogel, 15 Colo. Bar Ass'n Adv. Sh. 11 (1963); Caley v. Manicke, 29 Ill. App.2d 323, 173 N.E.2d 209 (1961), later overruled in Caley v. Manicke, 24 Ill.2d 390, 182 N.E.2d 206 (1962); Southern Indiana Gas & Electric Co. v. Bone, 180 N.E.2d 375 (Ind. 1962); Corkery v. Greenberg, 114 N.W.2d 327 (Iowa 1962); Eastern Shore Public Service Co. v. Corbett, 227 Md. 411, 177 A.2d 701 (1962), *aff'd*, 180 A.2d 681 (Md. 1962); Yates v. Wenk, 363 Mich. 311, 109 N.W.2d 828 (1961); Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957); Hernandez v. Baucum, 344 S.W.2d 498 (Tex. 1961); Olsen v. Preferred Risk Mut. Ins. Co., 11 Utah 2d 23, 354 P.2d 575 (1960); Jones v. Hogan, 56 Wash.2d 23, 351 P.2d 153 (1960); Evening Star Newspaper Co. v. Gray, 179 A.2d 377 (D.D.C. 1962).

3 McLaney v. Turner, 267 Ala. 588, 104 So. 2d 315 (1958); Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959); Louisville & Nashville R.R. v. Mattingly, 339 S.W.2d 155 (Ky. 1960); Little v. Hughes, 136 So. 2d 448 (La. 1961); Flaherty v. Minneapolis & St. L. Ry., 251 Minn. 345, 87 N.W.2d 633 (1958); 4-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954); Johnson v. Brown, 75 Nev. 437, 345 P.2d 754 (1959); King v. Railway Express Agency, Inc., 107 N.W.2d 509 (N.D. 1961); Hall v. Booth, 178 N.E.2d 619 (Ohio 1961); J. D. Wright & Son Truck Line v. Chandler, 231 S.W.2d 786 (Tex. 1950); Crum v. Ward, 122 S.E.2d 18 (W. Va. 1961).

4 Henne v. Balick, 51 Del. 369, 146 A.2d 394 (1958); Caley v. Manicke, 24 Ill.2d 390, 182 N.E.2d 206 (1962); Ahlstrom v. Minneapolis, St. Paul & S. Ste. M. R.R., 244 Minn. 1, 68 N.W.2d 873 (1955); Goldstein v Fendelman, 336 S.W.2d 661 (Mo. 1960); Chamberlain v. Palmer Lumber, 104 N.H. 221, 183 A.2d 906 (1962); Botta v. Brunner, 26 N.J. 82, 138 A.2d 713 (1958); Stassun v. Chapin, 324 Pa. 127, 188 Atl. 111 (1936); Certified T.V. & Appliance Co. v. Harrington, 201 Va. 109, 109 S.E.2d 126 (1959); Armstead v. Holbert, 122 S.E.2d 43 (W. Va. 1961); Affett v. Milwaukee & Suburban Transport Corp., 11 Wis.2d 604, 106 N.W.2d 274 (1960).

5 Stassun v. Chapin, 324 Pa. 127, 188 Atl. 111 (1936).

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10 *Ibid.*; See also Chamberlain v. Palmer Lumber, 104 N.H. 221, 183 A.2d 906 (1962).

11 Affett v. Milwaukee & Suburban Transport Corp., 11 Wis.2d 604, 106 N.W.2d 274 (1960).

12 See note 4 *supra*.

13 Ratner v. Arrington, 111 So. 2d 82 (Fla. 1959).

14 See note 3 *supra*.

qualifications.[15] Both of these groups have pointed out that juries might spontaneously strike upon the method, and that counsel should therefore not be prohibited from suggesting it.[16] They also note that the very lack of any standard of value argues for latitude in discussions of pain and suffering as elements of damages,[17] and that argument in mitigation may be made without implying an admission of liability, for as defendants must now attempt to mitigate the plaintiff's lump-sum claim, the need to mitigate component claims will impose no undue hardships.[18] It has even been noted that juries are likely to regard such arguments as "lawyer talk," and that as courts customarily instruct that such arguments are not to be considered as evidence, excessive verdicts will not necessarily follow.[19]

It may be seen that of the thirty-one jurisdictions here considered, two-thirds of these will, under some circumstances at least, allow the per diem argument, usually requiring the trial court to caution the jury as to the weight to be given the argument.[20] These courts have allowed counsel to break the time segments down to units of weeks,[21] days,[22] or even hours.[23] Nor has the per diem illustration been restricted to closing argument, *e.g.*, Mississippi allows it to be used in counsel's opening statement.[24]

Colorado counsel have for many years used the per diem method of argument as to the elements of past and future pain and suffering, and it is significant that the principal case represents the first time that it has been deemed a subject fit for appellate review. Here, as in the law of contracts, silence would seem to have been acceptance of its propriety, at least as being within the discretion of the trial court. Colorado has now moved in the direction of several of her sister states[25] in removing it from the realm of the trial court's discretion and giving it categorical approval. This is an enlightened view, appreciating the argument for what it is, merely a course of reasoning as is any other argument on the elements of pain and suffering.

It will be of interest to note the effect of the principal case, as Colorado is not presently considered a "high verdict state,"[26] and in some quarters is even regarded as being somewhat penurious. The Colorado plaintiff is now guaranteed the opportunity to argue and illustrate his process of evaluating pain and suffering, unfettered by judicial apron-strings.

PAUL S. GOLDMAN

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15 See note 2 *supra*.
16 Continental Bus System, Inc. v. Toombs, 325 S.W.2d 153 (Tex. 1959).
17 Caley v. Manicke, 29 Ill. App.2d 323, 173 N.E.2d 209 (1961); Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961).
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21 Harper v. Higgs, 225 Md. 24, 169 A.2d 661 (1961).
22 See note 13 *supra*.
23 Southern Indiana Gas & Electric Co. v. Bone, 180 N.E.2d 375 (Ind. 1962); Little v. Hughes, 136 So. 2d 448 (La. 1961); Hall v. Booth, 178 N.E.2d 619 (Ohio 1961).
24 4-County Electric Power Ass'n v. Clardy, 221 Miss. 403, 73 So. 2d 144 (1954).
25 Arnold v. Ellis, 231 Miss. 757, 97 So. 2d 744 (1957); Continental Bus System, Inc. v. Toombs, 325 S.W.2d 153 (Tex. 1959).
26 6 Defense L.J. 379 (1959).

BAR BRIEFS

OPINION NO. 27 OF THE ETHICS COMMITTEE OF THE COLORADO BAR ASSOCIATION ADOPTED MARCH 16, 1963

SYLLABUS

It is improper for a lawyer to conduct the trial of a lawsuit on behalf of a client when the lawyer knows in advance of trial that it is probable that his partner will be a witness in the lawsuit and will be required to testify to other than merely formal matters.

FACTS

Law firm F defended its client C in a lawsuit brought by A. B is obligated to hold C harmless from claims of A, including litigation costs and attorneys' fees but has refused to do so.

After the termination of the lawsuit by A, C wishes to sue B under the indemnity agreement. A partner in law firm F is expected to be a witness for the plaintiff in this action. He would testify concerning certain aspects relating to the first action other than merely formal matters.

May another partner in law firm F properly conduct the lawsuit on behalf of C against B?

OPINION

Canon 19 reads as follows:

> When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

We consider the only question to be whether, on these facts, another member of the law firm of the attorney-witness may be considered "other counsel" within the intent of this Canon. We believe that this question must be answered in the negative.

On two previous occasions this Committee has considered the propriety of a partner of a lawyer engaging in some activity in which the lawyer himself could not properly engage. Opinion No. 18, 38 Dicta 263 and Opinion No. 21, first published in 38 Dicta 369, amended and republished in 39 Dicta 265. Both opinions quote with approval from Opinions No. 49 and 72 of the American Bar Association Committee on Professional Ethics as follows:

> The relation of partners in a law firm are such that neither the firm nor any member or associate thereof may accept any professional employment which any member of the firm may not properly accept.

We believe that this statement is also applicable to the facts stated above.

Although the question is not raised by the facts presented, the Committee feels that an exception might properly exist where the possible need for the lawyer to testify at the trial cannot reasonably be foreseen in advance of the trial. Under such circumstances, upon advising the judge and opposing counsel, and with the sanction of the trial court, it might be appropriate for another member of the firm of the lawyer-witness to conduct the remainder of the litigation. This would be true only if the client's interests would be adversely affected because outside counsel could not become sufficiently familiar with the case in the middle of the lawsuit to fully represent the client. This problem would not arise where the need to testify can be anticipated in advance of the trial.

The Committee is aware that the ABA Committee on Professional Ethics has concluded that a partner of the lawyer-witness may be considered "other counsel" within the meaning of Canon 19, ABA Opinion No. 220. This Committee feels that the views expressed by Committee Members Houghton and Brand in dissenting to ABA Opinion No. 220 are more compelling than the views expressed in the majority opinion.