

An Ethical Review of the Maxims of Jurisprudence



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Written and Presented by:

John B. Stahl, PLS, CFedS
P.O. Box 901617
Salt Lake City, Utah 84090-1617

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Abstract

The *Maxims of Jurisprudence* are found mentioned throughout our case law and are even codified in statutory form in a few states. These maxims form the conceptual foundation of our legal justice system and encapsulate the ethical considerations woven into our modern law. The fundamental principles of land boundary determination can be found in all 34 Maxims of Jurisprudence. By studying these maxims, the legal practitioner can gain a sense of the ethical premise upon which our land tenure system is based.

The land surveyor will be surprised at their familiarity with these fundamental tenants. Understanding the foundation of the modern principles, which were built upon ancient Roman and English common laws, will bring a new perspective to the ethical application of land boundary principles today. This course will provide a review of 34 Maxims of Jurisprudence which directly influence the land boundary decisions which govern our profession. We will look at each maxim and its direct correlation with the land boundary principles which were developed upon it.

Instructor Biography



John B. Stahl, PLS, CFedS, is a registered professional land surveyor in the states of Utah and Montana, currently owning and operating Cornerstone Professional Land Surveys, Inc., and Cornerstone Land Consulting, Inc., in Salt Lake City. Mr. Stahl specializes in surveying land boundaries, resolving boundary conflicts, performing title research, land boundary consultation services, mediation and dispute resolution. He has been qualified as an expert witness in numerous boundary and negligence cases and has actively participated in the preparation of amicus curiae briefs to the Utah Supreme Court. He has furthered his mediation education by participating in a state qualified 40-hour training program. He has also completed a 200-hour training and examination program to earn his recognition as a Certified Federal Surveyor. Mr. Stahl has been a state chair of the Utah Council of Land Surveyors and a Utah delegate to the Western Federation of Professional Surveyors. He is an adjunct professor for the Salt Lake Community College, where he has taught mathematics, ethics and liability courses for land surveying students. He continues to teach an extensive course in land boundary law comprising 54 hours of lecture per year since 1991. Mr. Stahl received his A.A.S. degree in land surveying from Flathead Valley Community College in Kalispell, Montana and has authored several articles and publications covering topics on boundary laws, research, and resolving conflicts of evidence.

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An Ethical Review of the Maxims of Jurisprudence

by John B. Stahl, PLS, CFedS

Introduction

The *Maxims of Jurisprudence* provide a set of fundamental principles upon which many of the legal decisions are based. The maxims are found mentioned throughout our case law and are even codified in statutory form in some states. These maxims form the conceptual foundation of our legal justice system and encapsulate the ethical considerations woven into our modern law. By studying these maxims, the legal practitioner can gain a sense of the ethical premise upon which our land tenure system is based. Understanding the foundation of the modern principles, which were built upon ancient Roman and English common laws, will bring a new perspective to the ethical application of land boundary principles today.

Ethics

The common view of ethics transports us to thoughts of morality, integrity, sense of purpose or personal duty. We look to circumstances to define our natural responses and our conduct. Situational ethics can give us insight into our philosophical underpinnings as individuals or as a society, but ethics really goes well beyond individual response. Normally, when we view ethics, we see them from a perspective of professional duty or responsibility. We think of the Model Rules of Professional Conduct or the Model Code of Professional Responsibility, or perhaps the Canons of Professional Ethics. While these rules are beneficial, they approach ethics from the perspective of duty and responsibility, *i.e.* what are you, as a professional, required to do to obtain the favor of the review board.

The *Merriam-Webster Online Dictionary, 2009*, defines **Ethics** as:

1. *the discipline dealing with what is good and bad and with moral duty and obligation.*
2. *a. a set of moral principles; a theory or system of moral values.*
b. the principles of conduct governing an individual or a group
c. a guiding philosophy
d. a consciousness of moral importance
3. *a set of moral issues or aspects (as rightness)*

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The *Webster's Revised Unabridged Dictionary*, 1996, 1998 MICRA, Inc., defines **Ethics** as:

The science of human duty; the body of rules of duty drawn from this science; a particular system of principles and rules concerning duty, whether true or false; rules of practice in respect to a single class of human actions; as, political or social ethics; medical ethics.

The phrase which struck this author's interest wasn't the duty and obligation which arises from ones' ethics, but the reference to the "moral principles" and "principles of conduct" which "govern and individual or a group." Governance equated with the law. How could the law be equated with ethics? Ethics associate easily with the arts and philosophy of society. They speak of the individual and societal influences which guide our conduct in certain situations. The laws which govern us are a result of the political underpinnings which dictate to us our duty to our clients, our fellow professionals and society. Our duty and our conduct combine to form our moral principles; or so, I thought.

Reading from the *Study of Law*, by Blackstone, published in 1809, we see it written that:

"Aristotle himself said,
... Jurisprudence is the principal and most perfect branch of ethics."

Maxims of Jurisprudence

Maxims of Jurisprudence have been referenced throughout history, each reference giving further reference to a settled principle from an earlier period of time. These maxims provide a sense of foundational premise upon which the current common law rests. They provide a view into the historical application of common sense, fairness, and equity which formed the rules of law and promoted the concepts of justice, peace, and individual freedom to an ordered society.

John Bouvier, 1787 – 1851, in his *Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union* published in 1839 and revised under the sixth edition in 1856, defined the term.

MAXIM. An established principle or proposition. A principle of law universally admitted, as being Just and consonant with reason.

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There are a number of Maxims of Jurisprudence mentioned in the court's history. Bouvier listed 1180 maxims with sources quoted throughout history spanning from Greek, Roman and English contemporaries. The California, Montana and North Dakota statutes recite thirty-four of them. Guam adopted the Maxims from California and added a thirty-fifth addressing the right of its children to public education. Section 3509 of the California Civil Code presents us with the reasoning provided by application of these maxims.

§ 3509. The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this Code, but to aid in their just application.

Numerous works were published at the turn of our nation after its War of Independence from British rule. The revolution required the formulation of laws for a new nation, the United States of America, based upon new ideas of freedom and democracy established upon the successes and failures of nations which preceded it. The founding Fathers didn't put pen to blank paper with the idea of forming our Constitution and Bill of Rights from their own construction, but sought Divine intervention and looked to the past annals of the history of nations for inspiration.

John George Phillimore wrote in his *Principles and Maxims of Jurisprudence in 1856 that:*

"Next to the possession of Freedom, a wise system of Laws regulating the relations of individuals to each other, is the greatest blessing that any community can enjoy."

The *Oxford Latin Dictionary*, Oxford press, Oxford, published in 1982, tells us that the word **Jurisprudence** is derived from two Roman roots – *Juris* and *prudens* – the Latin words for Justice and Prudence. *Juris* is the genitive (possessive) case singular of the Latin noun *jus*, meaning "right", i.e., that which is good, productive, healthful, uplifting, empowering, nurturing, peaceful, joyful, and liberating for both individuals and nations. *Prudens* is the adjective form of *prudencia*, a contraction of *providens*, comprised of *pro* and *videns*, "forward" and "seeing". Thus Prudence is "the power of seeing in advance, the faculty of looking ahead, anticipating the future, prescience."

The Roman jurist Ulpian (d. 228 A.D.), known as the Pioneer of Human Rights, said:

"Juris prudentia est divinarum atque humanarum rerum notitia, justae atque injustae scientia." **Jurisprudence is a knowledge both human and divine, to understand what is just and what is unjust.** (quoting from Cicero in 43 B.C.)

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A Brief History of Ethics

Any study of the history of ethics must equate to a study of the history of the nations. If ethics are the foundation of our system of moral principles, then the search for that foundation takes us on a search through history. Of course, history is a long and potentially controversial topic when taken to its origin. A search for the origin of ethics can start with what is known about civilized society (or by what we think we know). Because our ethics are principally formed with European ancestry, we'll trace our origins through that branch of society. After all, our laws are based upon English common law, correct?

A search for the origins of the Maxims of Jurisprudence takes us through, and more practically skirts around, the English common law and points us in the direction of Rome. A search through the history of Rome points us back to Greece; and Greece to Egypt where we learn of the Dynasties which ruled the people of Egypt for nearly 2600 years. The Greek lawgiver, Solon, visited Egypt in the sixth century, B.C., to study their laws, adapting many of their aspects into the legal system of Athens. We learn of the Greek scholars during the late period that there were likely eight books which set out the legal code of Egypt. No evidence has yet been recovered of remains of these documents. We can only surmise what impact the Egyptian culture and laws had upon the Greek pundits.

Egyptian Influences

Historians and archeologists have recovered clues of the conduct of the ancient society of Egypt. They tell of the *criminal law* through the famous trials of tomb robbers and their punishments. We also learn of the courts where the petitions of common citizens were received by the local justice from the workmen raising accusations against their foreman. We see evidence of the *civil law* through actions of probate which divided the property between male and female children; written contracts between merchants; and actions between the plaintiff and defendant. The discovery in 1901 of the ancient Babylonian code is one of several known compilations of public law dating back to 1790 B.C. The *Codex Hammurabi* or the Code of Hammurabi, is inscribed upon a 7 foot 4 inch piece of basalt containing the preface to the code, "*Anu and Bel called by name me, Hammurabi, the exalted prince, who feared God, to bring about the rule of righteousness in the land.*" An even earlier and oldest known set of laws dating to 2050 B.C. is written in the Sumerian language credited to the king Ur-Nammu of Ur designating a list of crimes and punishments. The cross-cultural interactions, typically through occupation and conflict, resulted in an admixture of many of the laws

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and precepts exchanged between cultures. As kingdoms expanded to encompass more remote territories, the absorption of the laws and customs of other cultures surely had an effect upon subsequent nations.

Greek Influences

While much conjecture is required to see the impact of Egyptian society on the Greeks, the same cannot be said for the impact of the Greeks upon the Romans. Greece survived two principle eras: the Golden Age (800 – 86 B.C.) with the introduction of written law in 620 B.C., and the Roman Age (86 B.C. to 476 A.D.). Much is written and most are familiar with the Golden Age of Greece: its thinkers; its artisans; its architects; its philosophers; and its politicians. When we think of Greece, this is the Greece we envision.

The Greek society was engulfed in a long period of peace when the laws of a civilized society were allowed if not encouraged to proliferate. We see the development of *tort law* dealing with issues of harm to property and personal injury. We see the formulation of *public law* in the form of zoning, commerce, and export regulations. *Family law* was developed to deal with the concepts of marriage, adoption, and guardianship. *Procedural law* established guidelines for judges and rules for witnesses. The foremost thought which pervaded the philosophical minds of Socrates, Plato, Aristotle and Thomas Aquinas was the Devine source of what was termed the *Natural Law* or the *Law of Nations*. This concept is perhaps the single most pervasive thought with the greatest degree of impact found today in our legal system.

Roman Influences

The Roman conquest of Greece in 86 B.C., as well as the conquest of other foreign nations, carried back to Rome the Grecian customs, ideas, and laws. The Roman culture, established as a *monarchy* in 753 B.C., had already transitioned to a *Republican* form of government in 509 B.C. which endured for nearly five centuries. Soon after Rome’s conquest of Greece, we witness rise of the *Imperial* government which thrived for another four centuries.

The history of laws which developed and secured the Roman Empire include numerous writings such as the Twelve Tables in 455 B.C. and the Justinian Code in 534 A.D. spanning nearly 1000 years of civilized society. The Twelve Tables defined such things in Roman law as court procedure, trials, debt, rights of fathers, legal guardianship, acquisition and possession of land and personal property rights, torts and injuries, public law and sacred law.

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At the beginning of the reign of Justinian, Roman emperor from 527 to 565 A.D., a ten-person commission was established to produce a new code of Roman law. The commission's first production was a 529 A.D. compilation of the existing statutes and constitutions of the emperors known as the *Codex Justinianus* or the *Codex Vetus*. A codification of the Roman jurist legal opinions known as the *Digestum* or *Digest* otherwise known by its Greek name, the *Pandects*, was published in 533 A.D. The *Pandects* are recognized as the most influential book ever produced which influenced the European laws and world-wide jurisprudence. In 534 A.D., the emperor Justinian I who ruled over the Byzantine Empire in the east, published a codification of the common law of Rome collectively known as the *Corpus Juris Civilis*, more well known as the *Justinian Code*.

The Roman Republic form of government has influenced American government through its establishment of a balanced form of government comprised of three branches. The *executive branch* (the monarchy) was formulated on an election of Magistrates and Consuls which had a limited term of office and control over the military. The *legislative branch* (the senate) made up of elected Patricians serving as advisors to the Emperor and empowered to pass statutes which governed the populace. The *judicial branch* (the Assembly) was comprised of elected officials given final authority over judicial decisions. The balance of power between the various branches of government resulted in government role which expanded the Roman Empire throughout Spain, Europe, Egypt and the Mediterranean.



British Influences

The Anglo-Saxons were predatory bands, composed of tribes of a variety of names and places. Known as the Frisians, the Angles, the Jutes, and the Saxons, these groups swarmed Britain from northern Germany during the fifth and sixth centuries. These bands of conquerors were headed by chiefs who turned upon their allies exterminating, murdering, and plundering the Britons. Their barbaric tribes were known as the most bloodthirsty of all conquerors, among a diversity of warring

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nations of Europe including the Goths, Vandals, Franks and the Huns. The Anglo-Saxons were successful in dismembering even the Roman Empire.

In 596, Pope Gregory I sent Saint Augustine and a few zealous companions to convert the Anglos to Christianity. Their success in preaching the Gospel to the barbaric people forever changed the face of Britain cloaking it in a shroud of piety perfected over the course of time as the Kingdom of England ruling from 827 to 1707 A.D. The Kingdom, also referred to as the *Heptarchy* for its seven petty Kingdoms, was united under one sovereignty by King Egbert of Wessex. The Norman Conquest in 1066 A.D. brought England into its more modern era.

The delivery of the *Magna Carta* to King John in 1215 forced the admission that the King was subject to his own laws. British law, however, being steeped in the culture and local customs of the aristocracy, the church, and the subjects, was broadly administered to the subjects by a county court system. The court system included the *King's Bench* (equivalent of the Supreme Court), the *Court of Common Pleas* (the trial court), and the *Exchequer* (the treasury). The thirteenth century brought one of the most highly praised works of law to come out of the middle ages. *Bracton on the Laws and Customs of England* was attributed to Henry of Bracton however later editions to the original were more likely made by Bracton around 1290 A.D. Sir Edward Coke entered the scene with his appointment as Attorney General in 1593 A.D. during the height of his legal and political careers. Coke is attributed with two famous works, the *Reports* and the *Institutes*, and is praised for his champion of the cause of the common law while serving as chief Justice on the King's Bench in 1613. Blackstone's lectures from the Oxford University were published in a four-volume treatise entitled *Blackstone's Commentaries on the Laws of England*.

The introduction of *feudalism* to Britain through the ancestry of the Anglo-Saxons and the barbaric enslavement of entire villages and countries established a way of life founded upon the rules, customs and laws of *monarchial* society. A system of county courts and self-regulating commerce, a localized and oppressive system, formed the basis for the current system of governance in Britain. Our visions of this era are brought to life by such movies as *Robin Hood: Men in Tights*, and *King Arthur and the Knights of the Round Table*.

Brief History of the Church

Of course, no study of the history of ethics can forgo a review of the history of the church. After all, ethics is morality, and morality is defined by religious influence. The history of the nations which

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we've just reviewed runs parallel with the history of the church. While seemingly a separate part of society, and considerably more thought of in that perspective today, society itself, the political officers, and the judiciary are comprised of people. People are influenced by their religious beliefs which, in turn, influence the way they are governed.

The Old Testament Era

The *patriarchal period* from the birth of Abraham to the death of Jacob, 1996 to 1690 B.C., established many of the fundamental customs and beliefs which survive to this day. The 1491 B.C. exodus from Egypt ended 200 years of captivity freeing the Israelites from slavery. Despite the many years of slavery, the religious beliefs of the people remained intact. It may never be clear what influence the religion of the slaves had upon the Egyptians or what influence the Egyptians had upon the slaves, but one can be certain that 200 years of mixture resulted in an impact upon both societies.

The new-found freedom of the Israelites caused a near immediate establishment of a judicial system. The return to the patriarchal system when two to three million people were looking to Moses as their leader proved to be impossible. We see the formulation of the Judeo-Christian legal system in the Exodus account in Chapter 2 of the Revised Standard Version when Jethro, the priest of Midian visited Moses.

13 On the morrow Moses sat to judge the people, and the people stood about Moses from morning till evening. **14** When Moses' father-in-law saw all that he was doing for the people, he said, "What is this that you are doing for the people? Why do you sit alone, and all the people stand about you from morning till evening?" **15** And Moses said to his father-in-law, "Because the people come to me to inquire of God; **16** when they have a dispute, they come to me and I decide between a man and his neighbor, and I make them know the statutes of God and his decisions." **17** Moses' father-in-law said to him, "What you are doing is not good. **18** You and the people with you will wear yourselves out, for the thing is too heavy for you; you are not able to perform it alone. **19** Listen now to my voice; I will give you counsel, and God be with you! You shall represent the people before God, and bring their cases to God; **20** and you shall teach them the statutes and the decisions, and make them know the way in which they must walk and what they must do. **21** Moreover choose able men from all the people, such as fear God, men who are trustworthy and who hate a bribe; and place such men over the people as rulers of thousands, of hundreds, of fifties, and of tens. **22** And let them judge the people at all times; every great matter they shall bring to you, but any small matter they shall decide themselves; so it will be easier for you, and they will bear the burden with you. **23** If

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you do this, and God so commands you, then you will be able to endure, and all this people also will go to their place in peace."

Thus began the *period of judges* in Israel (1410 to 1050 B.C.). The 1050 B.C. capture of the ark of the covenant by the Philistines ushered in the period of First Kings which lasted until 930 B.C. During this period we witness the rule of King Saul, King David, and King Solomon. In 928 B.C. the kingdom was divided into Israel and Judah. Israel survived for nearly 200 years before the Syrian conquest; Judah fell to the Babylonians after nearly 360 years. In 63 B.C. the expansion of the Roman Empire swallowed up the region.

The Apostolic Church

The *apostolic period* from 35 to 120 A.D. was incredibly short-lived from an historical perspective, yet far-reaching in its impact upon the formation of nations. Clement is considered as one of the first of the apostolic fathers, well known when Ignatius was writing his letters to Polycarp. In 64 to 68 A.D., emperor Nero blamed the burning of Rome on the Christians, using them for candles to "light his gardens." Constant pressure from the Roman consul against the newly formed Christian religion resulted in scattering the believers throughout the Roman Empire and lighting a fire which continues to spread its influence. By 98 A.D., emperor Trajan started his "don't ask; don't tell" policy toward Christians, allowing them to avoid persecution if they simply refrained from professing their faith.

The Roman Catholic Church

By A.D. 130, Justin Martyr had merged the Greek philosophies and pagan religions in his "search for truth" finding seeds of truth in all religions. In A.D. 150, the clement of Alexandria used Plato to support Christianity. The early formation of the Roman Catholic Church and its influence upon the rulers of Roman Empire were most apparent in A.D. 312 when the emperor Constantine issued the Edict of Milan giving Christians equal rights. The open gathering of the Council of Nicea and postulation of the Nicene Creed in A.D. 325 led to the establishment of Christianity as the official religion of the Roman Empire under the 379 to 395 A.D. reign of Theodosius. In 596 A.D., Gregory sends Augustine of Canterbury to convert the pagans in England.

The formation of the Ecclesiastical Courts under the Roman Catholic Church mirrored the process of government of Rome. The hierarchy within the church provided for adoption of statute law, Canon law, and Ecclesiastical common law. The jurisdiction of the Church courts combined a system of pecuniary judgments, control over matrimonial causes and testamentary causes involving wills and probates of its parishioners.

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The Anglican Church

By 1054 A.D. the Roman and Eastern (Anglican) Churches permanently split over offenses toward amendments to the Nicene Creed without an ecumenical council. The next 300 years were marked by the Seven Crusades resulting in driving a permanent wedge between the Church and the Jews, the Church and the Muslims, and between the Roman and Anglican Church. Nearly a century of plague known as the “Black Death” from 1300 to 1400 A.D. wiped out one-third of the population from India to Iceland including half of Britain leading to the “Peasant’s Revolt” in 1381 A.D. 30,000 angry peasants descended upon London seeking redress for wrongs done to them by the Church and the Crown. This revolution paved the way for the Reformation of the Church. Wycliff and his followers translate the Bible from the Vulgate to English.

The Protestant Reformation was spurred on by Martin Luther nailing his 95 Theses to the door of the church in Wittenburg in 1517 A.D. and John Calvin’s development of Christian theology. The commentaries of Calvin, a reformed humanist lawyer, and other reformists of the time brought the bible to the masses and spawning considerable influence over major religious leaders. His ideas contributed to the rise of capitalism, individualism and representative democracy opening the way to colonization and settlement of the Americas.

Foundations of American Law

There is no debate that the many of the early settlers of the American continent departed Europe in search of freedom from religious persecution. They brought with them their own religious beliefs, their customs and their government. Beginning with the signing of the *Magna Carta* by King John in 1215 forced by the subjects, the powers of the English Crown began to transition into a period of constitutional rule. The signing of the *Mayflower Compact* in 1620 by the protestant pilgrims gave rise to the establishment of self-government and self-rule in early America. The American Revolution in 1776 brought English rule to an abrupt end in the newly formed United States of America. The *Declaration of Independence*, the *Articles of Confederation*, the *Constitution* and the *Bill of Rights* laid the foundation for the American system of governance.

There seems to be no clear line of influence from either the English common law or the law of nations as passed down through the lineage of Roman law. Many of the early writers were sharply divided upon the subject. Even the writings of Coke, Blackstone and others from English aristocracy were, at times, adamantly opposed to any idea that English law could be fettered with the precepts

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of Roman thoughts or ideas. The early American jurists were quick to recognize the original Greek and Roman concepts of *Natural Law* and the *Law of Nations*. The concept of natural law gave rise to the development of the legal *Maxims of Jurisprudence* through the recognition that certain precepts are simply laws of nature and common to all men and all nations. The Maxims postulate the ideas gathered from many nations and from many religious sources. The Maxims were seen as basic and fundamental concepts which were inalienable, against which no laws could be passed and the nation survive. The concepts of equal and inalienable rights of the citizens were etched into the very foundation of the new form of self-government, the very words being indelibly inked upon the *Bill of Rights*.

Sir James Mackintosh, a Scottish born jurist, politician and historian, wrote that “Maxims are the condensed Good Sense of Nations,” which became the Motto on the title page of *Broom’s Legal Maxims*, published in 1839. The writings of Coke recognized the role of the maxims in English law when he stated:

“‘A maxime in law.’ A maxime is a proposition to be of all men confessed and granted without prooffe, argument, or discourse.” (Co. Litt. 67 a.),

And described the maxim as:

“[A] sure foundation or ground of art, and a conclusion of reason so called quia maxima est ejus dignitas et certissima autoritas, atque quod maxime omnibus probetur, so sure and uncontrollable as that they ought not to be questioned.” (Co. Litt. 10b-11a.)

An anonymous letter to chief justice Lord Mansfield in 1770 stated,

“In contempt or ignorance of the common law of England, you have made it your study to introduce into the court, where you preside, maxims of jurisprudence unknown to Englishmen. The Roman code, the law of nations, and the opinion of foreign civilians, are your perpetual theme; but whoever heard you mention Magna Carta or the Bill of Rights with approbation or respect?” (Caffentzis 1995, 25)

Similar sentiments were expressed by Lord Esher, an American jurist and legal lexicographer in his ruling,

“I need hardly repeat that I detest the attempt to fetter the law by maxims. They are almost invariably misleading: they are for the most part so large and general in their language that they always include something which really is not intended

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to be included in them." *Yartmouth v. France* (1887), 19 Q.B.D. 647, 653; 57 L.J.Q.B. 7, 9, Lord Esher, M.R.

The alternate view expressed in numerous early American writings on the subject were expressed by J.J. Robbins, in an 1846 treatise entitled "*The Influence of the Roman Law*," (the Pennsylvania Law Journal, Vol. VI.) that,

"The exclusive devotion of English lawyers to the cultivation of their own common law, has long been proverbial. To an extent quite unparalleled in the history of the profession in other parts of Europe, they have neglected the study of foreign systems of jurisprudence, and have regarded the maxims and doctrines of the Roman law particularly, with a degree of contempt which could only be the fruit of ignorance of its principles." And further that, "The great body of the civil law, as compiled and arranged in the reign of Justinian, presents to us, for a period of nearly fourteen hundred years, the genius, the institutions, and, to a great extent, the political history of the most powerful commonwealth known in the annals of the world. During this long lapse of time we have, in studying its history, (as laws are the mirror of a nation's genius,) a most instructive view of the rise and progress of the peculiar civilization of the Roman empire; and the lessons it teaches us are of vast practical interest in this country."

Albert Schweitzer summarized the application of the maxims of jurisprudence in American law in 1959 in a treatise entitled "*Civilization and Ethics*."

"The law of reason is exalted in the convictions of the men of the eighteenth century to a position above all traditional maxims of jurisprudence. It alone is allowed to have permanent authority, and legal decisions have to be in harmony with it. Fundamental principles of law, principles everywhere equally beyond dispute, have to be deduced from human nature. To protect these and thus ensure to every human being a human value with an inviolable measure of freedom of which he can never be robbed, is the first task of the State. The proclamation of "the Rights of Man" by the States of North America and the French Revolution, do no more than give recognition and sanction to what, in the convictions of the time, had already been won." (Schweitzer 1946, 95)

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Maxims of Jurisprudence - Rules of Logic

Obsolete reason, obsolete rule

“Cessante ratione legis cessat ipsa lex”

*** When the reason of a rule ceases, so should the rule itself. ***

4 Co. Inst. 330; Co. Litt. 70b; Broom’s Max., 159.

Brown’s Boundary Control and Legal Principals, 6th ed., Brown, Robillard & Wilson, 2009

In *Tagliaferri v. Grande*, (16 N.M. 488, 120 P. 732), C. J. Pope, speaking for the court, said:

"The rule is general that where a natural object having extension is named as a boundary, the line runs to the middle of the object. This has been repeatedly held as to nonnavigable rivers and lakes and also trees. The rule has also been extended to artificial objects of like character to those above stated, although in the case of objects, such as houses, where the support of the soil even to the center of the earth is an element to the tenure, the line stops at the beginning of the object agreeably to the principle that **with the ceasing of the reason of the rule, the rule itself ceases.**"

Same reason, same rule

“Ubi eadem ratio ibi idem jus”

*** Where the reason is the same, the rule should be the same. ***

7 Co. 18; Co. Litt. 10a; Broom’s Max., 153.

Brown’s Boundary Control and Legal Principals, 6th ed., Brown, Robillard & Wilson, 2009

Land v. California, 74 Cal. App. 3d 736, 141 Cal. Rptr. 820 (Cal.App.Dist.1 11/07/1977)

Land v. California involved a 650 acre subdivision affected by the Coastal Commission’s passage of the California Coastal Zone Conservation Act of 1972. The case was brought claiming inverse condemnation claiming that its land was taken by the state through the acts and omissions of the North Central Regional Commission. The subdivider argued that it was deprived of the only use it

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had for its land, the sale of lots for single family home construction, and thereby took its property without just compensation. The trial court sided with the commission's regulations and refused the claim of inverse condemnation while recognizing the affect of the costal act on "marketability of all projects within the permit area. The trial court recognized the developer's vested rights in one unit of the subdivision, but refused to recognize their right to construct improvements on the lots. They court ruled that the restrictions imposed by the commission acting under the costal act were "reasonable and necessary" to carry out the purposes of the act. The judgment was affirmed by the Appellate Court.

The developer had received approvals and filed subdivision plats for units 1, 3 and 4 and the regional commissioner review found that the developer had a vested right in unit 5. The commission determined that "the erection of houses by individual purchasers on individual lots in all units would constitute separate developments within the meaning of the coastal act." The construction of the homes were subject to the permit provisions of the coastal act, meaning that each individual purchaser of a lot had no guarantee whether they would be granted a permit for the house construction on the approved lot. The Developer, consistent with the Attorney General's advice to the commissioners, applied for a "blanket permit" to allow construction of a house on any lot in units 3, 4, or 5 by any person.

A staff review report recommended 13 conditions be imposed "or the control of erosion; for access to and signposting of access to, the beach; and for the maintenance of common lands." The subdivider objected to the conditions claiming that the lots would be rendered more unsaleable. After a series of additional meetings, discussions, conditions and continuances, the developer withdrew his application. Despite the withdrawal, the commission imposed eight conditions to be imposed upon any permit for home construction within the subdivision. After further negotiations between the lot owners, the homeowners' association and the Coastal Commission, two owners of lots in unit 3 and unit 5 applied for and were granted permits subject to 10 modified conditions which were upheld under judicial review. The Appellate Court recognized that the developer had failed to exhaust the administrative remedies when he withdrew his application for the blanket permit.

"The cases ... have established that the objector must exhaust his administrative remedies before seeking judicial review of a regional commission's action on an application for an exemption. [Cite] There is **no reason the same rule should not apply** to review of the denial of a permit, or review of the grant of a permit on

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conditions which the permittee contends are invalid or unwarranted. "This is the doctrine of 'exhaustion of administrative remedies.' In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." (Abelleira v. District Court of Appeal (1941)17 Cal. 2d 280, 292 [109 P.2d 942, 132 A.L.R. 715].

Apparent Nonexistence

"De non apparentibus et non existentibus eadem est ratio."

*** That which does not appear to exist is to be regarded as if it did not exist. ***

5 Rep. 6; Broom's Max., 163.

Oberjuerge Rubber Company v. State Tax Comm., 674 S.W.2d 186 (Mo. App. E.D. 06/05/84)

In *Oberjuerge Rubber Company v. State Tax Commission*, the matter of distinguishing personal property from real property arose. A pre-engineered steel office and warehouse building was constructed on the Oberjuerge property. Two overhead cranes were erected upon columns designed to bear the weight of the cranes. The cranes, which follow tramrails running the length of the building, were installed after the building was constructed. The St. Louis County Assessor valued the cranes at \$93 K including the land and building improvements totaling \$1.2 M. Oberjuerge appealed the assessor's valuation claiming that the cranes were not "fixtures" and, therefore, should not be included in the real property valuation.

"The cranes were only slightly attached to the building because they were electrically wired into the beams and moved about along the tramrails. That the annexation may be slight or easily displaced will not, however, prevent an article from being a fixture if the article is adapted to the proper use of the building and was placed in the building by the owner with the intent of forming a part of the special object and design for which the building was constructed. See *Banner Iron Works v. Aetna Iron Works*, 143 Mo. App. 1, 122 S.W. 762, 764 (1909); *St. Louis Radiator Mfg. Co. v. Carroll*, 72 Mo. App. 315, 319 (1897). Thus, the undisputed facts point to annexation of the cranes to the building."

The court also recognized the paramount importance of determining intent. While the cranes were an integral part of the building design lending an implication of inferred intent, evidence was

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presented in their federal income tax submittal that the cranes were purchased after the buildings were constructed. The court determined that, despite this evidence, there was substantial and competent evidence to support the Commissions finding of intent.

“It has previously been shown that the proper test ... where third persons without notice are involved ... is the intention test, objectively applied. What would the reasonable person consider part of the land so as to pass with a deed or mortgage? It seems only proper that the same test should apply here. **If the fixture is apparently part of the realty, the assessor is justified in relying on its appearance regardless of the existence of secret agreements for retention of title or a right of removal under the doctrine of trade fixtures.** If the parties wish to avoid the more drastic consequences of the rule they need only give the assessor proper notice of separate ownership of such fixtures.”

Trifles

“De minimis non curat lex.”

*** The law disregards trifles. ***

Hob. 88; 5 Hill, N.Y. Rep. 170; Broom's Max. 333.

Clinton v. Miller, 226 P.2d 487, 124 Mont. 463 (Mont. 01/13/1951)

The Montana case of *Clinton v. Miller*, derives from a real estate sales contract between the parties wherein Miller agreed to purchase a lot in a subdivision from the Clintons. One-third of the purchase price was paid upon signing the contract with the balance to be paid upon delivery of a warranty deed conveying merchantable title, free and clear of all encumbrances and liens. The Clintons delivered a certified abstract prepared by a licensed abstracter which was then submitted by the Millers to their attorney for examination and opinion. The attorney declined to approve the title and responded as follows:

"I have examined the Helena Abstract and Title Company's abstract No. 2612 covering Lot 15 in Block 15 of the Lockey Addition to the City of Helena. The matters in this opinion are based entirely upon the information contained in that abstract.

"In 1873, a bond for deed was given to Jacob D. Tietzen and A.N. Rand and that interest assigned to Thomas Perry and Peter Larkin. Peter Larkin, thereupon

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deeded to Richard Hoback and Henry Pflaume. Richard Hoback and Henry Pflaume never disposed of their interest. The other interest passed to Charles W. Cannon and Robert C. Wallace. The name Wm. Carr appears in the abstract in that transaction and William Carr deeded so that some interest in said premises still remains in Thomas Perry, Wm. Carr, Richard Hoback, Henry Pflaume, Charles W. Cannon and Robert C. Wallace.

"Sam'l Schwab received the deed to that property in 1882 and deeded the same as Samuel Schwab. There is no presumption that an abbreviation of a man's name is one and the same person whose name is written out.

"The county took title to the within property by Tax Deed dated October 31, 1929, and by deed dated April 11, 1936, conveyed the same to R.C. Hoffman, who in turn, with his wife, by deed recorded February 6, 1946, conveyed the same to J.H. Clinton, of Helena, Montana, the present owner. J.H. Clinton thereafter filed an action to quiet title to said property in himself. There are several procedural errors in the quiet title proceedings which may be briefly enumerated as follows:

"1. The concluding phrase of the named defendants which is inserted for the obvious purpose of coming within the provisions of Section 93-6204, R.C.M. 1947, fails to show a comma after the word estate. The statute provides for the 'adding in the caption of the complaint in such action the words' and it would seem that the foregoing makes absolute compliance with the wording in the statute mandatory.

(The letter continues...)

Upon receipt of the attorney's opinion, the Millers refused to perform their contract, resulting in the commencement of the action by Clintons. The trial court rendered its decree adjudging:

"That none of the objections made by defendants to Clinton's title is valid; that none casts any cloud upon such title; that the plaintiffs are the owners in fee simple and entitled to the possession of the property; that such title is merchantable and that upon the delivery to them of proper deed of conveyance the defendants shall forthwith perform their obligations under the contract."

Millers appealed. The Appellate Court responded:

"Defendants' counsel objects to Clinton's quiet title proceedings because of what he terms "procedural errors" enumerated as follows: (1) Failure to show a comma after the word "estate" in the above quoted concluding phrase of the caption to the complaint and summons... It is well nigh impossible to imagine a more frivolous hairsplitting objection or contention than that the absence of a comma in the

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caption of a complaint or summons in a quiet title action constitutes a "procedural error" affecting the jurisdiction of the court, rendering the proceedings defective and either adversely affecting or invalidating plaintiff's decreed title to real property.

The title examiner's assignment is not to examine the abstract and records for mistakes in orthography, punctuation and grammar but to determine therefrom the condition of the title involved. **The law disregards trifles**, R.C.M. 1947, sec. 49-125, and so must title examiners and the courts. There is no merit in defendants' two specifications grounded upon the "missing" comma.

By deed recorded May 31, 1882, an undivided one-quarter interest in the original placer mining claim was conveyed to "Saml. Schwab" and nine days later the same undivided interest in the same placer claim was conveyed by a deed executed by "Samuel Schwab."

Every title examiner should know that there are certain standard abbreviations, derivatives and nicknames for the more common Christian names which the courts have long recognized as interchangeable with the full name such as Alex. for Alexander, Bill or Wm. for William, Bob for Robert, Dan for Daniel, Geo. for George, Jno. or Jack for John, Jos. or Joe for Joseph, Saml. — Sam'l or Sam for Samuel, Thos. or Tom for Thomas, etc.

But says defendants' attorney: "There is no presumption that an abbreviation of a man's name is one and the same person whose name is written out."

It is the function of an attorney at law retained to pass upon a title to determine from the abstract ... where the title rests, and what liens or encumbrances, if any, exist against the property involved. ... Such title examiner should be familiar with the statutes and decisions of his own state and he must apply the settled rules of law that should be known to all conveyancers.

The entire proceeding is frivolous and an imposition on the courts. The decree entered herein on July 20, 1950, does not and it cannot supply to Clinton any better title than was and is adjudged to him in the decree entered in his quiet title action entered on December 9, 1946. Clinton has a good and merchantable title acquired: (1) Through the deed of conveyance from the Hoffmans; (2) through adverse possession for much longer than the statutory period, and (3) through the valid final decree entered in his quiet title action."

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Smaller within larger

“Omne majus continet in se minus. In eo quod plus est semper inest et minus.”

*** The greater contains the less. ***

In re *Estate of Campbell*, 40 Haw. 543 (Haw. 06/17/1954)

Campbell is a Hawaiian appellate case which discusses the construction of a will brought by the trustees of the estate of James Campbell. The trustees requested the court of equity to construe the will to determine whether they had the power with respect to the lands contained in the trust to execute valid leases for a term of fifty-two years, irrespective of a prior termination of the trust.

The pertinent facts of the case as determined by the chancellor are that: "(1) the trustees have in the estate certain marginal lands not suitable for the major agricultural enterprises of the Territory but which are well suited for potential residential, commercial, industrial, piggery and small farm purposes; (2) That the lands in question at present are either non-income producing or yield a relatively low income; (3) That there is a pressing demand for the utilization of these lands but that demand cannot be fulfilled unless the trustees are in a position to grant leases for a term in excess of 51 years; (4) That few prospective tenants are interested in the leasing of said lands unless they can secure adequate financing and this cannot be done without a lease for a term in excess of 51 years; (5) ... to comply with conditions for the obtaining of financing through the Federal Housing Authority among which is a requirement that a lease of real property will not be approved for Federal Housing Authority financing unless it is for a term in excess of 51 years; (6) That the estate of James Campbell is at a competitive disadvantage ... ; (7) That the will of James Campbell directs that the real estate 'shall be particularly and especially preserved intact, and shall be aliened only in the event, and to the extent, that the obvious interests of my Estate shall so demand' and accordingly the trustees are in the dilemma of either holding relatively unproductive land or selling it unless they secure the approval of the Court for long term leases; (8) The conditions that existed at the date of the death of James Campbell have materially changed and the present urban development of Honolulu could not reasonably have been anticipated in 1900; (9) That the will of the testator vests full power of management and discretion in his trustees and provides, among other things, in the Twelfth Article: 'It being my purpose herein to provide a safe and certain income and maintenance for my wife, our children and grandchildren, for and during the period of the trusts hereby established, . . . and that the Trustees herein named, and their successors in trust hereunder, shall keep intact my Estate,

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and administer the same under the name of "The Estate of James Campbell" . . .'; (10) That it is to the best interests and benefit ... that the trustees have and exercise the power to execute leases for such terms that will be valid notwithstanding the prior termination of the trust, [and] based upon the [ten] findings as above set forth it is the determination of the chancellor [11] that the granting of authorization to the trustees to execute leases for a definite term of 52 years, notwithstanding the prior termination of the trust, is necessary in order to make the lands in question properly productive and for the protection of both the income of the income takers and the assets of the remaindermen, and will be a definite and certain benefit to all the beneficiaries, and [12] that such deviation is in accordance with the cardinal objectives of the testator."

The appellate court found no reason to disturb these findings.

"Having the express power to sell to the extent that "the obvious interests of my estate shall so demand," the trustees to the same extent plainly have the power to make a lease which is a possessory sale of less than the whole interest. In correlation, the power to alienate as a sale of both title and possession carries with it the power to lease as a sale only of possession, even though the tenancy created thereby may extend beyond the probable duration of the trust. To that broad power of alienation, the legal maxim is applicable that "**The greater contains the less,**" i.e., **Omne majus continet in se minus.** For example, a power to lease for ninety-nine years has been held to be within the greater power to sell in construing comparable wills which conferred powers not so broad as those conferred by this will." (Marshall's Trustee v. Marshall, 225 Ky. 168, 7 S.W.2d 1062, 61 A. L. R. 1365; Estate of Gray, 196 Wis. 383, 220 N.W. 175.)

Void Act

"Quod ab initio non valet in tractu temporis non convallescit."

"Quod initio vitiosum est non potest tractu temporis convallescere."

*** Time does not confirm a void act. ***

Dig. 50, 17, 29; Broom's Max., 178.

State v. State Board of Land Commrs., 109 Mont. 127, 94 P.2d 201 (Mont. 07/17/1939)

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The proceeding involves the right of the State Board of Land Commissioners to sell state land in conflict with Constitutional provisions.

The Northern Montana Lumber Company, a corporation, contracted to buy 160 acres of common school land from the state on May 6, 1910, for the consideration of \$3,200. Payments were made from time to time, the final payment being made April 3, 1917. Patent was issued July 3, 1919. The land is located within three miles of the city or town of Cut Bank, and under the provisions of section 1, Article XVII of the Constitution must be classified as Class Four lands, and under section 2 of the same Article can be sold only in alternate tracts of five acres each.

Sections 1 and 2, Article XVII of the Montana Constitution, provide as follows:

"Section 1. All lands of the state ... granted to the state by congress, and all lands acquired ... shall be public lands of the state, and shall be held in trust for the people, to be disposed of as hereafter provided ... Fourth, lands within the limits of any town or city or within three miles of such limits ..."

"Sec. 2. ...The lands of the fourth class shall be sold in alternate lots of not more than five acres each..."

The sale is clearly void and "**time does not confirm a void act.**" (Sec. 8768, Rev. Codes; State ex rel. Brink v. McCracken, 91 Mont. 157, 6 P.2d 869.) Maxims of jurisprudence relied upon by the board set forth in sections 8744, 8745, 8746 and 8748, Revised Codes, apply to the board as well as to the petitioners, and none of them can be construed to modify constitutional provisions."

Maxims of Jurisprudence - Fundamentals

Wrong – remedy

"Ubi jus, ibi remedium."

*** For every wrong there is a remedy. ***

1 T. R. 512; Co. Litt. 197, b; 3; Bouv. Inst. n. 2411;

4 Bouv. Inst. n. 3726; Broom's Max., 191, 192, 204.

Farina v. Bevilacqua, 192 Cal. App. 2d 681, 13 Cal. Rptr. 791 (Cal.App.Dist.1 05/31/1961)

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Plaintiffs owned and farmed 10 acres of land along the easterly side of Channel Street . . . Defendants had been subdividing land west of Channel Street. . . Defendants agreed to contribute 20 feet of land from their property, provided a like width on the other side of the existing street could be obtained from plaintiffs.

[P]laintiffs deeded the 20-foot strip of land to defendants. Defendants arranged with the county that the roadway be but 58 feet in width, rather than the 60 feet which had been represented to plaintiffs. Defendants conveyed to the county only the land necessary for a roadway 58 feet wide. The 2 feet not deeded to the county immediately adjoined plaintiffs' land, and separated it from the street, which was paved by the county.

Upon completion of the paving, defendants' counsel advised plaintiffs that they were trespassing upon defendants' land in going to and from the roadway over the 2-foot strip retained by defendants. Plaintiffs promptly gave notice of rescission, and tendered to defendants the proportion of \$6,000 represented by the 2-foot strip retained by defendants. This action followed. The court decreed rescission and directed defendants to deed the strip to plaintiffs upon repayment to them of this proportion of the original price.

[A]fter the street was paved and defendants' claim of trespass asserted, they offered to sell the 2-foot strip to plaintiffs for \$7,500, \$1,500 more than defendants had paid them for the entire width of 20 feet. Defendants concede that the narrow strip can be put to no use by them. Obviously, its only value to defendants lies in the price that plaintiffs' need for access to the street may compel them to pay for it, or in barring future development of plaintiffs' land.

Contrary to defendants' contention, their fraud is plain. The record fairly reeks of it, and we do not impose upon those who must purchase these reports by further detailing the facts supporting the finding of fraud.

Defendants, however, contend further that partial rescission is not a remedy known to the law. Here the county, which was not a party to the fraud, now owns 18 of the 20 feet conveyed by plaintiffs to defendants, and has paved it. Obviously, the return of this land to plaintiffs cannot be decreed. Similarly, the decree requires restoration to defendants only of that proportion of the purchase price which is attributable to the 2 feet which can be returned. Thus, say defendants, the rescission is but partial and cannot be allowed. Undoubtedly, the general rule is that rescission cannot be had unless the party demanding it can and does restore the other party to status quo (*Joshua Tree T. Co. v. Joshua Tree L. Co.*, 100 Cal. App. 2d 590, 596 [224 P.2d 85]).

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The rule, however, is based upon the theory that one cannot retain the portions of the contract which he deems desirable and repudiate the remainder (Simmons v. California Institute of Technology, 34 Cal. 2d 264, 275 [209 P.2d 581]). That theory has no application here. Plaintiffs ... seek to recover from the defrauding defendants all that remains salvageable of the original consideration given by plaintiffs, and to restore to defendants the full consideration given by the latter for that portion.

Where a defendant has been guilty of fraud, "courts of equity are not so much concerned with decreeing that defendant receive back the identical property with which he parted . . . as they are in declaring that his nefarious practices shall result in no damage to the plaintiff" (Arthur v. Graham, 64 Cal. App. 608, 612 [222 P. 371]).

We do not suggest that any of these cases presents a fact situation precisely comparable to that before us. They do, however, establish that in aggravated situations equity is not powerless to effect a fair result even though exact restoration of the prior condition of the parties is impossible.

"Under the rule that **for every wrong there is a remedy** (Civ. Code, § 3523), courts of equity may invoke new methods of relief for new types of wrongs (4 Witkin, Summary of California Law, p. 2788). The peculiar circumstances of this case cry aloud for the invocation of this means of easing the normally valid restrictions upon the remedy of rescission."

Beyond Man's Control

"Actus Dei nemini facit injuriam."

*** No man is responsible for that which no man can control. ***

2 Blacks. Com. 122; Broom's Max., 230; see Act of God.

Midgett v. North Carolina State Highway Commission, 260 N.C. 241, 132 S.E.2d 599 (N.C. 10/09/1963)

"We follow the "Civil-Law Rule," which recognizes a natural servitude of natural drainage as between adjoining lands, so that the lower owner must accept the surface water which naturally drains onto his land but, on the other hand, the upper owner cannot change the natural drainage so as to increase the natural burden. *ibid* ; also *Johnson v. Winston-Salem*, 239 N.C. 697, 81 S.E.2d 153.

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... the waters flowed as a stream in a natural depression until impounded by the elevated highway and cast back upon plaintiff's land. It is common knowledge that waters naturally flow from higher to lower levels and tend to follow depressions and ravines.

Of course, the plaintiff is not entitled to maintain the action unless the facts alleged constitute a cognizable cause of action. An Act of God is not a sufficient predicate for an action for damages. The term "Act of God," in its legal sense, applies only to events in nature so extraordinary that the history of climatic variations and other conditions in the particular locality affords no reasonable warning of them.

In conclusion, it is held that the plaintiff has failed to establish by a preponderance of the evidence that defendant has invaded any riparian right vested in plaintiff or that plaintiff has sustained injury or damage caused by negligence, nuisance or defendant's violation of any law conferring upon plaintiff a right of action for the alleged injuries and loss sustained by him.

Bruton v. Carolina Power and Light Co., 217 N.C. 1, 6 S.E.2d 822 (1940)

"An actionable injury arises when the consequence of the detention of water by a dam is the flooding of the lands of owners either upstream or downstream. However, the owner of a dam may permit water to flow from a dam if the waters coming to the dam are neither accelerated in speed nor increased in quantity, so long as ordinary care is exercised in the discharging of the water ponded behind the dam. Nothing appears to be more settled than that the owner of a dam is not bound to anticipate unprecedented storms or rainfalls, and is not liable for damages resulting from extraordinary storms and floods. But where the negligence of the defendant in the operation of its plant during unprecedented and unforeseeable storm or rainfall is a contributing factor in producing injury - that is when the injury resulted from a combination of the defendant's negligence acting in concert with some natural force such as an unprecedented storm the defendant is not relieved from liability, since an **act of God** which exculpates the owner of a dam must be such an act as constitutes the sole cause of the injury."

Impossibilities

"Lex non cogit ad impossibilia."

*** The law never requires impossibilities. ***

Co. Litt. 231, b; 1 Bouv. Inst. n. 951; Broom's Max. 242.

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Lyons v. Bassford, 249 S.E.2d 255 (Ga. 10/31/78)

Defendant introduced evidence that the current fence was not at the same location as the former fence. ... He also offered testimony by a witness who did survey work but who was not a licensed surveyor, that he had measured plaintiff's property and that the dimensions of the two sides called for in plaintiff's deed were nine feet short of the new fence on one side and 7.4 feet short on the other side.

... The party in bona fide possession who holds against the world may not know and may have no means of determining the identity of every adverse claimant. For instance, if an adverse party suffered from periods of insanity, and at the same time enjoyed lucid intervals, **it would be unreasonable if not impossible to require** the plaintiff to prove his prescription by identifying and tacking all the lucid intervals necessary to make out a prescriptive period.

Idle Acts

“Lex non cogit ad vana seu inutilia.”

*** The law neither does nor requires idle acts. ***

Co. Litt. 197; Broom’s Max., 252.

Hart v. Barron, 204 P.2d 797, 122 Mont. 350 (Mont. 03/23/1949)

By contract in writing dated August 28, 1942, entered into between Winters agreed to sell and Hart agreed to purchase for the sum of \$5,800, 153.12 acres of described land in Montana, including the landlord's share of 1942 crops thereon. They further agreed that Hart would make payments directly to the bank and that said bank "is to hold said deed in escrow and deliver the same to [Hart] upon his full compliance of the terms of this contract" and that Hart was to "have possession of premises on expiration of present lease March 1, 1943. Hart then informed the tenants that he had bought the land and would expect the landlord's share of the 1942 crops. Hart was told by the tenant that "there was nothing doing;" that he did not have any hay and that he "did not have any business there."

At the time Hart demanded of the tenants the landlord's share of the 1942 crops not a dollar of the agreed consideration had been received by the owner, Mrs. Winters. Plaintiff had not delivered to her the \$100 down payment called for by the contract, — he had not delivered to her any part of the purchase price, — he had not completed his proposed loan; he had not paid the 1942 taxes; he had

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not paid for the land nor acquired title thereto, — in fact, he had not complied with any of the terms of his contract.

On October 3, 1945, by warranty deed that day made, executed, acknowledged and delivered by Mrs. Winters and her husband, grantors, to the defendants, Dennis Barron and Irma Barron, grantees, said grantors granted, sold and conveyed all of the described land to the Barrons. On October 5, 1945, Hart and his attorney, Mr. Parcels, having learned of the sale and conveyance to defendants, journeyed to Billings where they conferred with attorney Snell regarding the sale to the Barrons. Following his conference of October 5, 1945, with Attorney Snell in Billings, Mr. Parcels returned to Columbus and obtained from Irvin M. Black, cashier of the Yellowstone Bank of Columbus, the escrow deed theretofore held by the bank and, thereafter, at the crack of dawn on the morning of October 6, 1943, Mr. Parcels presented such escrow deed to the county clerk and recorder of Stillwater county for recording and such official endorsed thereon: "I hereby certify that the within deed was received for record this 6 day of October A.D. 1945 at 6:23 o'clock A.M. * * * Return to M.L. Parcels, \$1.00."

That same day but the county clerk and recorder received and filed for record at 10 o'clock a.m. on October 6, 1943, the deed which had theretofore been delivered to the Barrons in Mr. Snell's office at Billings. On October 8, 1945, being two days after the deeds had been placed of record, the cashier of the bank issued the bank's draft for \$5,422.10 payable to the order of Mrs. Esther Winters and forwarded same, with an accompanying letter, addressed to Mrs. Winters at Vallejo, California, but such draft, not being delivered, was returned to the bank. The bank's letter to Mrs. Winters read: "In conformity with your instructions of September 2, 1942 supplemented November 5, 1942, we are closing the above escrow and enclose, herewith, our Federal Reserve Bank draft for \$5422.10 in settlement of the account."

On October 18, 1945, being but twelve days after the recording of the escrow deed, the plaintiff, Edmond F. Hart, by his counsel, M.L. Parcels, commenced this action to quiet title as against the defendants, Dennis Barron and Irma Barron. The determinative question is: Which deed conveyed title?

Hart relies upon two letters written by Parcels, Hart's attorney, and sent to Mrs. Winters on November 12, 1942 and January 12, 1943 complaining of an affidavit recorded October 2, 1942 by W.B. Garrigus, now deceased, reciting: "W.B. Garrigus, being first duly sworn, on oath, deposes and says: That he is a legatee and devisee mentioned in that certain will of Mary Frances Garrigus dated

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November 20, 1918, and probated in the District Court of the Fourth Judicial District, County of Missoula, Montana; that affiant, under terms of said will and the proceedings in said estate, does hereby assert and claim that he owns an interest in and to the real estate mentioned in said Will, which real estate consists of approximately 160 acres of land known as the 'Garrigus Ranch' ... W.B. Garrigus." The Parcell letters to Mrs. Winters that the affidavit constituted a cloud on the title and prevented Hart from completing his obligations to secure a loan against the property.

"The affidavit is void on its face. The pretended "claim" attempted to be asserted will not admit of proof for under the law the affiant and all claiming under him, are concluded by the distribution made in the decree and they had been so concluded for more than 22 years prior to the filing of the affidavit. Being void the affidavit cast no cloud. It was and is nothing. It would have been but idle shadow boxing against the W.B. Garrigus affidavit "to probate his estate and sue to quiet title on this land" as demanded in the bank's letter of April 16, 1945, to Mrs. Winters. **The law neither does nor requires idle acts and its disregards trifles.**" Sections 8761 and 8762, R.C.M. 1935.

With regard to the contract between Mrs. Winters and Hart, the court confined its interpretation to statutory requirements.

In 19 Am. Jur., "Escrow," at pages 426-441, it is said: "Where an instrument has been delivered to a depository as a writing or escrow of the grantor, it does not become a deed, and no legal title or estate passes until the condition has been performed or the event has happened upon which it is to be delivered to the grantee or until the delivery by the depository to the grantee * * *" Sec. 11, p. 426. "In the law governing performance of escrow agreements, there is no doctrine of substantial compliance to be found. Compliance must be full and to the letter, or else it constitutes merely noncompliance. Strict and full performance only can discharge a condition precedent to valid delivery by the escrow holder. ..."

The only instructions given the bank for the handling of the escrow are to be found in: (a) The contract of sale and purchase; (b) Mrs. Winter's letter to the bank of September 2, 1942, stating: "I want these held in escrow until final payment is made to me;" and (c) Mrs. Winters' letter to the bank of November 5, 1942, instructing the bank to pay the 1942 taxes as Mrs. Winters would retain possession of the 1942 crops. Hart had not complied with his contract at the time the bank handed the escrow deed over to plaintiff's attorney, Mr. Parcells, and the bank surrendered the deed in violation of the provisions of the contract and the instructions given it by Mrs. Winters.

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At the time plaintiff's attorney procured the deed from the bank he and plaintiff had actual knowledge: (a) That a couple of days previous, in Attorney Snell's office Winters by deed there made and delivered, had passed title to the land to Barrons; (b) that the deed to Barrons had not yet been placed of record; and (c) that Mrs. Winters was in no position to accept any money from plaintiff nor to deliver deed conveying title to plaintiff. The procuring and recording of the escrow deed under such facts, could only lead to trouble and litigation for all parties concerned.

The bank, knowing of plaintiff's noncompliance with his contract, was wholly without authority to surrender the escrow deed to plaintiff's attorney, who with soiled hands, reached for such deed and, upon procuring it, raced to the court house to place it of record ahead of the recording of the deed to defendants which both plaintiff and his attorney then knew had been delivered to defendants some three days previous. As is said in *Rosenthal v. Landau*, Cal.App., 202 P.2d 810, at page 812: "The dates upon which the various deeds were recorded are false factors in the case." The unauthorized delivery of the escrow deed passed no title and serves only to wrongfully cloud defendants' title to the property.

Mrs. Winters having declined to waive plaintiff's noncompliance and having elected to sell and convey the land to defendants, the contract of August 28, 1942, was rightfully rescinded, terminated and at an end. The deed from Mrs. Winters, grantor, to plaintiff, Edmond F. Hart, grantee, dated August 28, 1942, filed for record October 6, 1945, at 6:23 o'clock a.m. and recorded in the office of the county clerk and recorder, canceled as null, void and of no effect.

Consent

"Scientia et volenti non fit injuria."

*** He who consents to an act is not wronged by it. ***

Broom's Max., 268, 269, n. 271.

Thomas v. Holliday, 764 P.2d 165, 1988 OK 116 (Okla. 10/25/1988)

Thomas, a security guard for Safeway and an off-duty Lawton police officer, observed the defendant, Daniel D. Holliday [Holliday], partially eat a pastry in the grocery store and then replace it on a shelf. Holliday then left the store. Thomas, along with another employee, went to the parking lot where they saw Holliday sitting inside a car. Thomas noted the license tag number and approached the

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vehicle. While showing his badge he asked Holliday to roll down the window and answer some questions. Holliday denied any wrongdoing and began to drive away. Thomas then opened the car door and attempted either to get inside or turn off the ignition. Unable to do either, he grabbed the back of the bucket seat while his left hand was on the door. Thomas then jumped on the side of the car and fell from it while it was turning. He sustained an injury to his shoulder.

Thomas brought this action against Holliday to recover for his injury, medical bills, lost time from work and other damages. Holliday raised the assumption-of-risk defense and requested a jury charge explaining this theory and its legal effect as a complete shield from liability.

The defense of assumption of risk is relatively new to the common law, and the typical case of risk assumption draws either from a status relation or a contract between the parties. The root of the defense, which evolved in the master/servant or employer/employee context, was used by employers to protect the emerging industries of the 19th century from claims of employment-related injuries. This aspect of risk assumption survives today mainly in situations where a plaintiff either expressly agrees that the defendant will be held blameless for the plaintiff's failure to exercise due care for his protection in certain circumstances, or where the defendant does not owe a duty of care to the plaintiff. A classic example of this type of risk assumption is afforded by a fan injured while attending a sports event.

Another aspect of risk assumption arises from Roman law and is the source of much confusion. This concept is encapsulated in the maxim *volenti non fit injuria*, which means: If one, knowing and comprehending the danger, voluntarily exposes himself to it, though not negligent in so doing, he is deemed to have assumed the risk and is precluded from recovery for the resulting injury. The maxim is predicated upon the theory of knowledge and appreciation of the danger and voluntary assent.

The volenti principle, which means that a person who consents to an act is not wronged by it, is predicated on the theory of knowledge and appreciation of the danger and voluntary assent to the risk associated with it.

... The volenti maxim reflects the Roman law's notion of legal wrong or injuria. The principle embodied in the maxim is that a loss inflicted by one's voluntary act or submission is not actionable, i.e., one who voluntarily exposes himself to a known, appreciated and avoidable danger may not recover for injuries occasioned by the exposure. Dig. 47, 10, 1, 5 (Quia nulla injuria est, quae in volentem fiat); see Burdick, Principles of Roman Law, pg. 504 [1938]. The volenti doctrine is expressed

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as a common-law rule both in *Cruden v. Fentham*, 2 Esp. 685, 170 Eng.Rep. 496 [1799] and *Priestley v. Fowler*, 3 M. & W. 1, 150 Eng.Rep. 1030 [1837].

Contributory negligence, which was introduced to the common law a few years after assumption of risk first made its appearance, is that conduct on the part of the plaintiff, contributing as a legal cause to the harm he has suffered, which falls below the standard of one to which he is required to conform for his own protection. Contributory negligence implies the omission of a duty on the part of the injured person and excludes the idea of willfulness. What is in actuality lack of due care or heedlessness on the part of a plaintiff is often mislabeled assumption of risk. For risk assumption to avail as a defense to a tort claim for negligence there must either be an express agreement, a pre-existing status between the defendant and plaintiff, or an element of consent to the harm that is known and appreciated by the plaintiff. Anything falling outside these areas is simply contributory negligence.

In the present case, it cannot be said that the plaintiff consented to being thrown from the car when he jumped onto it. The plaintiff may have been reckless and exhibited a lack of due care, but that would require a jury charge on contributory negligence and not on assumption of risk.

Own wrong – No advantage

“Nullus commodum capere potest de injuria sua propria.”

*** No one can take advantage of his own wrong. ***

Co. Litt. 148; Broom’s Max., 279.

Western Aggregates, Inc. v. County of Yuba, 130 Cal.Rptr.2d 436 (Cal.App. Dist.3 07/17/2002)

This case involves a gravel moonscape left by hydraulic mining in the 19th Century; in the background it features ferries, stage coaches, gold dredging, abandoned towns, access to the Yuba River and millions of dollars worth of high-quality construction aggregates (sand and gravel). During labor unrest, Western Aggregates, Inc. (Western) had several union members arrested for trespass in the Yuba Goldfields. Some arrestees filed civil rights suits in state and federal court, naming the County of Yuba (County) as one of the defendants. Their theory was that they were on

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a public road and therefore County officers should not have participated in the arrests, because no trespass occurred. In defense of these suits, the County asserted the arrests did not take place on public property. In addition, citizens want to use the road to reach recreational sites.

Western sued the County to quiet title to the portions of Western's property over which it was claimed an historic public road ran. After a court trial, the trial court concluded a public road existed, although the original route had changed.

The evidence revealed that there were a number of floods and washouts in the early 1900's, and that the quarry commenced operations during this time. The road appears to have been re-routed around the quarry site. . . . [T]he evidence points to the fact that the portions of the road lying to the east of the [CDC site] was further broken up during storms and fell into almost total disuse. . . . By the late 1960's, only bits and pieces of a road or roads existed in this area east of [the CDC work]. However, it is impossible for the Court to tell if these remnants were left over from the original Historical Road or were a result of new roadbuilding activities."

The County conceded the road through Hammonton to the Park's Bar Bridge did not equate to the Marysville-Nevada Road, but the trial court found it functioned in its stead. The exact course of the road has changed in certain places, due in large part to the actions of Western and its predecessors. Western asserts the trial court was mistaken to treat "the haul road built in the 1980s by Western and a 1940s-vintage road to . . . Hammonton" as the functional substitute for the Marysville-Nevada Road, asserting a taking has occurred.

"[T]he distance to which a roadway may be changed without destroying an easement will be determined somewhat by the character of the land over which it passes, together with the value, improvements, and purposes to which the land is adapted." [cite] "[T]he obstruction of an old way and the opening of a new by the landowner, or the substitution of a new highway for an old, when accepted by the public has been held a dedication of the new highway." [cite] Where the termini remain the same, and a party over whose land a roadway changes voices no objection (or changes the route), the new route succeeds to the status of the old. [cite] "It is sufficient if the line of travel remains substantially unchanged, although at times it may deviate to avoid bad roads or obstructions." Moreover, a party who "actually assisted in the variation of the road" cannot complain about such variation. (Bumpus v. Miller, supra, 4 Mich. at p. 164; see Civ. Code, § 3517 [**No one can take advantage of his own wrong**].)

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Maxims of Jurisprudence – Conveyances

Preference to the Earliest

“Qui prior est in tempore potior est in jure.”

*** Between rights otherwise equal, the earliest is preferred. ***

Broom’s Max. 354, 357 n. 1, 358.

Ladue v. Currell, 110 S.E.2d 217, 201 Va. 200 (Va. 09/03/1959)

On June 4, 1957, Clyde J. Currell and Dorothy Currell, his wife, hereinafter called complainants, instituted suit against Vivian S. LaDue (formerly Vivian Schaeffer), hereinafter called defendant, to establish and confirm their title to one acre of land in Centreville magisterial district, Fairfax county, Virginia. The acre in controversy is bordered on the south by State route 658 and is shown within wide black lines on a plat dated May 10, 1958, attached to the final decree.

Currell alleges that by deed of August 29, 1939, duly recorded, they acquired a tract of land of fifty-five acres and that they entered upon the premises. It is then alleged that since that date they exercised actual, notorious, continuous, hostile and exclusive possession of the area granted, but that in January, 1957, defendant owner of an adjoining parcel of land staked off a portion of complainants' land and asserted ownership of that area. Currell requests that their title to the parcel in controversy be quieted, established and confirmed, and that the claims of LaDue to that part of their land be barred and extinguished.

LaDue's answer asserted that by deed of February 22, 1926, recorded June 2, 1927, she was conveyed a parcel of land described in the deed by metes and bounds, a computation of which amounts to slightly more than three acres and that the three-acre parcel includes the area in controversy, which is slightly more than an acre. The answer also stated that defendant's grant was earlier in point of time, her record title to the three-acre parcel was superior to complainants' title to any part thereof, and that defendant and her predecessors in title had been in continuous and exclusive possession and control of the entire three-acre tract of land since 1897.

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[T]he litigants claim title to their respective **overlapping tracts of land from this common source**. However, it also appears from the stipulation that the conveyance from the common grantor in **defendant's chain of title was earlier in point of time** than the conveyance in complainants' chain of title and that defendant's record title is superior to that of complainants.

Defendant proved no actual possession of the land in question, but she is under no obligation to do so. **Her senior grant confers upon her constructive possession of the parcel** of slightly over three acres, and her constructive possession to the limits of her boundary continues good regardless of the junior grant unless and until there is a disseisin. To constitute disseisin it is just as necessary for claimants to take actual possession of some part of the interlock as if they had entered without color of title. To be effective the entry must be with intent to oust the owner and the possession must be evidenced by some act or acts indicating an actual possession of the land itself, as distinguished from mere sporadic taking of the products thereof.

The usual kind of actual possession relied upon is occupancy, use or residence upon the premises for the statutory period of time, evidenced by cultivation, enclosure, or erection of improvements, or other plainly visible, continuous and notorious manifestation of exclusive possession in keeping with the character and adaptability of the land.

Limit on Rights

“Sic utere tuo ut alienum non lædas.”

* One must so use his own rights as not to infringe upon the rights of another. *

1 Bl. Com. 306; Broom's max. 160; 4 McCord, 472; 2 Bouv. Inst. n. 2379; Wing. Max., p. 482.

Neyman Et Al. v. Pincus Et Al., 82 Mont. 467, 267 P. 805 (Mont. 05/29/1928)

Plaintiff brought action originally against the owner of certain lots on which an excavation was made for building purposes, and the contractors who made the excavation, for damages resulting when a building, standing on an adjoining lot and in which plaintiffs were conducting a mercantile business, fell by reason of the removal of the lateral and subjacent support from the lot. The complaint alleges

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that the nature of the subsoil of the lots in question is such that the wall of the excavation made therein would not stand without artificial support and that the care, skill and caution required in making such an excavation dictated that the south wall of the excavation be made in sections and the new foundation erected in each section before further support was removed from the adjoining lot, which method defendants negligently failed to adopt. The contractors denied liability and alleged that the work next to the building in question was done under an independent contract and that the work done under the realty company contract did not result in the damage alleged by the plaintiffs.

On the day the work was commenced, the realty company served upon Hum Yow, the following written notice: "Dear Sir: This is to notify you, the owner of lot 12, block 41, original town site of Butte, Mont., that the Northwestern Realty Company is excavating for a basement on the property adjoining your above-named lot on the north. This excavation will go below the bottom of the north wall of your building. While all reasonable care will be taken in doing this excavating so as not to unreasonably jeopardize your wall, your particular attention is called to the very unsafe condition of the north wall of your building; and for your own protection you are cautioned to protect your wall."

Hum Yow entered into a contract with Jesse Huddleston, who, for a consideration named, agreed to "underpin and protect" the well from "settling, falling or caving in." The contractors discontinued work on the south wall of the excavation about the 7th or 8th of July, in order to permit Hum Yow to protect his wall, and immediately on securing the contract for that purpose, Huddleston commenced removing portions of the ground intervening between the wall of the excavation and the wall of the building and placing posts under the latter; but before he had completed the work the center third of the wall settled and toppled into the excavation, bringing the roof of the building with it, to the great damage of plaintiffs' stock of goods.

The ground of which lot 12 was composed would have stood in its natural condition without any support, but the building erected thereon added lateral pressure to the lot on which it was erected. "The right to lateral support pertains only to the land in its natural condition, and does not extend to encumbering buildings or structures which increase the lateral pressure."

... It must, of course, be conceded that the building fell by reason of the removal of the lateral and subjacent support thereof ...

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Counsel for plaintiffs, while acknowledging this rule, question its justice and propriety in this state under section 8743, Revised Codes 1921, which provides that **one may not so use his rights as to infringe upon the rights of another**. This statutory provision works both ways and the reason for the rule stated is found in the very declaration; i.e., one by altering the natural condition of his land which is entitled to lateral support, will not be permitted thereby to deprive the adjoining owner of his right to use his land in the manner in which it could have been used in its natural condition.

Grant includes Essentials

“Cuicumque aliquis quid concedit, concedere videtur et id sine quo res ipsa esse non potest.”

*** One who grants a thing is presumed to grant also whatever is essential to its use. ***

5 Co. 47; Broom’s Max., 479.

Kroeze v. Scott, No. 8-084 / 07-0995 (Iowa App. 03/14/2008)

This case involves a dispute between Stephen and Gloria Kroeze and Lowell and Tamara Scott over who owns certain real estate, legally described as "Parcel T." In 1976 the Kroezees purchased real estate and built a house on land north of Parcel T. A deep ravine traverses a portion of their land, and they can access the other portion only via foot, tractor, or using the driveway located on Parcel T. In 1984 the Scotts purchased a house and real estate south of Parcel T. The driveway to the Scotts' house is partially located on Parcel T. Both the Kroezees and the Scotts thought they owned Parcel T. In fact, neither party's deed encompasses Parcel T. In 2003 the Kroezees desired to use the driveway on Parcel T to construct a pole barn on the land-locked portion of their property. The Scotts objected. In 2004 the Kroezees acquired a quit claim deed to Parcel T from Patrick and Catherine Hickey.

The district court's January 17, 2007 "Findings of Fact, Conclusions of Law and Ruling" found the Scotts owned Parcel T by adverse possession. It also found the Kroezees had failed to show an easement giving them use of the driveway on Parcel T to access their property. Therefore, the district court dismissed Kroezees' petition and quieted title to Parcel T in the Scotts' favor.

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Like the district court, the appellate court found the Scotts have proven ownership of Parcel T by adverse possession. The Scotts and their predecessors have shown hostile, actual, open, exclusive, and continuous possession, under claim of right for more than ten years. Since 1953 the Scotts and their predecessors testified that they believed they owned Parcel T based on representations made to them. They have used the driveway on Parcel T to access their property. They have maintained Parcel T, including mowing, clearing snow off the driveway, trimming the trees, and mending and replacing the fences bordering Parcel T. They have also made valuable improvements to Parcel T, including installing a security gate at the end of the driveway, rocking the driveway and eventually grading and paving the driveway, and installing utilities along the driveway.

Prior to 2004, the Kroeze's belief that they owned Parcel T was not reasonable. The Kroeze testified they were familiar with the plat of survey of the land they purchased in 1976, which clearly does not encompass Parcel T. In addition, the Scotts and their predecessors testified no access has been given to the Kroeze, except for a short time in 1991 when the Scotts gave the Kroeze permission to remove a six-foot section of the fence separating the Kroeze's property and Parcel T. In 2003 the Kroeze requested an easement giving them use of the driveway to build a pole barn. The Scotts objected and patched up the six foot section of fence. Then, the Kroeze took out a twelve-foot section of fence. In response, the Scotts permanently locked the gate to the driveway. In 2004 the Kroeze acquired a quit claim deed to Parcel T from the Hickey's. The Hickey's testified they were not aware that they were transferring Scotts' driveway to the Kroeze. The Hickey's did not intend to convey the driveway because they believed the Scotts owned it.

An easement is "a liberty, privilege, or advantage in land without profit existing distinct from ownership of the soil. . . ." [cite]. The party claiming an **easement by necessity** exists must show: "(1) unity of title to the dominant and servient estates at some point prior to severance, (2) severance of title, and (3) necessity of the easement." [cite]. The doctrine generally applies "when a landowner parcels out a landlocked portion of his or her land and conveys it to another." Id. "Under these circumstances, courts may imply an easement by necessity across the seller's land to provide the purchaser of the landlocked parcel with access to a public road." Id. Our supreme court has held that strict necessity is not required but mere inconvenience is not enough. [cite]. "What is required is the easement must be reasonably **essential to the use and enjoyment** of the dominant estate as it existed at the time of conveyance of the servient portion." [cite].

Like the district court, we conclude the Kroeze has failed to show entitlement to an easement by necessity giving them use of the driveway on Parcel T to access their property. We find no unity of

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ownership between the Kroeze's property and Parcel T. Indeed, Parcel T was specifically excluded and was never part of the land purchased by the Kroeze's. Therefore, the first two elements have not been proven. Also, the Kroeze's have access by foot or tractor to their property. Therefore, the third element has not been met.

Principal

“Accessorium non ducit sed sequitur suum principale.”

*** The incident follows the principal and not the principal the incident. ***

Co. Litt. 152; Broom's Max. 491.

Owsley v. Hamner, 36 Cal. 2d 710, 227 P.2d 263 (Cal. 02/09/1951)

Plaintiffs are the owners of a two-story business building at the northwest corner of the intersection of Kinross Avenue, a street running east and west, and Broxton Avenue, a street running north and south. They acquired the property by purchase in 1945. In 1929, plaintiffs' predecessor-owner of the building, executed as lessor, a lease to defendant of store No. 2 for men's furnishings business describing it as: "That certain store space on the first floor..., said store premises hereby leased having total square footage of approximately 3,000 sq. feet and frontage of approximately thirty (30) feet on Broxton Ave. ..."

The court found that prior to the execution of the lease, negotiations were had between defendant-lessee and the owner. Defendant inspected the building while under construction, was shown the blueprints governing the construction, and the building was so constructed with the passageways, patio and display windows and entrances as heretofore mentioned, and has existed in that manner to the present. Thus, as constructed in 1929 by the owner, and as contemplated when the lease was made, store No. 2 occupied the north 30 feet of the building with a 30-foot frontage on Broxton, the patio extended into the south line of the store some distance, and show windows and entrances were on the south side of store on the patio and passageway from Broxton. There was also an entrance and show windows on Broxton.

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Plaintiffs, in their complaint, contend they have the right, and intend to close the passageways, except for a small portion extending from Broxton, and all of the patio, or at least a part thereof, and utilize them for other purposes.

The trial court found: "That the patio is obviously designed, constructed and decorated as a permanent and integral feature of the building. That the closing of the Kinross entry and expansion of Store No. 1 would interfere with and deprive the defendant Jack Hamner and his subtenants of light, air, and the public's view of the seven (7) display windows, and interrupt egress and ingress through the two doorways, all of which windows and doorways open on the said patio. That the continued use of the patio as it now exists for purposes of light, air, access and public view of the display windows, is of substantial and material value to the leasehold interest. ...

"That the patio is and has been in constant use by the general public, and is used as a shortcut between Broxton and Kinross Avenues. That the use thereby causes many people to pass by the seven display windows in said patio, all of which is of material financial benefit to the business being conducted in defendant's leasehold premises, and of substantial value to the leasehold.

"The Court finds that the continued existence of the building as it now exists, including the uninterrupted use of both the Kinross and Broxton entrances, is necessary to the full and beneficial use of the portion of the premises leased to the defendant Jack Hamner, and that the use of the windows and display purposes, and for light and air, is of substantial benefit to the said defendant.

"The Court further finds that if the Kinross entry to the patio was closed and the patio area reduced ..., the defendant ... would still suffer material and substantial loss in the business conducted in his leasehold premises, as such construction would obstruct all view of the display windows from Kinross Avenue, thus losing their value entirely, inasmuch as said windows are not clearly visible from Broxton Avenue; that such construction would destroy the shortcut feature of the patio and thereby discourage and prevent the public's use of the patio, and thereby destroy the display value of the windows; that the proposed change would destroy the beauty and the character of the building and create a narrow "hole" accessible only from Broxton entrance; that the general public would have no inducement to enter such narrow cul-de-sac, and that the light and air to his patio windows would be greatly diminished; all of which would be to the substantial detriment of the Defendant Hamner, and materially depreciate the value of his leasehold.

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"The Court further finds that when the lease to the said premises was entered into ... that it was the manifest intention and the agreement of the parties thereto that the defendant ... should have the occupancy of the interior areas described in his lease, and should also have the use of the patio as a source of light and air to his windows and doors opening thereon; for display of merchandise in the said windows; for room for customers and the general public to have convenient access to such windows; and for the free flow of pedestrian traffic through the patio by means of both the Broxton and Kinross entries. The Court finds that all of these things are reasonably necessary for the full and beneficial use of the interior store areas described in the lease to the defendant Jack Hamner. These facts were apparent to and were known by the plaintiffs when they acquired title to the property."

Thus the easements claimed by defendant to exist in the patio (floor area and upward to the sky) and the ways to both Kinross and Broxton were based in part at least on the doctrine of implied easements; no mention is made of such easements on the face of the lease. Plaintiffs contend, that in this state, there are no implied easements arising from a lease and running to the benefit of the lessee, relying upon section 820 of the Civil Code, reading: "A tenant for years or at will has no rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section."

Without mentioning that code section, it has been repeatedly held (and the rule is practically universal), as expressed by this court in *Bellon v. Silver Gate Theatres, Inc.*, 4 Cal. 2d 1, 10 [47 P.2d 462] : "A lease of a part of a building passes with it, as an incident thereto, everything necessarily used with or reasonably necessary to the enjoyment of the part demised. ... The general rule is that where a store is leased, everything then in use for the store, as an incident or appurtenance, passes by the lease. ...

"The above principles are well settled. Supported by many authorities, the principles are stated as follows in 36 Cor.Jur. 39, section 630: "A lease of a particular part of a building gives the lessee no rights outside of such part, except such as were intended to be included as appurtenant to the beneficial enjoyment thereof, or such as it was manifest had been designed and appropriated for the benefit of the leased premises."

"A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." (Civ. Code, § 662.) "The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself." (Civ. Code, §

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1084.) "The incident follows the principal, and not the principal the incident." (Civ. Code, § 3540.) "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." (Civ. Code, § 1104.)

In the instant case the ways were designed by the lessor owner who constructed the building and were so indicated on the plans at the time the lease was made. They were constructed in that manner with defendant's-lessee's display windows and entrances facing thereon. Those factors point to their being appurtenant to or part of store No. 2. They were obvious and permanent in nature. They existed at least to the point of being contemplated and designed and laid out when the lease was made.

"The purpose of the doctrine of implied easements is to give effect to the actual intent of the parties as shown by all the facts and circumstances. Although the prior use made of the property is one of the circumstances to be considered, easements of access have been implied in this state in situations in which there was no prior use. For example, where land was conveyed by reference to a map or plat showing proposed streets, it has been held that the grantee had an implied easement therein for use as a private way."

There are no implied easements for light and air, plaintiffs assert, and the court erred in finding that the patio must remain open to the sky, citing *Kennedy v. Burnap* [cite], holding that no such easement over the grantor's property will be implied when he conveys his property which adjoins that over which the easement is claimed. There is a conflict of authority on the subject [cite], but the weight of authority is in accord with the *Kennedy* case. However, there is not as much divergence in regard to easements flowing from a lease of only a part of the property. [cite] As we understand plaintiffs' complaint, however, they are not seeking to close the patio area where it extends through the second floor and roof of the building, so that problem is not presented. As we have seen, defendant has an easement which prevents plaintiffs' proposed alterations based upon factors other than light and air. Hence the portion of the judgment referring to light and air may be treated as surplusage.

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Determination of Intent

“Benignae faciendae sunt interpretationes propter simplicitatem laicorum ut res magis valeat quam pereat; et verba intentioni, non e contra, debent inservire.”

* A liberal construction should be put upon written instruments, so as to uphold them, if possible, and carry into effect the intention of the parties. *

Co. Litt. 36a; Broom’s Max., 540.

Brown’s Boundary Control and Legal Principals, 6th ed., Brown, Robillard & Wilson, 2009.

Templeton v. Dreiss, No. 04-95-00772-CV (Tex.App. Dist.4 01/21/1998)

The suit arose out of a dispute between the Templetons and the Dreisses concerning the ownership of a twenty foot wide road strip located in Kendall County. Also incidental to the lawsuit, but later abandoned at trial, was the boundary between a tract of land owned by the Dreisses and one owned by the Templetons. The genesis of this road is found in a deed dated July 24, 1918 by which G.F. Bierschwale conveyed to Edward Dreiss, Sr. a twenty foot wide strip of land in Kendall County lying parallel to a partition fence between the Clarence Voigt and G.F. Bierschwale properties, to be used as a road for entrance from the San Antonio - Fredericksburg Highway to an 82.8 acre tract. Prior to this conveyance, Edward Dreiss, Sr. had purchased the 82.8 acre tract of land from Edward and Kathryn Wentworth by deed dated December 16, 1912. This purchase gave access to the Lower Government Road and frontage on the Guadalupe River. However, at that time there was no access to the San Antonio - Fredericksburg Highway. In the 1920's Edward Dreiss, Sr. built a road that connected with the San Antonio - Fredericksburg Highway to the north and which went down the twenty foot strip to the river bottom fronting the Guadalupe River at the other end.

The Road can be located with reasonable certainty by reference to the 1938 certified aerial photo which was admitted into evidence as Plaintiff's Exhibit No. 33 and which fairly and accurately depicts the location of the Road. The Road has been visible, apparent and in continuous use since prior to 1933. Defendants had actual notice of William Franklin Dreiss and Ruth Dreiss's ownership of the 14.9 acre tract and the road prior to Defendants' purchase of approximately 65.26 acres in Kendall County, Texas by Deed dated January 18, 1994, filed January 18, 1994, recorded in Volume

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411, Page 780, Deed Records, Kendall County, Texas, from William S. Busbee and wife, Karen K. Busbee to Dennis L. Templeton and wife, Karen C. Templeton (the "1994 Deed").

It is claimed that the road is not described by metes and bounds in the 1933 deed or in the plat and that the deed and plat do not provide a definite beginning point, a definite ending point, the width of the road, a course, a distance, ownership or an indication as to what undivided interest less than the whole is sought to be conveyed. At the trial, the Templetons insisted that the 1933 deed was ambiguous while Dreiss urged nonambiguity. The trial court found that the deed was not ambiguous and the Templetons do not challenge this finding, but to the contrary agree with it. Thus, it would seem that even though the Templetons have urged insufficiency of evidence as a challenge, that the true complaint can only be as to the correctness of the deed's construction, a purely legal issue.

The court's primary duty when construing an unambiguous deed is to ascertain the intent of the parties from the "four corners" of the deed. Under the "four corners rule" the intention of the parties, especially that of the grantor, will be gathered from the instrument as a whole and not from isolated parts thereof. That intention, when ascertained, prevails over arbitrary rules. **Every presumption should be indulged to reach the conclusion that some interest should be passed by a deed. In fact, a deed will be construed to confer upon the grantee the greatest estate that the terms of the instrument will permit.** An unambiguous deed will be enforced as written, even though it does not express the original intention of the parties. This is so because the intention expressed controls over the expression that was intended.

The general rule governing unambiguous instruments disallows the introduction of parol testimony unless it is clearly alleged and proved that the execution of the instrument was procured by fraud, accident or mistake. But even if the instrument is not uncertain, if the meaning of language used therein becomes uncertain when an attempt is made to apply it to the subject matter of the instrument, parol evidence is permissible to aid in making the application. This does not mean, however, that the parties may prove the making of an agreement different from that expressed in the instrument, nor that the unambiguous language used in the instrument may be violated or the legal effect thereof changed. It merely permits proof of the then existing circumstances, in order to enable the court to apply the language used therein to the facts as they then existed. And although extrinsic evidence may not be resorted to for supplying the location or description of property, nevertheless, it may be resorted to in identifying the land with reasonable certainty from the information in the writing.

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It is further recognized that **the description in a deed is not required to be mathematically certain**, but only reasonably certain so as to enable a party familiar with the locality to identify the premises to be conveyed to the exclusion of others. [cites] **[W]ords of description are generally given liberal construction in order that conveyance may be upheld.**

... Therefore, where a map, plat, plan or survey of the premises conveyed is adequately referred to deed, it is usually to be considered as a part of the latter instrument and construed in connection therewith and the courses, distances, or other particulars which appear on such map, plat, plan or survey, are as a general rule to be considered as the true, or part of the true, description of the land conveyed.

Avoiding Voidness - Reasonableness

“Ut res magis valeat quam pereat.”

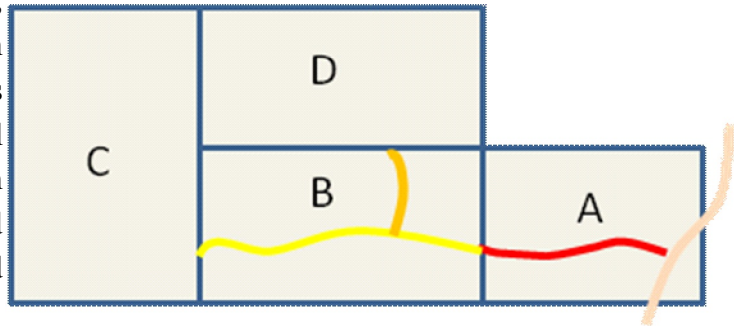
* An interpretation which gives effect is preferred to one which makes void. *

* Interpretation must be reasonable. *

Co. Litt. 36a; Broom’s Max., 540.

Newmyer v. Parklands Ranch, LLC, 40 Cal.Rptr.3d 801 (Cal.App. Dist.2 03/23/2006)

Oakley owns A and B. Oakley sells B together with “An easement [red] for ingress, egress, roadway, water lines, utilities and incidental purposes, including the right to grade and improve the same, over a strip of land 60 feet wide, extending in a westerly direction from the new Dume Road across other lands of seller, to the easterly line of the parcel of land being conveyed in fee, such easement to be appurtenant to each and every part of the lands being so conveyed



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in fee and all sub-divisions and resub-divisions thereof, and with the further right to the grantee to grant easements for like purposes to others to be appurtenant to other lands, and the right to dedicate the same.”

Eight days later, B conveys to C an easement across A [red] as acquired in the deed from A to B “thence continuing in a generally westerly direction across its above described lands and adjoining easements acquired by it with the right to grant like easements to others, and providing for extensions of said system, westerly and northerly, in a manner which will serve the said lands of C and the NE4NW4 of said Section 13 and which system is further capable of being extended to serve other lands.” [yellow] The same day, B conveys to D a series of easements, including an easement over A and a connecting easement over B (the easement in issue)[orange] together with the easement acquired by B across A [red], stating that “each and every of said easements are hereby made appurtenant to D.

34 years later, Plaintiff acquires A. 3 years later Defendant (B) acquires D. A files a complaint to quiet title in abandonment of easement. B files late notice of intent to preserve easement. A does not bring an action over easement to C. An easement can be created to burden or benefit any estate in land, including future estates. [cite] "The intent of the parties determines which estates or servitude interests are burdened or benefited by a servitude. If their intent is not expressed, it may be inferred from the circumstances. In the absence of circumstances indicating some other intent, the normal inference is that the parties intend to burden or benefit the estates or other interests they own in the property." [cite] Easements as property rights, when appurtenant to land, are transferable and descendible. [cite] Easement in gross are also alienable.

As a general rule, an appurtenant easement may not be used for the benefit of property other than the dominant tenement specified in the grant of the easement, unless the terms of the easement provide otherwise. [cite]

The issue plaintiff raises is whether a property not identified in the document creating the easement can thereafter become an additional dominant tenement.

In any grant of property rights, the court will attempt to determine and facilitate the intent of the grantor, so long as it does not conflict with law. [cite] "Where the grant of an easement is ambiguous and the intent of the grantor cannot be ascertained, the law presumes that the easement is appurtenant." [cite]

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Here, the intent of the grantor can be ascertained from the language of the deeds conveying the easement rights. Deed [form A to B] states that any subsequent easement grant by [B] to others was "to be appurtenant to other lands." Deed [from B to D] provides that the easement rights conveyed, including the easement over plaintiff's property, "are hereby made appurtenant to" the property now owned by defendant.

Against the Grantor

"verba chartatum fortius accipiuntur contra proferentum."

*** The words of an instrument shall be taken most strongly
against the party employing them. ***

Co. Litt. 36a; Broom's Max., 594.

Dukes v. Crumpton, et al., 233 Miss. 611 (Miss.06/02/1958)

In the first paragraph of the deed of conveyance, as originally prepared, there is granted a half interest in the land (describing the said land), and following the said description were the words: "Containing in all 1986 acres, more or less." This concluded the description, and then there appeared below, the following: "less all previous reservations." The Grantor, Denton R. Dukes, testified and admittedly added to the prepared deed immediately following the four quoted words last above mentioned, the following: "Grantor or his successor reserve all rights of sale and management." It is the contention of the said Grantor and his brothers, composing a partnership known as Dukes Brothers, that the eleven word sentence quoted above was added to the deed by the grantor before its execution and acknowledgment before the circuit clerk, and therefore before its delivery.

The said Denton R. Dukes testified that the deed written by Miss Doris Crumpton under the supervision of her brother Billy John Crumpton, was delivered to the said Dukes by the father, W. B. Crumpton, and that he, the grantor, added the last above quoted words to the deed. He and his two brothers testified that these words were typed on the deed prior to its execution, after the three Dukes brothers had discussed the matter and had decided that these words should be added in the deed

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prepared by Billy John Crumpton for execution by Denton R. Dukes, since the two brothers were likewise interested in the other half interest in the lands.

On the other hand, W. B. Crumpton, Billy John Crumpton and Lawrence Crumpton all testified that the last above quoted words were not in the deed at the time of its execution and delivery, but that during the latter part of the year 1951 when they borrowed \$6,000 from the appellant Denton R. Dukes, for their use in dealing in other lands, they deposited their unrecorded deed for the half interest in the land in question with the said Denton R. Dukes as security for the repayment of the loan; that it was not until they repaid this loan a long time later and regained possession of the deed that it was discovered that the words "grantor or his successor reserve all rights of sale and management" were in the deed.

We do not feel justified in disturbing the finding made by the chancellor upon the specific issue of fraud alleged in the bill of complaint, since he reached his conclusion in that behalf upon conflicting testimony and this issue of fact could have well been decided either way. ... But be that as it may, we do not think that the added provision was a part of the granting clause, as contended by the appellant. We think that the granting clause consisted of what preceded the description of the land and the said description. ... **[T]he right of alienation is an indispensable incident to an estate in fee**, such as was, in our opinion, conveyed by the granting clause of the deed here in question. We think that the provision added by the grantor, to-wit "grantor or his successor reserve all rights of sale and management" is an illegal and void restraint upon alienation and repugnant to the granting clause of the deed. But even if the clause should be held to be valid, **it is to be construed strictly against the grantor**, since he admittedly typed the words in question into the deed which had been prepared and submitted to him for execution. The reservation unto the grantor of all rights of sale and management as to the one-half interest in the land conveyed to the grantees, when construed most strongly against the grantor, does not preclude the grantees from having the land partitioned in kind, as was ordered by the chancellor.

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Latent Ambiguities

“Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.”

*** Latent ambiguity may be supplied by evidence; for an ambiguity which arises by proof of an extrinsic fact, may, in the same manner, be removed. ***

Bac. Max., reg. 23; Broom’s Max., 608.

Emerald Pointe, L.L.C. v. Jonak, 202 S.W.3d 652 (Mo.App. S.D. 08/07/2006)

The parol evidence rule is a rule of law, and not merely a rule of evidence. [cite]. The parol evidence rule bars the use of extrinsic evidence unless the instrument to be interpreted is ambiguous. [cite]. Whether a document is ambiguous is a question of law. Id. Two types of ambiguities in an instrument may exist: (1) a patent ambiguity and (2) a latent ambiguity. [cite]. There is no patent ambiguity if the face of the deed does not raise any ambiguities.

A latent ambiguity, on the other hand, arises where a writing is clear and unambiguous on its face, but the meaning is made uncertain due to collateral matters. Id. Where an uncertainty in the description of the land conveyed does not appear upon the face of the deed but evidence discloses that the description applies equally to two or more parcels, a latent ambiguity is said to exist and extrinsic evidence or parol evidence is admissible to show which tract or parcel of land was intended. [cite]. However, courts must not use parol evidence to create an ambiguity that otherwise does not exist. [cite].

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Conclusion

It is arguable what degree of influence the English, Roman, Greek, Egyptian, Summarian, and Babylonian knowledge, cultures and customs have had upon the American legal system. It can also be argued what level of influence each culture's religious beliefs have had upon American law. What cannot be argued is that American common law is based upon centuries of culture, knowledge and wisdom acquired from all corners of the globe, for America is a melting pot of people from all nations. The fundamental laws of jurisprudence are, as the Greek scholars recognized, the *laws of nations*; natural laws which no culture looking to survive the long term can reject. Laws which produce fundamental distinctions based upon what is good, what is right, what is fair, and what is just.

The very principle foundations of the law found in the *Maxims of Jurisprudence* are based upon these principles. Their result provides a steady foundation upon which our entire legislative, executive and judicial systems rest. Recognition of the "*reasons for the rules*" is imperative to our modern society. The base ethics which guide us are discovered in these "*reasons.*" We must always remember that, when the ethical "*reason*" for these rules ceases to be recognized, the "*reason for the rules*" themselves will cease.



"Jurisprudence is the principal and most perfect branch of ethics." Aristotle (384 BC - 322 BC)

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