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THE RESTATEMENT (SECOND) OF CONTRACTS AND THE UCC: A REAL PROPERTY LAW PERSPECTIVE

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INTRODUCTION

In the last two decades some rather revolutionary changes have taken place in the area of real property law. New doctrines have been announced and have proceeded to sweep the country. The alacrity with which the new doctrines have been embraced occasions surprise. Rapid change has not been a conspicuous characteristic of real property law. But more importantly, courts have brought an approach to these deviations from *stare decisis* that portends even greater change. It seems appropriate to examine these decisions and other areas of real property law that seem ripe for change, and to analyze the process of change.

WARRANTIES IN SALES OF NEW HOMES—BASIS FOR RULE THAT STATUTES ARE A PREMISE FOR JUDICIAL REASONING

In the sale by a merchant-builder of a new home there is, under the new decisions, an implied warranty of habitability and sound construction. The old, firmly-entrenched doctrine of *caveat emptor* has disappeared in this area. Credit has been given the Colorado Supreme Court for introducing this innovation.[1] Courts everywhere have hastened to indicate their ac-

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1. Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964).

2. Cochran v. Keeton, 252 So. 2d 313 (Ala. 1971); Columbia Western Corp. v. Vela, 122 Ariz. 28, 592 P.2d 1294 (Ct. App. 1979); Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922 (1970); Pollard v. Saxe & Yolles Dev. Co., 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); Carpenter v. Donohoe, 154 Colo. 78, 388 P.2d 399 (1964); Gilsan v. Smolenske, 153 Colo. 274, 387 P.2d 260 (1963); Vernali v. Centrella, 28 Conn. Supp. 476, 266 A.2d 200 (1970); Berman v. Watergate West, Inc., 391 A.2d 1351 (D.C. App. 1978); Gable v. Silver, 258 So. 2d 11 (Fla. Dist. Ct. App.), *cert. dismissed*, 264 So. 2d 418 (Fla. 1972); Bethlahmy v. Bechtel, 91 Idaho 55, 415 P.2d 698 (1966); Petersen v. Hubschman Constr. Co., 76 Ill. 2d 31, 389 N.E.2d 1154 (1979); Weck v. A:M Sunrise Constr. Co., 36 Ill. App. 2d 383, 184 N.E.2d 728 (1962); Barnes v. Mac Brown & Co., 264 Ind. 227, 342 N.E.2d 619 (1976); Theis v. Heuer, 264 Ind. 1, 280 N.E.2d 300 (1972); Markman v. Hoefer, 252 Iowa 118, 106 N.W.2d 59 (1960); McFeeters v. Renollet, 210 Kan. 158, 500 P.2d 47 (1972); Crawley v. Terhune, 437 S.W.2d 743 (Ky. 1969); Roberts v. Boulmay, 186 So. 2d 188 (La. App. 1966)

ceptance of the new view.[2] The legal literature is favorable to the new decisions.[3]

It is significant that most of the courts, in arriving at the new rule, found persuasive the analogy afforded by the implied warranty sections of the UCC.[4] It is evident from these decisions that a clear majority of the courts were willing to draw upon public policy considerations reflected in a statute that has no explicit application to real property. The inferences are obvious and of overwhelming importance. Thus, we have at last a widespread acceptance of the view first propounded by Chief Justice Stone when he argued that we should treat a statute like a judi-

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(based on redhibitory action, LA. CIV. CODE. ANN. arts. 2520-2548 (West 1952)); Krol v. York Terrace Bldg., Inc., 35 Md. App. 321, 370 A.2d 589 (1977) (discussing MD. REAL PROP. ANN. CODE. art. 21, § 10-203 (1981)); Weeks v. Slavick Builders, Inc., 24 Mich. App. 621, 180 N.W.2d 503, *aff'd*, 384 Mich. 257, 181 N.W.2d 271 (1970); Robertson Lumber Co. v. Stephen Farmers Coop. Elevator Co., 274 Minn. 17, 143 N.W.2d 622 (1966); Brown v. Elton Chalk, Inc., 358 So. 2d 721 (Miss. 1978); Smith v. Old Warson Dev. Co., 479 S.W.2d 795 (Mo. 1972); Henggeler v. Jindra, 191 Neb. 317, 214 N.W.2d 925 (1974); Norton v. Burleaud, 115 N.H. 435, 342 A.2d 629 (1975); Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965); McDonald v. Mianecki, 159 N.J. Super. 1, 386 A.2d 1325 (App. Div. 1978), *aff'd*, 79 N.J. 275, 398 A.2d 1283 (1979); Lutz v. Bayberry Huntington, Inc., 148 N.Y.S.2d 762 (Sup. Ct. 1956); Hinson v. Jefferson, 287 N.C. 422, 215 S.E.2d 102 (1975); Hartley v. Ballou, 286 N.C. 51, 209 S.E.2d 776 (1974); Air Heaters, Inc. v. Johnson Elec., Inc., 258 N.W.2d 649 (N.D. 1977); Dobler v. Malloy, 214 N.W.2d 510 (N.D. 1973); Tibbs v. National Homes Constr. Corp., 52 Ohio App. 2d 281, 369 N.E.2d 1218 (1977); Jeanguneat v. Jackie Hames Constr. Co., 576 P.2d 761 (Okla. 1978); Jones v. Gatewood, 381 P.2d 158 (Okla. 1963); Yepsen v. Burgess, 269 Or. 635, 525 P.2d 1019 (1974); Elderkin v. Gaster, 447 Pa. 118, 288 A.2d 771 (1972); Padula v. J.J. Deb-Cin Homes, Inc., 111 R.I. 29, 298 A.2d 529 (1973); Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970); Waggoner v. Midwestern Dev., Inc., 83 S.D. 57, 154 N.W.2d 803 (1967); Humber v. Morton, 426 S.W.2d 554 (Tex. 1968). The following decisions have held so indirectly: Tibbitts v. Openshaw, 18 Utah 2d 442, 425 P.2d 160 (1967); Rothberg v. Olenik, 128 Vt. 295, 262 A.2d 461 (1970); House v. Thornton, 76 Wash. 2d 428, 457 P.2d 199 (1969); Hoye v. Century Builders, 52 Wash. 2d 830, 329 P.2d 474 (1958); Tavares v. Horstman, 542 P.2d 1275 (Wyo. 1975).

3. *See* Haskell, *The Case for an Implied Warranty of Quality in Sales of Real Property*, 53 GEO. L.J. 633 (1965); Jaeger, *The Warranty of Habitability*, 47 CHI.-KENT L. REV. 1 (1970); Nielsen, *Caveat Emptor in Sales of Real Property—Time for a Reappraisal*, 10 ARIZ. L. REV. 484 (1968); Valore, *Products Liability For a Defective House*, 18 CLEV.-MAR. L. REV. 319 (1969); Recent Decisions, *Contracts—Caveat Emptor—Implied Warranty of Habitability*, 12 DUQ. L. REV. 109 (1973); Note, *An Implied Warranty of Fitness and Suitability for Human Habitation as Applied to the Sales of New Homes in Texas*, 6 HOUS. L. REV. 176 (1968); Note, *Builder-Vendor Liability for Construction Defects in Houses*, 55 MARQ. L. REV. 369 (1972); Notes and Comments, *Torts—Implied Warranty in Real Estate—Privity Requirement*, 44 N.C.L. REV. 236 (1965); Note, *Implied Warranties in the Sale of Real Estate*, 26 U. MIAMI L. REV. 838 (1972); Recent Decisions, *Vendor & Purchaser—Abrogation of Caveat Emptor in New Homes Sales by Builder-Vendor*, 7 U. RICH. L. REV. 399 (1972).

4. *See, e.g.*, Wawak v. Stewart, 247 Ark. 1093, 449 S.W.2d 922, 923 (1970); Petersen v. Hubschman Constr. Co., 76 Ill. 2d 31, 389 N.E.2d 1154 (1979).

cial precedent: as both a declaration and a source of law, and as a premise for legal reasoning.[5]

This view has been accepted in the Restatement (Second) of Property.[6] Acceptance of the UCC as a premise for judicial reasoning may be found in the case law as early as 1951.[7] Other more recent decisions exist.[8] But the principle is by no means confined to the UCC; scattered throughout the bound volumes of the Restatement (Second) of Property are numerous citations to statutes dealing with landlord and tenant law. These form the basis for a number of the black letter rules found in the Restatement. We may then attempt to formulate the principle in our own black-letter rule form, as follows:

> Where it is evident that a body of statutory law is expressive of a public policy formulated in light of a current economic and social background, the policy expressed in those statutes offers a reliable guide in the decision of real property law matters. The statute need not relate to real property.

WARRANTIES IN RESIDENTIAL LANDLORD AND TENANT LAW— DEMISE OF *CAVEAT EMPTOR* IN CONSUMER TRANSACTIONS

The decisional law moved quickly and naturally from sales of homes by merchant-builders to the area of residential landlord and tenant law. Here, too, the courts found an implied war-

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5. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13 (1936). Justice Stone observed that in civil law countries,

> [statutory] precepts are statements of general principles, to be used as guides to decision. Under that system a new statute may be viewed as an exemplification of a general principle which is to take its place beside other precepts, whether found in codes or accepted expositions of the jurists, as an integral part of the system, there to be extended to analogous situations not within its precise terms.

Id. *See generally* R. SCHLESINGER, COMPARATIVE LAW 232-34 (3d ed. 1970).

6. In the Introduction to the Restatement (Second), Herbert Wechsler, Director of the American Law Institute, noted:

> [I]n assessing the continuing vitality of precedents, rules and doctrines of the past, [courts] may give weight to the policies reflected in more recent, widespread legislation, though the statutes by their terms do not apply—treating the total body of statutory law in the manner endorsed long ago by Mr. Justice Stone "as both a declaration and a source of law, and as a premise for legal reasoning."

RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT at vii (1977) (citation omitted).

7. *See* Fairbanks, Morse & Co. v. Consolidated Fisheries Co., 190 F.2d 817, 822 n.9 (3d Cir. 1951).

8. *See, e.g.*, Zamore v. Whitten, 395 A.2d 435, 442 (Me. 1978) (UCC may be applied by analogy to situations not covered by the Code); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897, 904 (1979) (in assessing newly enacted laws, courts may seek guidance from policies underlying related legislation).

ranty of habitability.[9] The case law has prompted a substantial body of periodical literature.[10]

Any number of inferences can be drawn from this vast body of law. However, to narrow the area of concentration, one can confidently extract a useful principle for deciding real property issues today. Combining the thoughts expressed in the builder-sales cases with the landlord and tenant cases, and treating both as consumer transactions, we have another principle:

> In real property transactions involving consumers, the old rules of *caveat emptor* have ceased to exist.

UNCONSCIONABILITY AND THE UCC—THE UCC AS A PREMISE FOR JUDICIAL REASONING

The view that courts must concern themselves with questions of unconscionability is, of course, no novelty. The law of real property mortgages, notably that portion dealing with the equitable right of redemption, is one long treatise on the subject of unconscionability going back to 1600. But to find the concept

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9. Knight v. Hallsthamer, 160 Cal. Rptr. 847, 852 (1979), *rev'd on other grounds*, 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981); Thomas v. Roper, 162 Conn. 343, 350, 294 A.2d 321, 325 (1972); Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 366, 280 N.E.2d 208, 217 (1972); Mease v. Fox, 200 N.W.2d 791, 796 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 333, 521 P.2d 304, 309 (1974); Crowell v. McCaffrey, 377 Mass. 443, 386 N.E.2d 1256, 1261 (1979); King v. Moorehead, 495 S.W.2d 65, 69 (Mo. App. 1973); Kline v. Burns, 111 N.H. 87, 93, 276 A.2d 248, 251-52 (1971); Berzito v. Gambino, 63 N.J. 460, 470, 308 A.2d 17, 21 (1979); Marini v. Ireland, 56 N.J. 130, 144, 265 A.2d 526, 533 (1970); Glyco v. Schultz, 35 Ohio Misc. 25, 30, 289 N.E.2d 919, 925 (Ohio Cir. Ct. 1972); Pugh v. Holmes, 486 Pa. 272, 284, 405 A.2d 897, 900-03 (1979). *Pugh v. Holmes* cites Alaska, Arizona, California, Connecticut, Delaware, the District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin as having adopted the rule of implied warranty in the rental of residential property, in some instances by statute and in other instances by court decision. 405 A.2d at 901 n.2.

10. *See* Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability?*, 75 WIS. L. REV. 19 (1975); Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974); Recent Cases, *Landlord and Tenant—Tenantable Condition of Premises—Relation of Landlord's Statutory Obligations to Common Law Warranty of Habitability*, 25 CASE. W. RES. L. REV. 371 (1975); Note, *Judicial Expansion of Tenant's Private Law Rights: Implied Warranties of Habitability in Residential Urban Leases*, 56 CORNELL L. REV. 489 (1970); Note, *Landlord and Tenant: Contractual Basis for an Implied Warranty of Habitability and Safety in Leased Premises*, 77 DICK L. REV. 185 (1972); Comment, *Tenant Protection in Iowa*—Mease v. Fox *and the Implied Warranty of Habitability*, 58 IOWA L. REV. 656 (1972); Comment, *Landlord and Tenant Law—Implied Warranty of Habitability—External Defect of Suburban Townhouse Entitles Tenant to a Rent Abatement*, 7 RUT.-CAM. L. REV. 617 (1975).

of unconscionability embodied in a universally accepted statute (the UCC) gives the view credibility heretofore lacking.[11] The Restatement (Second) of Contracts adopts the UCC unconscionability concept.[12] Numerous decisions in the area of property law have likewise accepted and applied the concept.[13]

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11. The unconscionability provision of the UCC is found in § 2-302; it is provided therein:

> (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
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> (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

U.C.C. § 2-302 (1980).

By far the most exhaustive study of the history of the drafting of the unconscionability section of the UCC is Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967). The late Professor Leff was bitterly opposed to inclusion of the section and argued it would create insoluble problems. His thesis, unfortunately, was totally demolished in a superb analysis by Professor Murray. Murray, *Unconscionability: Unconscionability*, 31 U. PITT. L. REV. 1, 34-39 (1969) [hereinafter cited as *Unconscionability*]. Mankind, in its eternal quest for certitude, longs for detailed rules that will guide us to a correct solution regardless of the complexity of the problem. The quest has always been futile, fruitless, and infantile. Uncertainty is the very essence of human life. This is why Professor Murray is on solid ground when he tells us that the doctrine of unconscionability must not be rejected because of the uncertainty it creates. He quotes Cardozo:

> As the years have gone by, and as I have reflected more and more upon the nature of the judicial process, I have become reconciled to the uncertainty, because I have grown to see it as inevitable. I have grown to see that the process in its highest reaches is not discovery, but creation; and that the doubts and misgivings, the hopes and fears, are part of the mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born.

Id. at 11 n.35 (quoting B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 166-67 (paperbound ed., 1961)).

Murray argues for emphasis on the "circle of assent" as the key to the unconscionability problem. This is a concept he attributes to Karl Llewellyn, who argued that in contract situations what the parties really assent to is "the few dickered terms." *Unconscionability*, *supra*, at 12. In applying this concept, judges can be counted upon to avoid overkill by judicial self-restraint. *Id.* at 24.

12. RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981); *see also* note 14 and accompanying text.

13. The doctrine of unconscionability has been applied to leases of real estate. United States v. Bedford Assoc., 491 F. Supp. 851 (S.D.N.Y. 1980); Paradee Oil Co. v. Phillips Petroleum Co., 320 A.2d 769 (Del. Ch. 1974), *aff'd*, 343 A.2d 610 (Del. 1975); Weaver v. American Oil Co., 257 Ind. 458, 276 N.E.2d 144 (1971), *noted in* 6 IND. L. REV. 108 (1972); Casey v. Lupkes, 286 N.W.2d 204 (Iowa 1979); Mury v. Tublitz, 151 N.J. Super. 39, 376 A.2d 547 (N.J. Super. Ct. App. Div. 1977); Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (N.J. Super. Ct. Law Div. 1972); Atlantic Discount Corp. v. Mangel's of

The unconscionability clause of the Restatement (Second) of Contracts is found in section 208.[14] The Reporter's Note states that the section is new and follows section 2-302 of the Uniform Commercial Code. The comments are somewhat guarded, and the decisional law seems to have moved beyond them. Nevertheless, the comments recognize unconscionability in various aspects of contract law: *i.e.*, that the entire contract may be unconscionable; that a term thereof may be unconscionable, thus denying effect to the unconscionable term; that unconscionability may be found in the negotiating process; that unconscionability may affect performance and remedies; and that in certain circumstances it may be unconscionable to invoke an otherwise conscionable clause.[15] Moreover, the contract may be one relating to land.[16]

It seems appropriate to formulate a statement of a principle of real property law dealing specifically with the UCC. This statement draws upon the analogy suggested in *Fairbanks,*

N.C., Inc., 163 S.E.2d 295 (N.C. 1968); Atlantic Richfield Co. v. Razumic, 480 Pa. 366, 390 A.2d 736 (1978); Weidman v. Tomaselli, 81 Misc. 2d 227, 365 N.Y.S.2d 681 (Sup. Ct. 1975). *See also* RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 1.6, comment g, § 5.6, comment e (1977), Berger, *Hard Leases Make Bad Law*, 74 COLUM L. REV. 791, 806 (1974); Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443, 498 (1972).

The concept of unconscionability has also been applied to mortgages. United States v. White, 429 F. Supp. 1245 (D.C. Miss. 1977); Delgado v. Strong, 360 So. 2d 73 (Fla. 1978); Federal Home Loan Mortgage Corp. v. Taylor, 318 So. 2d 203 (Fla. 1975); Clark v. Lachenmeier, 237 So. 2d 583 (Fla. App. 1970); Campbell v. Werner, 232 So. 2d 252 (Fla. App. 1970); Continental Ill. Nat'l Bank & Trust Co. v. Eastern Ill. Water Co., 31 Ill. App. 3d 148, 334 N.E.2d 96 (1975); Streets v. MGIC Mortgage Corp., 177 Ind. App. 184, 378 N.E.2d 915 (1978) (citing 55 AM. JUR. 2D, *Mortgages* § 375 (1971)); First Fed. Sav. & Loan Assoc. v. Wick, 322 N.W.2d 860 (S.D. 1982); Miller v. Pacific First Fed. Sav. & Loan Assoc., 86 Wash. 2d 401, 545 P.2d 546 (1976). *See also* Comment, *Applying the Brakes to Acceleration Clauses: Controlling Their Misuse in Real Property Secured Transactions*, 9 CAL. W.L. REV. 514 (1973); Comment, *Acceleration Clauses as a Protection For Mortgages in a Tight Money Market*, 20 S.D.L. REV. 329 (1975).

Interest rates that were not usurious have been held to be unconscionable. *In re* Chicago Reed & Furniture Co., 7 F.2d 885 (7th Cir. 1925); *In re* Elkins-Dell Mfg. Co., 253 F. Supp. 864 (E.D. Pa. 1966); Feller v. Architects Display Bldg., 54 N.J. Super. 205, 148 A.2d 634 (N.J. Super. Ct. App. Div. 1959). The law of unconscionability has also been applied to options. Rego v. Decker, 482 P.2d 834 (Alaska 1971).

14. Section 208 provides:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

15. *See also id.* at § 205, comments c, d, and e.

16. *See* E. FARNSWORTH, CONTRACTS § 1.10, at 33-34 (1982).

Morse & Co. v. Consolidated Fisheries Co.:[17]

> The Uniform Commercial Code, insofar as it expresses principles of general application, must be treated like the Restatements, since it bears the stamp of approval of the great body of American scholarship.

The logic of this limited statement is self-evident. Approval of this general proposition is present in the periodicals,[18] and it is accepted in the decisional law.[19]

We can further make a more specific application of the concept of unconscionability:

> The law of unconscionability as expressed in the UCC and the Restatement (Second) of Contracts is applicable to contracts dealing with interests in land, whether in the form of leases, options, mortgages, contracts for the sale of land, or other contractual instruments.[20]

However, the unconscionability section of the UCC deals basically with only one aspect of real property documents, an aspect that enables courts to deny enforcement of or to *delete* unconscionable provisions from such documents.[21]

There is an equally important doctrine enabling courts to *insert* into such documents provisions needed to make them worthy of enforcement. In real property law it is a venerable doctrine, existing long prior to the UCC. Under this doctrine courts have frequently "read into" real property documents provisions deemed necessary in the interests of justice. This brings us to the "term implied in law."

THE PROCESS OF IMPLICATION—TERMS IMPLIED IN LAW

The process of implication has been explained by one of the great modern luminaries of the law. Speaking of the process of implication in contract law, Lord Denning said:

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17. 190 F.2d 817, 822 n.9 (5th Cir. 1951).

18. *See, e.g.*, Comment, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880, 881 (1965), wherein it is observed: "In a significant and ever increasing number of situations . . . statutory solutions deserve recognition by the courts—not because legislative drafters have spoken directly to the issue in controversy, but because they have spoken dispassionately and logically in an area troubled by analogous problems and involving analogous considerations."

19. *See, e.g.*, Adams v. Waddell, 543 P.2d 215 (Alaska 1975) (UCC standards used to determine lessee's rights regarding option to purchase leased property); Seabrook v. Commuter Housing Co., 72 Misc. 2d 6, 12, 338 N.Y.S.2d 67, 71 (N.Y. Civ. Ct. 1972) (landlord held to UCC merchant standard with respect to lease of an apartment).

20. *See* cases cited in RESTATEMENT (SECOND) OF CONTRACTS § 208, Reporter's Notes, comment c (1981).

21. *Id.* at § 208, comment g.

> This was a great advance in legal theory. Even though there was no express term, nevertheless the law itself—which means the Court itself—implied a term. It wrote into the contract a term which the parties had not written: and upon which they had never agreed. It did this so as to do what reason and justice required. This legal theory can be traced back at least to *Gardiner v. Gray* (1815) 4 Camp. 133, when Gray showed Gardiner samples of some waste silk and offered to sell him some. The bargain was made. A sale note written: "12 bags of waste silk 10s 6d a lb." On delivery the 12 bags were found to be inferior to the samples and of poor quality. Gardiner sued for damages. He sought to show an express warranty that the bags should be equal to the samples: he failed because it was not on the written sale note. In earlier times that would have been the end of the case. But Gardiner also alleged an implied warranty that the silk should be of good and merchantable quality. On this, he succeeded. Lord Ellenborough said:
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> > "Without any particular warranty, this is an implied term in every such contract. . . . The purchaser cannot be supposed to buy goods to lay them on a dunghill."
>
> The important point in that case was that the warranty was imposed or imputed by law. It was imposed because it was just and reasonable. Not because the parties had agreed to it, either expressly or impliedly.[22]

What Lord Denning called a term implied in law is what Corbin chose to call a constructive condition.[23] Terminology is not important, however. What is important is that the process of implication has long been used as a means of achieving a just and equitable result.

The doctrine of constructive conditions is recognized by today's authorities.[24] In so supplying a term that the parties failed to include in the contract, the courts sometimes indicate that this is done to require the parties to exercise "good faith and fair dealing."[25] In short, fairness requires interpolation of the term.[26] This is the Restatement's position.[27] One may assume that the word "supply" was used in the Restatement, instead of the familiar "imply," in order to emphasize the notion that the added language was strictly the contribution of the judge.

Like the doctrine of unconscionability, the doctrine of constructive conditions was invented in the interests of fairness and justice. But there is a difference. The doctrine of unconscionability, as defined in the Restatement, is basically a negative force employed to strike or limit unconscionable contracts or

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22. LORD DENNING, THE DISCIPLINE OF THE LAW 34 (1979).
23. *See* E. FARNSWORTH, *supra* note 16, at § 8.9, at 579 (1982).
24. *Id.* at §§ 7.16, 8.9.
25. *Id.* at § 7.17.
26. *Id.* at § 7.16, at 524.
27. RESTATEMENT (SECOND) OF CONTRACTS § 204, comment d (1981).

contract terms.[28] But the two doctrines, used together, create a push-pull effect. One is used to eliminate unfair provisions; the other is used to insert provisions needed to make the contract worthy of enforcement.

For the sake of completeness it seems appropriate to refer briefly to some of Corbin's well-known views on the implication of contract terms. He believes that the process is extremely common.[29] It is a conscious process aimed at achieving a just result.[30] Moreover, the process is wholly independent of expressed intention and occurs where the parties had no ideas on the subject.[31]

While Lord Denning talks of terms implied in law and Corbin talks of constructive conditions, the Restatement (Second) of Contracts strikes out in a new direction. It appears to discard the old terminology. Section 204 speaks of "supplying" an omitted essential term.[32] Comment d of that section states that "the court should supply a term that comports with community standards of fairness and policy. . . ."[33] No name is furnished for this process. In section 226, Comment c, it is stated that this process of "supplying" a term has often been "described as a 'constructive' (or 'implied in law') condition." But it is further added that "in most such situations," the process will fall under the obligation of "good faith and fair dealing" described in section 205.

Section 205, however, deals only with good faith and fair dealing in *performance* and *enforcement* of the contract.[34] The duty is not imposed during other stages of the contract. Bridging this gap in the Restatement approach is the doctrine of constructive conditions. To illustrate, the implied requirement of marketable title in a contract for the sale of land would not arise under the Restatement obligation of good faith and fair dealing because it is a condition implied in the *formation* of the contract. In the interests of justice, it is a constructive condition that the courts read into the terms of the contract.

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28. *Id.* at § 208, comment g.

29. 3 A. CORBIN, CORBIN ON CONTRACTS § 565 (1960).

30. *Id.* at § 561.

31. *Id.* at § 623. For a recent decision citing Corbin, see Onderdonk v. Presbyterian Homes of New Jersey, 85 N.J. 171, 425 A.2d 1057 (1981) (holding that contract between retirement community and its residents contained an implied covenant that the former supply the latter with meaningful financial statements).

32. RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981).

33. *Id.*

34. Section 205 provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

Somewhat similar problems exist with respect to the doctrines of frustration of purpose and impracticability of performance. Under these two doctrines, the court must determine whether the occurrence or nonoccurrence of an event frustrates or makes impracticable the continued enforcement of the contract. In the Introductory Note to Chapter 11 of the Restatement, it is stated that these doctrines are occasionally subsumed under the phrase " 'implied term' of the contract." The Restatement, however, rejects this analysis in favor of that of section 2-615 of the UCC. Under that section, the central inquiry is whether the occurrence of some circumstance was a "basic assumption on which the contract was made."[35]

To many, all this will seem merely a change in terminology. The judge trying a case in the real world is doing his best to arrive at a just result. Since each case is unique in its factual setting, the names the pundits attach to the doctrines they invent are of little importance. Most of the doctrines that have been created in the effort to enable courts to do justice on the unique facts of a case seem to puzzle the commentators dealing with *commercial law* problems. A glance at the illustrations given in the Restatement (Second) of Contracts reveals few *real property* decisions. One is entitled to inquire whether the traditional home of real property litigation, the court of equity, has found a simple, satisfactory way of dealing with the problem; namely, by simply asking where the equities lie.[36]

The sections of the Restatement referred to, and section 208, the unconscionability section, are obviously part of the process

35. RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to Chapter 11 (1981). The Reporter's Notes to the Introductory Note tell the reader that the chapter basically deals with frustration of purpose and commercial impracticability, concepts reasonably familiar to any real property lawyer. However, the Restatement changes and modernizes these concepts. *See* E. FARNSWORTH, *supra* note 16, at §§ 9.6-9.9. It is evident from Professor Farnsworth's analysis that the new contract law concerning frustration of purpose and commercial impracticability applies to real property transactions. Some improvement over existing law is apparent. Thus Farnsworth observes: "The new synthesis candidly recognizes that the judicial function is to determine whether, in the light of exceptional circumstances, justice requires a departure from the general rule that a promisor bears the risk of increased difficulty of performance." *Id.* at § 9.6, at 678. This is something any judge can understand. For a particularly illuminating but critical article on this topic, see Murray, *Basis of the Bargain: Transcending Classical Concepts*, 66 MINN. L. REV. 283 (1982).

36. *See* Eisenberg, *The Bargain Principle and Its Limits*, 95 Harv. L. Rev. 741, 750-51 (1982); it is there noted: "Equity courts have long reviewed contracts for fairness when equitable relief has been sought. Within recent years the principle has emerged . . . that law courts may to limit or deny enforcement of a bargain promise when the bargain is 'unconscionable'."

of doing what is perceived to be the fair and just thing.[37] That process is also practiced in the code-law countries of the European continent.[38] It is the principle function of the court to administer justice between the parties before the court.[39]

In a recent article, Professor Hillman deals with some of the problems raised by the doctrine of unconscionability.[40] Near the end of the article, he deals with the role of unconscionability as developed in the courts of equity.[41] He comments on Professor Leff's conclusion that the importation of equitable uncon-

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37. Those who fear the consequences of judicial tinkering with contracts are ignoring half the development of contract law, the equity half. For four hundred years chancellors have been doing justice and in the process have not hesitated to alter contracts and contract remedies. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1043 (1976), *cited by* Hillman, *Debunking Some Myths About Unconscionability: A New Framework for UCC Section 2-302*, 67 CORNELL L. REV. 1, 29 (1981). Is it possible to conceive of changes more drastic than the changes the chancellors wrought in the common law mortgage when they invented the equitable right of redemption? *See* R. KRATOVIL & R. WERNER, MODERN MORTGAGE LAW AND PRACTICE § 1.3, at 30 (2d ed. 1981); *Unconscionability*, *supra* note 11, at 28. Consider also equitable estoppel, reformation, marshalling of assets, equitable subordination; the whole range of equitable jurisprudence. Consider the equitable inroads upon the mortgage acceleration clause that are commonplace today. KRATOVIL & WERNER, *supra*, at §§ 14.01-14.73(b), at 201-12. If a contract must be tinkered with in the interests of justice and fair play, that is exactly what the chancellors have been doing all along. The UCC writers, in general, are accustomed to the conservatism of the law courts dealing with sales of goods or actions for contract damages. This, then, is a big part of the problem. The real property lawyers, accustomed as they are to operating in chancery, will feel quite at home with the power of the court to deal with unconscionability. They may not even understand the sufferings of the chattel transaction lawyers.

And, of course, the often absurd contortions of the common law judges in an effort to do justice, covertly, without disturbing doctrine, have been the subject of comment for many years. *See, e.g.*, Siegelman v. Cunard White Star, 221 F.2d 189, 204-05 (2d Cir. 1955) (Frank, J., dissenting) (courts often nullify contract provisions by strained construction or other backdoor methods); DOBBS, REMEDIES 708 (1973); Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939) ("Covert tools are never reliable tools."). Manipulation of either doctrine or facts should be avoided. Hillman, *supra*, at 16-17. The problem is one of a judicial grappling with all the facts and surrounding circumstances in a particular transaction, in order to dispense justice that avoids unconscionable results. *Unconscionability*, *supra* note 11, at 37-38. Article 2 of the UCC is simply a manifestation of American legal realism. *Id.* It is simply an addition to modern contract doctrines like frustration of purpose and commercial impracticability that reach for justice by seeking to allocate risk according to the intentions of the parties. At all events, the courts will not tolerate unconscionability today and will reform the contract, where necessary, to achieve a conscionable result. *Unconscionability*, *supra* note 11, at 27.

38. R. SCHLESINGER, COMPARATIVE LAW 232-34 (3d ed. 1970).

39. *Unconscionability*, *supra* note 11, at 5.

40. Hillman, *supra* note 37.

41. *Id.* at 35.

scionability into general contract law is not "sensible."[42] Hillman disagrees. Well, that issue is now settled. The UCC applies whether the litigation is at law or in equity simply because it is the law of the land. And its contract philosophy applies to land litigation, as the implied warranty cases involving builder-sellers or landlords show. The Restatement (Second) of Contracts embodies this philosophy; it has become part of our equity law and land law.

Hillman also comments on Leff's views that equity is, in practical effect, a stale concept, and that the UCC is not "primarily" designed for land transactions.[43] Again, Hillman disagrees with Leff, and Hillman is right. You cannot have contract law for chattel transactions that differs from the contract law applied to land transactions. As for the staleness Leff perceived in the law, is it conceivable that any real property lawyer could view as stale the problems that arise today in mortgage law alone? The acceleration problems? The due-on-sale problems? The specific performance of takeout-loan commitments? The problem of clogging the equity by participation by the lender in the profits of a sale or by an option to buy the land? The equitable lien on the proceeds of a construction loan? The diversion of proceeds in subordination cases? The subrogation problem created by the wrap-around mortgage?[44] It is precisely in today's complex multi-million dollar real-estate transactions that guidance is needed.

Hillman points out that UCC section 2-302 "provides a host of clues that suggest the section was patterned after equitable unconscionability."[45] This is a very valuable suggestion. Hillman's contribution is both insightful and courageous. He suggests that when required, the court may directly confront the problem of the basic fairness of enforcing the terms of the agreement under pure unconscionability.[46] In support, he quotes Professor Dawson, who said: "It seems to be forgotten that approximately half of our private law—the part that prevailed when any conflict arose—was ascribed by the chancellors who created it to standards no more precise than 'equity and good conscience.' "[47] And Professor Farnsworth speaks of equity as

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42. *Id.* at 37.

43. *Id.* at 38.

44. *See generally* R. KRATOVIL & R. WERNER, MODERN MORTGAGE LAW AND PRACTICE § 31.01 (2d ed. 1981).

45. Hillman, *supra* note 37, at 40 n.210.

46. *Id.* at 40.

47. Dawson, *Unconscionable Coercion: The German Version*, 89 HARV. L. REV. 1041, 1043 (1976).

the "precursor of unconscionability."[48] Many rules of contract law were derived from principles pronounced by the equity courts.[49] As is evident, more attention must be devoted to the problem of the equity judge confronted by a complex land transaction involving multiple parties and many millions of dollars.

CREATIVE JUDICIAL RECASTING OF REAL PROPERTY DOCUMENTS PRIOR TO THE UCC—MARKETABLE TITLE

Creative judicial recasting of real property documents took place long prior to the adoption of the UCC. Assume, for example, a bare-bones memorandum of sale of land devoid of any mention of the quality of title.[50] The buyer is entitled to a marketable title free from encumbrances although the contract is silent.[51] It is idle to pretend that this requirement can be found, by implication or otherwise, within the four corners of the instrument. The requirement is read into the contract ("supplied") by the court simply because the contract is unfair without it. No one is dismayed by this. We have all become accustomed to it. And yet it certainly constitutes a very formidable recasting of the document.

This problem recurs so frequently in analysis that it is deserving of further attention. While at times it seems like a matter of semantics, it has occasioned much difficulty. There are words in the English language that seem to exist only in the negative. One of these is the word "unconscionable." The word "conscionable" is rarely encountered in American legal usage. It does not appear in Black's Law Dictionary, Words and Phrases, or Corpus Juris. While a judge can strike from a document a clause he deems unconscionable, such as a waiver of the equitable right of redemption encountered in a mortgage, the same judge will not introduce into a contract a provision he deems *conscionable*, a clause needed to make the contract worthy of enforcement. Resort is compelled to different terminology, and a simple situation is rendered complex and difficult.

Let us suppose a simple contract for the sale of land that is devoid of any mention of the quality of the title to be proffered to the buyer. The court simply reads into the contract a requirement of "marketable title free from encumbrances." But the

48. E. FARNSWORTH, *supra* note 16, at § 4.27.

49. Hillman, *supra* note 37, at 40.

50. *See, e.g.*, Firebaugh v. Wittenberg, 309 Ill. 536, 141 N.E. 379 (1923) (vendee entitled to marketable title although contract for sale was silent as to quality of title).

51. 1 G. WARVELLE, A TREATISE ON THE AMERICAN LAW OF VENDOR & PURCHASER OF REAL PROPERTY 303 (1890).

word "unconscionable" is thought to be inappropriate to characterize this process. We need to resort to phrases like "term implied in law," or "constructive condition," or "good faith," or "term supplied by the court." This is unfortunate.

In any case, the document ought not to be enforced as written. Judicial intervention is needed to make the document just. But agreement is lacking as to some comprehensive phrase to characterize the judicial process by which a contract is revised to make it worthy of enforcement. We are driven by nomenclature to conclude that two different judicial processes are at work. This is not the case at all.

Another baneful influence which hampers understanding of the realities involved is the tendency to repeatedly apply an accepted doctrine without a critical appraisal of its implications. Thus, we can state the rule that the right of a purchaser to a good title in a land sale contract does not grow out of the contract of the parties, but is "given by law and is implied in every contract of sale."[52] But do we really understand the true import of this rule? Courts habitually take a simple contract for the sale of land that is wholly devoid of any mention of title, and interpolate a provision needed in the interest of justice. The courts then proceed to erect upon this base an enormous inverted pyramid of decisional law; the law of marketable title is vast indeed.[53] But in the process, courts often forget that the original purpose involved in recasting the contract was to achieve justice. The decisions are mechanical. Few say anything about justice or fair dealing. It is high time that these notions be introduced into this body of law. One needs to be reminded that justice is always the ultimate goal.

MORTGAGES—THE ACCELERATION CLAUSE

The law of unconscionability, of course, has its beginning in the mortgage doctrine creating the equitable right of redemption, and the correlative doctrine forbidding waiver of that right. The law of unconscionability in the field of mortgage law is also

52. C. MAUPIN, MARKETABLE TITLE § 5 (2d ed. 1907). *See also* Annot., 57 A.L.R. 1253, 1269 (1928). This is not the simple process of supplying the word "marketable" where the quality of title is not expressed. It is the process of introducing an entire complex body of law into the contract by implication in order to make the contract fair and just. And it is applicable whether the litigation occurs at law or in chancery. Evidently, law courts are quite competent to remake contracts in the interest of justice even where the complexities are great.

53. *See* Annot., 57 A.L.R. 1253-1554 (1928).

conspicuously present where questions of acceleration of the mortgage debt are concerned.[54]

This highly controversial problem has arisen in connection with due-on-sale clauses permitting acceleration of the mortgage debt where the mortgaged land is sold without the written consent of the mortgagee. The issues have been discussed by the author.[55]

In all the decisions it is conceded that the due-on-sale clause is not invalid. Indeed, this concession holds for all the acceleration clause decisions. The point, however, is that in given circumstances courts will refuse to countenance acceleration if an unconscionable result would follow. Thus, we can extract another principle:

> Despite the validity of a provision in a real property document, if it is invoked in circumstances that will lead to an unconscionable result, courts will refuse to permit such a provision to be enforced.

As is evident, this principle will compel re-examination of all older real property law decisions.

The above principle has been recognized for decades with respect to other real property documents. Thus, in an installment contract for the sale of land, most courts recognize the validity of the forfeiture clause. But if the vendor habitually accepts late payments, the provision that time is of the essence is waived and the forfeiture will be held invalid if it is not pre-

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54. *See* Delgado v. Strong, 360 So. 2d 73 (Fla. 1978); Clark v. Lachenmeier, 237 So. 2d 583 (Fla. App. 1970); Continental Ill. Nat'l Bank & Trust Co. v. Eastern Ill. Water Co., 31 Ill. App. 3d 148, 334 N.E.2d 96, 102 (1975); Streets v. MGIC Mortgage Corp., 177 Ind. App. 184, 378 N.E.2d 915, 919 (1978); Miller v. Pacific First Fed. Sav. & Loan Ass'n, 86 Wash. 2d 401, 545 P.2d 546, 547 (1976); Kratovil, *Mortgage Law Today*, 13 J. MAR. L. REV. 251 (1980). Much of this harks back to Justice Cardozo's famous dissent in Graf v. Hope Bldg. Corp., 254 N.Y. 1, 171 N.E. 884, 886-89 (1930) (Cardozo, J., dissenting), where he remarked: "However fixed the general rule [of acceleration] and the policy of preserving it, there may be extraordinary conditions in which the enforcement of such a clause according to the letter of the covenant will be disloyalty to the basic principles for which equity exists." *Id.* at 11, 171 N.E. at 887.

55. *See* Kratovil, *A New Dilemma for Thrift Institutions: Judicial Emasculation of the Due-on-Sale Clause*, 12 J. MAR. J. PRAC. & PROC. 299 (1979). Much of the discussion therein related to Wellenkamp v. Bank of Am., 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978). The California Supreme Court there found it would "unjust" to permit acceleration solely for the purpose of compelling payment of a higher interest rate. *Id.* at 953, 582 P.2d at 976, 148 Cal. Rptr. at 385.

In Judge Cardozo's *Graf* dissent, he used the word "unconscionable" several times. 254 N.Y. at 12, 171 N.E. at 887-88. In *Wellenkamp*, the court relied heavily on an article discussing the due on sale clause, Note, *Judicial Treatment of the Due-on-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability*, 27 STAN. L. REV. 1109 (1975). The unconscionability test is there treated in detail. *Id.* at 1126-27. The article also discusses decisions where acceleration was held invalid because it resulted from unconscionable conduct of the lender. *Id.* at 1118.

ceded by a timely warning reinstating that provision.[56] This is simply another way of stating that, in these circumstances, forfeiture is unconscionable.

OPTIONS

Rego v. Decker[57] involved a lease containing an option to purchase which provided for payment of the option price over a period of years. The tenant exercised the option. However, the court found that if the option were taken literally it would have taken more than fifty years to pay in full. On review, the Alaska Supreme Court held that in a suit for specific performance, the trial court should order reasonable terms of payment with adequate security, or direct the tenant to make a full cash payment for the property.

As is evident, the Alaska Supreme Court went beyond the approach taken by the Restatement (Second) of Contracts, since it recast the terms of the contract to make them fair to both parties. This should occasion no surprise. The UCC opened the door for the Restatement. Both have opened the door to a new approach in the decisional law, an activist approach that frankly recognizes the need to recast contracts where to enforce them literally would create a harsh result. Courts have always done this, though to a lesser degree and in more subtle form, using phrases like implied promise, implied condition, constructive condition, waiver, and the like. There is no longer any need to hide the fact that courts are there to administer justice, not to parrot ancient dogma.

BROKERS

The traditional rule of brokers is that a commission is earned when the broker finds a buyer ready, able, and willing to buy on the seller's terms.[58] Whether or not the deal closes thereafter has no impact on the broker's rights. However, a strong dissenting voice has recently been heard. *Ellsworth Dobbs, Inc. v. Johnson*[59] held that because the broker is much

56. Annot., 31 A.L.R.2d 8, 13-14 (1953).

57. 482 P.2d 834 (Alaska 1971). The approach taken by the Alaska Supreme Court in *Rego* is quite similar to that later taken by the New Jersey Supreme Court in Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (N.J. Super Ct. Law Div. 1972).

58. *See* Bonanza Real Estate Inc. v. Crouch, 10 Wash. App. 380, 517 P.2d 1371 (1974).

59. 50 N.J. 528, 236 A.2d 843 (1967). *See generally* Note, *Real Property—Brokers—Buyer's Default on Contract For Sale of Land Precludes Broker's Right to Commission*, 9 ARIZ. L. REV. 519 (1968); Note, *Brokerage Contracts—Prospective Purchaser's Breach of Contract of Sale—Broker Not En-*

better informed as to the buyer's financial ability to consummate a deal, the seller should not be liable for a commission[60] if the deal falls through because the buyer cannot command the necessary financial resources. This sensible case conforms the law to the common understanding of lay people. It can be regarded as introducing into the listing contract a term implied in law that the seller's liability does not accrue until the buyer obtains his financing. The case has been followed in many jurisdictions and must be regarded as stating today's law on this subject. Not surprisingly, *Ellsworth Dobbs* cites with approval a decision by Lord Denning.[61]

B & R Oil Co v. Ray's Mobile Homes, Inc.

It might prove helpful to apply these rules to current real property problems. In a recent decision involving the validity of an assignment of a lease, the Vermont Supreme Court followed the "majority rule" and held that the landlord's consent could be withheld unreasonably.[62] Under modern law, a lease is simply a species of contract which happens to concern real estate. Principles of contract law are applicable.[63] The UCC, including the unconscionability section, has been enacted in Vermont.[64] Since this statute, under the principles herein set forth, is a binding precedent, it was applicable to the contract problem under consideration in *B & R Oil Co*. Under the law of unconscionability, a conscionable provision of a contract will be inoperative if exercised in an unconscionable fashion. This simple reasoning demonstrates that the case is clearly wrong. Probably this aspect never appeared in the briefs, since real property lawyers are still trying to ignore the UCC. That is why we need

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titled to Commission From Seller, 17 CATH. U.L. REV. 487 (1968); Recent Cases, *Real Estate Broker—Failure of Purchaser to Close Title as Defeating Right to Compensation*, 72 DICK. L. REV. 522 (1968); Note, *Real Property—Broker's Commissions—Default by Buyer*, 19 MERCER L. REV. 460 (1968); Recent Cases, *Real Estate—Broker's Commission—Time of Accrual*, 30 OHIO ST. L.J. 600 (1969); Note, Ellsworth Dobbs, Inc. v. Johnson: *A Reexamination of the Broker-Buyer-Seller Relationship in New Jersey*, 23 RUTGERS L. REV. 83 (1968); Note, *Real Estate—Brokers—Vendor's Liability for Broker's Commission Accrues on Date Purchaser Closes Title—Defaulting Purchaser is Liable to Broker for Commission*, 13 VILL. L. REV. 681 (1968); Recent Cases, *Agency—Right of Real Estate Broker to Commission From Seller*, 10 WM. & MARY L. REV. 240 (1968).

60. 50 N.J. 528, 549, 236 A.2d 843, 853.

61. *Id.* (citing with approval Dennis Reed, Ltd. v. Goody, [1950] 2 K.B. 277, 284-85, [1950] 1 All E.R. 919, 923).

62. B & R Oil Co. v. Ray's Mobile Homes, Inc., 139 Vt. 122, 422 A.2d 1267 (1980).

63. Shell Oil Co. v. Marinello, 120 N.J. Super. 357, 294 A.2d 253 (N.J. Super Ct. Law Div. 1972).

64. VT. STAT. ANN. tit. 9A, § 2-302 (1966).

some black-letter law to guide the courts. The Restatement (Second) of Property agrees with this conclusion.[65]

IMPACT ON REAL PROPERTY LEGAL RESEARCH

The effect of the views here expressed on real property legal research is bound to be considerable. Even assuming that the Restatement (Second) of Property is comprehensive and thoroughly researched, as will be the case, it must ultimately take a definitive form. The legislatures will thereafter continue to legislate, as is obvious. Some of the legislation so enacted may fall into precisely the same pattern that the Restatement considered worthy of adoption as black letter law. Here, of course, is the rub—legal researchers delving into the law of Illinois, let us say, will have no choice but to research the statutory law of the other forty-nine states seeking a pattern that gives rise to black letter law. No doubt, commercial services will arise to fill the need. But a new element of uncertainty will be injected into the research process. This, on the whole, should be welcomed in the profession. Legal research, after all, is the province of scholars. Moreover, good legal research is a highly creative process. The catalogue of constructive conditions, for example, is never complete. If you are going to ask a reviewing court to add a new constructive condition to the list, you must have a good grasp of the process by means of which such conditions are created. This is a task for scholars.

CONCLUSIONS

It may occur to some readers that much of what has been said here has been said previously. This, to be sure, cannot be denied. But it will be found that each such statement occurs in isolation. It is only when these statements are strung together, so to speak, that a new philosophy of real property law is revealed.

What is important is that we recognize a need to take stock, to draw a line, and to acknowledge that real property problems must now be analyzed in view of the great strides that may have recently taken place. The old, black letter law is no longer an ironclad guide to the achievement of justice in a given legal con-

65. RESTATEMENT (SECOND) OF PROPERTY, LANDLORD AND TENANT § 15.2(2) (1977) provides:

> A restraint on alienation without the consent of the landlord of the tenant's interest in the leased property is valid, but the landlord's consent to an alienation by the tenant cannot be withheld unreasonably, unless a freely negotiated provision in the lease gives the landlord an absolute right to withhold consent.

troversy. The old landmarks and precedents must be continually subjected to scrutiny. *Stare decisis*, if not dead, has been dealt some mortal blows.