

SURVEY OF KANSAS LAW: REAL PROPERTY

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The Kansas courts have extensively considered several areas of the law of real property in recent years. Some of these areas were not covered in the previous *Survey*, so the descriptions and comments stretch back further on some topics than others. Principal among these is the area of land use regulation, which has received a good deal of judicial attention in the past few years, but little commentary.

I. LAND USE REGULATION

The United States Supreme Court determined early on that land use regulations, specifically zoning, could only be imposed on a particular piece of property when there was a sufficient nexus between the restriction and the protection of the health, safety, or welfare of the community.¹ This substantive due process requirement has long been reiterated in Kansas and is built directly into enabling statutes for both municipal and county zoning under the standard of "reasonableness."² Recently, the Kansas Supreme Court has reviewed several cases under the reasonableness standard. In *Highway Oil, Inc. v. City of Lenexa*³ it stated that reviewing courts in zoning actions are limited to determining the lawfulness of the procedures employed by the local governing body and the reasonableness of its actions. The appellate courts have repeated the standard in later cases.⁴

The rub, of course, is the degree to which the courts will superimpose their own views of "reasonableness" onto those of the local governing body. Courts have historically recognized that a presumption of reasonableness attaches to a zoning ordinance as the action of a coequal branch of the government.⁵ Still, courts nationally have varied greatly to the extent they will delve into the evidence and make their own judgments about substance. Kansas appellate courts have traditionally been on the side of injecting their own views into cases while offering lip service to deference.⁶ One decision during the recent era cuts against that tendency. In *Rickard v. Fundenburger*⁷ the court of appeals restated that in actions attacking the reasonableness of municipal determinations, the attacking party must overcome the local governing body judgment by "clearly compelling

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¹ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). Two years previously the Court had decided that the general concept of zoning laws fell within permissible governmental activity under the due process clause of the fourteenth amendment. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

² *Highway Oil, Inc. v. City of Lenexa*, 219 Kan. 129, 547 P.2d 330 (1976); *Ware v. City of Wichita*, 113 Kan. 153, 214 P. 99 (1923); *Mouber v. City of Prairie Village*, 6 Kan. App. 2d 972, 637 P.2d 424 (1981). The statutory standards are found at KAN. STAT. ANN. § 12-712 (1982) (municipal) and KAN. STAT. ANN. § 19-2926 (1981).

³ 219 Kan. at 129, 547 P.2d at 330 (1976).

⁴ *Mouber*, 6 Kan. App. 2d 972, 637 P.2d 424; *Rickard v. Fundenburger*, 1 Kan. App. 2d 222, 563 P.2d 1069 (1977).

⁵ *Village of Euclid*, 272 U.S. 365; *Spurgeon v. Board of Comm'rs*, 181 Kan. 1008, 1014, 317 P.2d 798, 803 (1957).

⁶ See *infra* note 13 and accompanying text.

⁷ 1 Kan. App. 2d at 222, 563 P.2d at 1069 (1977).

evidence."⁸ All of these standards came together in what must be considered the highlight zoning case of the period, a court of appeals affirmation that it was reasonable for the City of Prairie Village to consider McDonald's a "restaurant" rather than a "drive-in."⁹ Of such stuff is great jurisprudence made.

Golden v. City of Overland Park,¹⁰ decided in 1978, is the most important case in land use regulation law since *Ware v. City of Wichita*,¹¹ the 1923 case upholding the constitutionality of zoning Kansas. *Golden* is important both as a case establishing the standards under which reasonableness determinations are to be made, and even more so as the case that brought Kansas into a very small camp of states that considers zoning amendments to be quasi-judicial rather than legislative acts. As we shall see, the implications of the latter holding are substantial.

The plaintiff-owner in *Golden* purchased land zoned for office buildings in 1966. He attempted to package tenants and obtain financing for several years, such attempts culminating in a 1974 request for rezoning to allow a small shopping center. The professional staff recommended approval, but rezoning was denied on the basis of perceived problems with traffic, neighborhood aesthetics, and anticipated pressure for similar changes. After the issue endured a considerable amount of bouncing back and forth between the district court and the commission, the court eventually decided the local governing body had acted unreasonably. The court of appeals reversed, stating that the district court had exceeded its authority. The supreme court then reversed the court of appeals, setting out six factors to be considered when reviewing the reasonableness of a zoning action:

- (1) The character of the neighborhood;
- (2) the zoning and uses of properties nearby;
- (3) the suitability of the subject property for the uses to which it has been restricted;
- (4) the extent to which removal of the restrictions will detrimentally affect nearby property;
- (5) the length of time the subject property has remained vacant as zoned; and
- (6) the relative gain to the public health, safety and welfare by the destruction of the value of plaintiff's property as compared with the hardship imposed on the individual landowner.¹²

The court added that it would also be useful to consider the professional staff's recommendation and the community's comprehensive plan.¹³

The weighing of these factors on any individual record will draw the court almost inexorably toward a virtual *de novo* review. While under normal circum-

⁸ This standard of review seems to have arisen from earlier cases that defined the presumption of reasonableness in terms of avoiding "arbitrary and capricious" action. *Spurgeon*, 181 Kan. at 1008, 317 P.2d at 798; *Heckman v. City of Independence*, 127 Kan. 658, 274 P. 732 (1929).

⁹ *Mouber*, 6 Kan. App. 2d at 972, 637 P.2d at 424. Gourmets will be pleased to learn that there is contrary authority, *see, e.g.*, *Franchise Realty Interstate Corp. v. Rab*, 72 Misc. 2d 1061; 340 N.Y.S.2d 446 (1973), though the meat of authority has been on the side of the fast-food industry. *See, e.g.*, *Township of Abington v. Dunkin' Donuts Franchising Corp.*, 5 Pa. Commw. 399, 291 A.2d 322 (1972); *Burger King of St. Louis, Inc. v. Weisz*, 444 S.W.2d 517 (Mo. App. 1969); *Annot.*, 82 A.L.R.2d 989 (1962).

¹⁰ 224 Kan. 591, 584 P.2d 130 (1978).

¹¹ 113 Kan. at 153, 214 P. at 99.

¹² 224 Kan. at 598, 584 P.2d at 136. These factors were borrowed almost *in toto* from the Illinois Supreme Court, which first announced them in *La Salle Nat'l Bank v. County of Cook*, 12 Ill. 2d 40, 145 N.E.2d 65 (1957). *See also* *Smith v. City of Macomb*, 40 Ill. App. 3d 658, 352 N.E.2d 697 (1976); *La Salle Nat'l Bank v. City of Evanston*, 57 Ill. 2d 415, 312 N.E.2d 625 (1974). The use of these factors by Illinois courts has won for them the reputation of being highly susceptible to reviews that appear to be almost *de novo*. R. ELLICKSON & A. TARLOCK, *LAND USE CONTROLS* 765-77 (1981). *See also* *Babcock, The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509 (1959).

¹³ 224 Kan. at 598, 584 P.2d at 136.

stances that would seem to be an intrusion into legislative prerogatives, the court avoided such a pitfall by its even more important announcement in the case; when specific tracts of land are being considered for rezoning, “the function becomes more quasi-judicial than legislative.”¹⁴

The court cited three other state supreme court cases and a law review comment as authority for this bombshell. Of the three cases, the headwater and by far the best known is *Fasano v. Board of County Commissioners*.¹⁵ The *Fasano* decision was tied very closely to its requirement that all zoning amendments conform to the comprehensive plan.¹⁶ It stated that whenever an applicant wished to amend the plan and ordinance, he must come forward with proof of a public need for the kind of change in question, and that the need would best be served by reclassifying this property.¹⁷ The court characterized these actions as “judicial” based on its belief that the specific concentration of the commission and the accumulation of evidence made the ultimate determination more adjudicatory than legislative in nature.¹⁸ The *Fasano* court acknowledged that such a movement greatly reduced the flexibility of local governing bodies to amend their ordinances, commenting that “the dangers of making desirable change more difficult” were overcome by the more severe danger of “the almost irresistible pressures that can be asserted by private economic interests on local government” if such a mechanism for stability is not built into the ordinance.¹⁹

It is significant that a number of states have chosen not to follow the *Fasano* lead.²⁰ Indeed, a great majority still seem to rely exclusively on the “fairly debatable” test regardless of the nature of the local governmental act.²¹ One of the basic reasons for resisting the *Fasano* doctrine is the staggering implications it brings. The most obvious is the much greater detail of review it requires of the actions of local governing bodies. Beyond this, the Supreme Court of Kansas found only that for such a “quasi-judicial” act the “board, council or commission . . . should enter a written order, summarizing the evidence before it and stating the factors which it considered in arriving at its determination.”²² This seems a *sine qua non* for proper review. But there are many other possible distinctions between a legislative and quasi-judicial act. Do we now have “parties” at such “hearings,” or is any member of the public still permitted to speak? Do persons who speak need to be sworn? Must the opposition be given the opportunity to cross-examine parties or witnesses? Should commissions have subpoena powers? What should the standard for review be? Is it allowable to have *ex parte* contacts with members of the local governing body before an issue is decided? Are members of the local governing body permitted to speak on important land use issues

¹⁴ *Id.* at 597, 584 P.2d at 135.

¹⁵ 264 Or. 574, 507 P.2d 23 (1973). The other two cases cited in *Golden* were *Kropf v. City of Sterling Heights*, 391 Mich. 139, 215 N.W.2d 179 (1974) and *Fleming v. City of Tacoma*, 81 Wash. 2d 292, 502 P.2d 327 (1972). The law review piece was Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

¹⁶ 264 Or. at —, 507 P.2d at 28.

¹⁷ *Id.*

¹⁸ *Id.* at —, 507 P.2d at 26-27.

¹⁹ *Id.* at —, 507 P.2d at 30.

²⁰ *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980); *State ex rel. Rochester Ass'n of Neighborhoods v. City of Rochester*, 268 N.W.2d 885 (Minn. 1978); *Hall Paving Co. v. Hall County*, 237 Ga. 14, 226 S.E.2d 728 (1976).

²¹ R. ELLICKSON & A. TARLOCK, *supra* note 12, at 277-78 (1981).

²² 224 Kan. at 597, 584 P.2d at 135.

in the community before they render a decision? If not, has not something been lost in the democratic process?²³

None of these questions has been addressed since *Golden*. We have few hints from either court whether they will back away from *Golden* or continue to impose the kind of judicial standards suggested above.²⁴ If *Golden* is expanded, all that is clear is that the traditional city commission meeting with the developer, the neighbors, the neighborhood organization, and others sitting around raising their hand for recognition will soon give way to a process that is more traditionally adversary, lengthier, and quite likely more expensive.²⁵

One positive fallout from the *Golden* decision was its effect on the most important procedural issue to arise recently—whether an action attacking a zoning amendment must be brought as an appeal within thirty days or whether it can be classified as an independent action to which a five year statute of limitation applies. In *Bolser v. Zoning Board*,²⁶ the supreme court reversed the court of appeals and ruled that such an action was an “appeal,”²⁷ and thus had to be brought within thirty days of the amendment. The court cited the *Golden* case and the quasi-judicial nature of the act in question as one reason for its decision. The court of appeals had held that attacks were independent actions, thus opening every zoning change to question for an unconscionable amount of time.²⁸ The supreme court also cited this “practical need,” noting that if the five year period were permitted “chaos would result.”²⁹ That is certainly correct.

The courts helped resolve a number of other important issues in public regulation during this period. They held that estoppel does not operate against public officials if they acted on the basis of incorrect information supplied by the applicant.³⁰ In addition, comprehensive plans were made more important by the supreme court’s conclusion that a city’s failure to review and update its comprehensive plan annually as required by section 12-704 of the Kansas Statutes Annotated was an important factor in holding the municipalities actions based on that plan unreasonable.³¹ The courts reiterated the importance of following strictly the public hearing requirements in the enabling statute,³² resolved a dispute about city or county control of area within the city’s extraterritorial limitation,³³

²³ For an extended discussion of the many differences implied in characterizing a process as “legislative” or “adjudicative,” see K. DAVIS, ADMINISTRATIVE LAW, ch. 12 (2d. ed. 1979).

²⁴ Board of County Comm’rs v. Berner, 5 Kan. App. 2d 104, 613 P.2d 676 (1980) held that the absence of certain formalities, including a formal record, from the governing body’s action was not fatal because no substantial rights were affected. This appears to reflect an attitude at least a few degrees removed from carrying *Golden* to all its logical conclusions.

²⁵ For other thoughts on *Golden* and its possible ramifications, see Comment, *Rezoning in Kansas: Legislation, Adjudication, or Confusion*, 30 KAN. L. REV. 571 (1982); Thompson, *Dealing with Bids in Zoning Hearings—A Golden Opportunity*, 51 J. KAN. B. ASS’N 277 (1982).

²⁶ 228 Kan. 6, 612 P.2d 563, *rev’g*, 4 Kan. App. 2d 288, 605 P.2d 156 (1980).

²⁷ See KAN. STAT. ANN. § 60-2101(d) (1983).

²⁸ 4 Kan. App. 2d at 291, 605 P.2d at 159.

²⁹ 228 Kan. at 14, 612 P.2d at 569.

³⁰ City of DeSota v. Centurion Homes, Inc., 1 Kan. App. 2d 634, 573 P.2d 1081 (1977).

³¹ Security Nat’l Bank v. City of Olathe, 225 Kan. 220, 589 P.2d 589 (1979). Even so, the court seems again to have overlooked critical language in KAN. STAT. ANN. § 12-708: “Any [zoning] amendment shall, *if based upon the comprehensive land use plan*, be presumed to be reasonable.” (emphasis added). The obvious inference is that if there is *not* compliance with the comprehensive plan, the amendment loses its presumption of reasonableness and should be reviewed de novo.

³² Reeves v. Board of Johnson County Comm’rs, 226 Kan. 397, 602 P.2d 93 (1979); *Cf. Berner*, 5 Kan. App. 2d at 104, 613 P.2d at 676.

³³ City of Salina v. Jagers, 228 Kan. 155, 612 P.2d 618 (1980).

and, in a case that has drawn national attention,³⁴ determined that not all state uses are exempt from the operation of local zoning land use ordinances.³⁵ Finally, the court of appeals gave important guidance to developers and owners of property pegged for rezoning by articulating more clearly when a use becomes vested under the nonconforming use statute.³⁶ The test states that no vested right to continue a use obtains until the court finds it would be inequitable and unjust to forbid proceeding. More specifically, the court said that no vested right begins "until a building permit is issued and construction has begun."³⁷ In the same case the court decided that newly annexed land retains its original zoning character until rezoned by its new jurisdiction.

II. LANDLORD-TENANT

Landlord-tenant law was covered briefly in the last survey,³⁸ but that discussion did not encompass a number of the major cases decided by the Kansas appellate courts during the past decade.

The decade began with the passage of the Kansas version of the Uniform Residential Landlord Tenant Act (URLTA),³⁹ covering most residential tenancies within the state. This was passed on the heels of *Steel v. Latimer*,⁴⁰ a 1974 Kansas Supreme Court case deciding that thereafter a warranty of habitability would be implied as a matter of common law in residential leases of urban tenants.⁴¹ Almost all questions that have been decided by our appellate courts since have inherently contained either an interpretation of *Steele* or the URLTA or, more often, the question of how much of the pre-legislation common law remained after the passage of the URLTA.

Kansas courts have long treated commercial leases primarily as contracts, despite occasional nods to the common law theory of the lease as a transfer of an interest in real property.⁴² That proclivity has continued. In *Wichita Properties v. Lanterman*,⁴³ the failure of the lessee to obtain the necessary license to operate a liquor store under a lease limiting use to that purpose was held not to excuse the lessee from further performance. The court of appeals held that under both the "impossibility" and "commercial frustration" doctrines the events creating the difficulty must have been unforeseeable at the time the agreement was entered. This, they declared, was not the case here since both parties had access to the necessary facts and the law. This contract-based analysis is consistent with the

³⁴ See R. ELLICKSON & A. TARLOCK, *supra* note 12, at 898.

³⁵ *Brown v. Kansas Forestry, Fish and Game Comm'n*, 2 Kan. App. 2d 102, 576 P.2d 230 (1978).

³⁶ *Colonial Inv. Co. v. City of Leawood*, 7 Kan. App. 2d 660, 646 P.2d 1149 (1982).

³⁷ *Id.* at 666, 646 P.2d at 1154.

³⁸ *Survey of Kansas Law: Property*, 29 KAN. L. REV. 555 (1981).

³⁹ KAN. STAT. ANN. §§ 58-2540 to -2573 (1983).

⁴⁰ 214 Kan. 329, 521 P.2d 304 (1974).

⁴¹ *Steele* followed a series of cases in other jurisdictions finding a warranty of habitability in certain residential leases as a matter of common law, as an inference from municipal housing codes, or as both. For a summary of the developments prior to *Steele* and the legislative adoption of the URLTA, see Davis, *URLTA, Kansas, and the Common Law*, 21 KAN. L. REV. 387 (1973). A more recent study of these developments can be found in Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 Urb. L. Ann. 3 (1979).

⁴² *Service Oil Co. v. White*, 218 Kan. 87, 542 P.2d 652 (1975); *William v. Safeway Stores, Inc.*, 198 Kan. 331, 424 P.2d 541 (1967); *Phillips Petroleum Co. v. Skinner*, 140 Kan. 413, 36 P.2d 968 (1934).

⁴³ 6 Kan. App. 2d 656, 633 P.2d 1154 (1981).

majority opinion of other American courts.⁴⁴ In the same case the court impliedly renewed Kansas' long held, contract-based view that a lessor must attempt to mitigate damages in the face of abandonment by a lessee.⁴⁵ In this specific instance the court found that the landlord's "lackadaisical" attempt to get a new tenant during the first three months after notification of the original lessee's abandonment meant that the landlord could not later collect rent for that period.⁴⁶

In another commercial lease case the court of appeals made clear that while constructive eviction seems to be eliminated as a remedy in residential cases by the URLTA,⁴⁷ it remains the principal option for an unhappy lessee whose beneficial enjoyment has been substantially disturbed by a commercial lessor.⁴⁸ In its ruling, the court either overlooked the almost-universal requirement that a lessee must abandon the premises within a reasonable time or adopted without comment the minority view that a declaratory judgment regarding the legal presence of constructive eviction can be obtained before abandonment.⁴⁹

Two other commercial lease cases gave the court of appeals the opportunity to offer instruction on renewing leases. In the first, the court held that oral notice does not violate the Kansas Statute of Frauds, and that an oral election to exercise an option can be valid.⁵⁰ In a very recent case the court held that an assignee of a lease exercises its renewal option by offering and having accepted by the lessor monthly rent checks for periods beyond the term of the original lease, even though such offers were not accepted until after the period for exercising the option had expired.⁵¹ This renewal was for a five-year term as provided in the option; it was not a renewal as a year to year lease as contemplated by section 58-2502 of the Kansas Statutes Annotated. That section reads: "When premises are let for one or more years, and the tenant with the assent of the landlord continues to occupy the premises after the expiration of the term, such tenant shall be deemed to be a tenant from year to year."⁵² Given the absence of mutual assent in the case, it seems quite difficult to have reached the court's result from the statutory language.

The other commercial lease question discussed by the appellate courts leads directly to the most important residential lease question discussed during the decade: who will have liability in tort for occurrences on the premises that harm persons or damage property? Prior to adoption of the warranty of habitability and the URLTA, Kansas had always been in the solid majority of states holding

⁴⁴ See *Warhowsky v. American Automotive Products Co.*, 12 Ill. App. 2d 178, 138 N.E.2d 816 (1956); 1 AMERICAN LAW OF PROPERTY § 3.104 (Casner ed. 1952).

⁴⁵ 6 Kan. App. 2d at 659; 633 P.2d at 1158.

⁴⁶ *Id.* at 658-59, 633 P.2d at 1157-58.

⁴⁷ The Kansas (or general) version of the URLTA does not have this specific language. But KAN. STAT. ANN. § 58-2568 offers specific remedies when "the landlord unlawfully removes or excludes the tenant from the premises . . ." Because the remedies given exceed the mere abandonment remedy offered a constructively evicted tenant under the common law, it would seem natural for the residential tenant to use the section. If the courts interpret the language to cover only *actual* evictions, the common law remedy would apparently remain. *Davis, supra* note 41, at 411.

⁴⁸ *Baca v. Walgreen Co.*, 6 Kan. App. 2d 505, 630 P.2d 1185 (1981), *rev'd on other grounds*, 230 Kan. 443, 638 P.2d 898, *cert. denied*, 459 U.S. 859 (1982).

⁴⁹ 6 Kan. App. 2d at 527; 630 P.2d at 1201-02. See *Charles E. Burt, Inc., v. Seven Grand Corp.*, 340 Mass. 124, 163 N.E.2d 4 (1959).

⁵⁰ *Continental Builders, Inc. v. Leach*, 5 Kan. App. 2d 766, 625 P.2d 5 (1981).

⁵¹ *Prince Enter. v. Griffith Oil Co.*, 8 Kan. App. 2d 644, 664 P.2d 877 (1983).

⁵² KAN. STAT. ANN. § 58-2502 (1983).

that the key issue in these matters was “control,” and that the landlord had no responsibility for occurrences on the premises after the lease was begun except in certain, limited instances.⁵³ All of this was quite rationally premised on the lease as a conveyance of an estate in land, an axiom of which was that the landlord had no right even to enter the premises, much less bear responsibility for what occurred there. Not surprisingly, it was unreasonable to expect him to be responsible for most accidents or injuries.⁵⁴ The question the Kansas appellate courts faced over the last decade, whether they were aware of it or not, was whether the change in that underlying assumption wrought by *Steele* and the URLTA undermined the traditional tort rules in residential cases and, by analogy, in commercial cases.

The changes in legal assumptions inherent in *Steele* were less likely to affect the court's view of tort liability in commercial leases, particularly so given its contract-based orientation in these cases.⁵⁵ A 1979 case seems to say that these commercial relationships are unaffected by either statutory or judicial warranty concepts.⁵⁶ Such a conclusion was a precondition to the supreme court's later determination for the lessor in *Moore v. Muntzel*.⁵⁷ In *Moore* the plaintiff-lessee's inventory was destroyed by a fire caused by faulty wiring. Though the plaintiffs had repaired the wiring, they had never informed the defendant that they were having problems. The court eventually determined that the lessor could not be responsible in tort for the loss of inventory, reasoning that the entire premises had been leased to the lessee, and thus that the defendant had neither control nor ensuing responsibility. The court also found no warranty or other contractual responsibility arising from the terms of the lease. Thus, in one case, the court seems to have said that any warranty of habitability would *not* be extended to cover commercial leases, and as a result, the original common law tort rules still obtain. This again seems entirely consistent with the court's treatment of commercial leases as contracts.

The court's reluctance to find a change in responsibility in residential leases is far more perplexing. In *Steele* the Kansas Supreme Court specifically rejected the notion of the residential lease as a conveyance of an estate in land.⁵⁸ It seems difficult to square that rejection with continued acceptance of tort responsibility based on the “control” doctrine. If it has become the landlord's responsibility both to warrant the habitability of the premises and thereafter to keep those premises in conformance with applicable housing and safety codes,⁵⁹ it would follow that any failure to meet these responsibilities that results in injury or damage should create tort liability.⁶⁰ Apparently such is not the case.

⁵³ *Campbell v. Weathers*, 153 Kan. 316, 111 P.2d 72 (1941); *Bailey v. Kelly*, 93 Kan. 723, 145 P. 556 (1915). A thorough review of the Kansas court's treatment of the subject is found in *Borders v. Roseberry*, 216 Kan. 486, 532 P.2d 1366 (1975).

⁵⁴ *Borders*, 216 Kan. at 488, 532 P.2d at 1369.

⁵⁵ See *supra* note 42 and accompanying text.

⁵⁶ *Fredricks v. Foltz*, 225 Kan. 663, 594 P.2d 665 (1979).

⁵⁷ 231 Kan. 46, 642 P.2d 957 (1982).

⁵⁸ 214 Kan. at 333, 521 P.2d at 308.

⁵⁹ *Id.* at 335-36, 521 P.2d at 309-10.

⁶⁰ Many courts in other jurisdictions have found that abolishing the concept of the lease-as-conveyance has eroded permanently the basis of immunizing the landlord from tort liability. Among the most frequently cited are: *Old Town Dev. Co. v. Langford*, 349 N.E.2d 744 (Ind. App. 1976), *rev'd*, 267 Ind. 176, 369 N.E.2d 404 (1977); *Cromwell v. McCaffrey*, 377 Mass. 443, 386 N.E.2d 1256 (1979); *Henderson v. W.C. Haas Realty Management*, 561 S.W.2d 382 (Mo. Ct. App. 1977); *Sargent v. Ross*, 113 N.H. 388, 308

In *Borders v. Roseberry*⁶¹ the supreme court continued to apply the traditional common law, giving no recognition to the new landlord responsibilities, even though the case came to them a year after they had rejected the "control" doctrine and announced the common law warranty of habitability in *Steele*. Since then, the court has passed by at least three chances⁶² to offer even a flicker of recognition that the rules of the game have changed. The court must pull away from its current tack and carefully reexamine both *Steele* and the URLTA to determine whether the foundations upon which classic landlord-tenant tort law stood have been, as many jurisdictions have found, completely eroded.⁶³

The courts have had other opportunities to interpret the URLTA. In *Joe v. Spangler*⁶⁴ the court of appeals permitted a withholding of rent in the face of established housing code violations, one of which was characterized by the City Inspector as "dangerous." After such withholding, the landlord sued for possession. The court stated that section 58-2553(a) of the Kansas Statutes Annotated places a clear duty on the landlord to comply with all building and housing codes materially affecting health and safety.⁶⁵ It noted that an accompanying statute states that this duty cannot be waived in the rental document.⁶⁶ All that seems correct. The difficulty with the opinion is that the court never incorporates section 58-2561 of the Kansas Statutes Annotated into its discussion. That statute describes how rent is to be apportioned when an action for possession faces a defense based upon a breach of duty under the URLTA. We are left wondering why the court in *Joe* found that the rent was excused, or at least why *all* of the rent was excused.⁶⁷

In *New Hampshire Insurance Co. v. Hewins*⁶⁸ the court of appeals held a tenant-defendant liable in a subrogation action by a fire insurer for a fire negligently set by the tenant's wife, citing Section 58-2555(f) of the Kansas Statutes Annotated: "[t]he tenant shall . . . be responsible for any . . . damage . . . [on] the premises caused by an act or omission . . . by any person . . . on the premises at any time with the express or implied permission or consent of the tenant." Finally, the court of appeals recently held that the remedy for a landlord's failure to engage in the joint inventory of a premises as required by the URLTA⁶⁹ is the creation

A.2d 528 (1973); *Dwyer v. Skyline Apts., Inc.*, 123 N.J. Super. 48, 301 A.2d 463, *aff'd*, 63 N.J. 577, 311 A.2d 1 (1973). For discussions of the issue, see Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982); Davis & DeLaTorre, *A Fresh Look at Premises Liability As Affected by the Warranty of Habitability*, 59 WASH. L. REV. 141 (1984); Love, *Landlord's Liability for Defective Premises Caveat Lessee, Negligence or Strict Liability?*, 1975 WIS. L. REV. 19 (1975).

⁶¹ 216 Kan. at 486, 532 P.2d at 1366 (1975).

⁶² *Lemley v. Penner*, 230 Kan. 25, 630 P.2d 1086 (1981); *Fredricks*, 225 Kan. at 663, 594 P.2d at 665 (1979); *Hamilton v. Ling*, 1 Kan. App. 2d 22, 561 P.2d 880 (1977). *Fredricks* can be explained away as a commercial case, but its facts are a particularly unhappy set on which to rest traditional common law doctrine.

⁶³ See *supra* note 60 and accompanying text.

⁶⁴ 6 Kan. App. 2d 630, 631 P.2d 1243 (1981).

⁶⁵ *Id.* at 632, 631 P.2d at 1245.

⁶⁶ *Id.*

⁶⁷ KAN. STAT. ANN. § 58-2561 (1983) states, in relevant part:

(a) In an action for possession based upon nonpayment of the rent . . . the tenant shall counterclaim for any amount [owing under the agreement or statute.] In that event, the court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing, and shall determine the amount due to each party.

⁶⁸ 6 Kan. App. 2d 259, 627 P.2d 1159 (1981).

⁶⁹ KAN. STAT. ANN. § 58-2548 (1983).

of a presumption that any damage occurred before the lease began.⁷⁰ The court went on to note, however, that the presumption could be rebutted.⁷¹

III. OTHER REAL PROPERTY MATTERS

The courts have spoken on several other real property issues, though not to the extent that separate, sectional treatment is merited.

A. Easement and covenants

There have been two important easement cases and one important covenant case decided recently. In 1979, the Kansas Court of Appeals made clear that whenever a properly filed instrument refers to a plat, the references on that plat are incorporated into the chain of title of all those purchasing the property.⁷² Thus, the purchaser is bound to easements and covenants created on the face of a plat so long as that plat is referred to in the properly filed materials.

In the second case, *Allingham v. Nelson*,⁷³ a previous owner had conveyed the western half of his tract to Nelson, specifically reserving a narrow strip on the east side. The grantor also leased land immediately to the south for pasture. He subsequently used the reserved strip for both properties. The strip had been used in conjunction with the leased property on the south for many years before. The south tract passed by mesne conveyances to the plaintiff, who was suing to establish an easement by reservation or prescription along the strip. The court of appeals found no easement by reservation. It said that the original easement reserved was appurtenant only to the tract *owned* by the grantor. It excluded the southern portion from the dominant tenement for one of two reasons: (1) the leasehold interest was insufficient to support an easement appurtenant; or (2) the failure to mention the southern tract in the reservation eliminated its possible consideration as a part of the dominant tenement. The second is a more logical basis. The court remanded the question of prescription, finding insufficient testimony on the question of whether the land had been used under belief of ownership or by permission. The court seems to have misstated itself at one point when it noted that “[t]here is no serious contention on appeal by either party . . . that use of the property . . . was not exclusive.”⁷⁴ An easement is a use interest, not a possessory interest. Consequently, courts have never required exclusivity to establish a prescriptive easement.⁷⁵

The covenant case reflects the importance of reading one's chain of title carefully. Plaintiffs petitioned for a mandatory injunction to force removal of a newly constructed commercial building from an area protected against encroachment by a covenant of record. When none of defendant's equitable defenses were accepted, both the trial court and the Kansas Court of Appeals held that the mandatory injunction must issue.⁷⁶ The court of appeals recognized this imposed significant hardship, but seemed to think it had no choice.

⁷⁰ *Buettner v. Unrun*, 7 Kan. App. 2d 359, 642 P.2d 124 (1982).

⁷¹ *Id.* at 362, 642 P.2d at 127.

⁷² *Roberts v. Osburn*, 3 Kan. App. 2d 90, 589 P.2d 985 (1979).

⁷³ 6 Kan. App. 2d 294, 627 P.2d 1179 (1981).

⁷⁴ *Id.* at 299, 627 P.2d at 1183.

⁷⁵ 2 AMERICAN LAW OF PROPERTY §§ 8.53-.85 (Casner ed. 1952).

⁷⁶ *Schartz v. DRB & M Real Estate*, 5 Kan. App. 2d 625, 621 P.2d 1024 (1981).

B. Mortgages

There were several Kansas cases regarding mortgage law during the last few years. Most were merely interpretative. For example, in *First National Bank & Trust Co. v. Lygrisse*,⁷⁷ the Kansas Supreme Court held that a mortgage with a "dragnet" or "future advances" clause covered a subsequent loan even though there was no reference back to the original mortgage. The court recognized its own rule against extending a mortgage containing a "dragnet" clause to secure antecedent debts, but noted that the principle had no application where subsequent notes specifically indicated that certain antecedent debts were intended to be secure.⁷⁸ It was unclear from the opinion exactly what reference or references in the final transaction met this test.

A more recent case makes even clearer the importance of a well-written future advancement clause. In *Fidelity Savings Association v. Witt*,⁷⁹ the court of appeals interpreted section 58-2336 of the Kansas Statutes Annotated to grant priority to a mortgagee with a future advancement clause vis-a-vis mechanic's lien holders whose liens attached after the mortgage was recorded but before advances were made. This was the case even if advancements were optional. The interpretation seems sound in light of the statutory language⁸⁰ and will no doubt simply force potential lien holders to assume that the full amount of advancement will be given before they can consider themselves secured.

Despite a 1979 case declaring flatly that a "clear and unambiguous" forfeiture clause will be enforced as written,⁸¹ a subsequent court of appeals case makes clear that Kansas will retain its position of being quite ready to impress an "equitable mortgage" on virtually *any* transaction in which money is borrowed, with land as security.⁸² In *Mustard v. Sugar Valley Estates*,⁸³ an installment land contract allowed the vendor to cancel thirty days after a written notice demanding that the vendee cure a default. The contract also explicitly permitted the vendor to recover possession and retain all previous payments as liquidated damages. After a dispute, the vendor gave the vendee sixty days notice. The vendee twice wrote insufficient fund checks for the amount due. The vendor finally returned a last (small) payment, cancelled the contract, and sold the property to an employee of its homeowners' association. A year later, the vendee filed suit for damages, claiming he had been deprived of his equitable interest in the property without benefit of judicial foreclosure.

The vendor eventually accepted the trial court's determination that an equitable mortgage was involved and appealed only on damages. The remaining ques-

⁷⁷ 231 Kan. 595, 647 P.2d 1268 (1982).

⁷⁸ *Id.* at 602, 647 P.2d at 1273.

⁷⁹ 8 Kan. App. 2d 640, 665 P.2d 1108 (1983).

⁸⁰ "Every mortgage . . . may secure future advances and the lien of such mortgage shall attach upon its execution and have priority from time of recording to all advances made thereunder until such mortgage is released of record . . ." KAN. STAT. ANN. § 58-2336 (1983) (emphasis added). *Cf.* *Union State Bank v. Chapman*, 124 Kan. 315, 259 P. 681 (1927) (mortgage to secure future advances a valid security); KAN. STAT. ANN. § 84-9-204 (1982) (personal property).

⁸¹ *Coble v. Scherer*, 3 Kan. App. 2d 572, 598 P.2d 561 (1979).

⁸² *See* *Fuqua v. Hanson*, 222 Kan. 653, 567 P.2d 862 (1977); *Union Nat. Bank & Trust Co. v. Acker*, 213 Kan. 491, 516 P.2d 999 (1973); *Hill v. Hill*, 185 Kan. 389, 345 P.2d 1015 (1959); *Rex v. Warner*, 183 Kan. 763, 332 P.2d 572 (1959); *Dyer v. Johnson*, 109 Kan. 338, 198 P. 944 (1921); *Foster Lumber Co. v. Harlan County Bank*, 71 Kan. 158, 80 P. 49 (1905); *Hiatt v. Parker*, 29 Kan. 549 (1883).

⁸³ 7 Kan. App. 2d 340, 642 P.2d 111 (1981).

tion was which party would benefit from a substantial appreciation of the property during the time payments were being made. The appeals court stated that the appreciated value should go to the vendee, even though it specifically recognized the appreciation as solely the result of the vendor's efforts.⁸⁴

The court also has used the "equitable mortgage" concept to promote fairness in land-financing matters without regard to the form of the transaction. In a recent case the court found that a deed was intended to be an equitable mortgage,⁸⁵ and in the last several years equitable mortgages also were impressed on a quitclaim deed⁸⁶ and on a transaction in which a statutory mortgage was improperly executed.⁸⁷ The Kansas Supreme Court also implicitly recognized an immediate equitable right of a buyer in an installment sales contract, holding that such an equitable interest could be taken as security.⁸⁸ Occasional judicial statements to the contrary notwithstanding, the underlying lesson of these cases makes clear that it is very difficult in Kansas to create a forfeiture clause enforceable without regard to foreclosure and redemption doctrines.

The timing for redemption was the principal focus of two cases. In *Anspacher & Associates, Inc. v. Leslie*⁸⁹ the purchaser of real property in an execution sale attempted to avoid redemption confirmation. Redemption had occurred more than a year after sale but prior to the date that the original owner and judgment creditor had agreed to be the proper period. The court of appeals granted the motion to void the confirmation, holding that section 60-2414(a) of the Kansas Statutes Annotated states specifically that the redemption period starts at the time of sale.⁹⁰ It also said that because the purchaser was not a party to the agreement, the extension was not valid as to him.⁹¹

A second case reiterated the principle that the trial court may extend the redemption period when equitable circumstances require.⁹² Here the purchaser paid what she thought was the full amount prior to the end of the redemption period. It later proved insufficient. The court of appeals had little difficulty affirming the trial court's extension of the redemption period under these circumstances.

C. Miscellaneous

On two occasions, holders of pre-emption offerings held off attacks that their interest violated the rule against perpetuities. In *Smercheck v. Hamilton*,⁹³ the defendant's option was to run for thirty days "after written notice of death." The plaintiff argued that because there was no guarantee the option holder would ever be notified, the option violated the rule. The supreme court held that the "reasonable time" rule set out in *Singer Co. v. V. Makad, Inc.*,⁹⁴ would run well

⁸⁴ *Id.* at 343, 642 P.2d at 113.

⁸⁵ *Schulte v. Franklin*, 6 Kan. App. 2d 651, 633 P.2d 1151 (1981).

⁸⁶ *Fuqua*, 222 Kan. at 653, 567 P.2d at 862 (1977).

⁸⁷ *Beck v. Brooks*, 224 Kan. 300, 580 P.2d 882 (1978).

⁸⁸ *Garnett State Savings Bank v. Tush*, 232 Kan. 447, 657 P.2d 508 (1983).

⁸⁹ 5 Kan. App. 2d 348, 616 P.2d 297 (1980).

⁹⁰ *Id.* at 350, 616 P.2d at 299.

⁹¹ *Id.*

⁹² *First Fed. Savings & Loan Ass'n v. McKain*, 5 Kan. App. 2d 387, 617 P.2d 583 (1980).

⁹³ 4 Kan. App. 2d 346, 606 P.2d 491 (1980).

⁹⁴ 213 Kan. 725, 518 P.2d 493 (1973).

within twenty-one years after the plaintiff's death, and the interest would therefore not violate the rule. Similarly, the court of appeals later found that the transfer of an option to purchase was personal to the defendant, and thus, though unlimited in time, could not violate the rule.⁹⁵ Both results seem entirely sensible.

Another area of property law that received an unusual amount of attention recently was title by common agreement. In 1980 the supreme court found in *Stith v. Williams*⁹⁶ that the original owners had not reached a sufficient level of agreement to alter their boundary line by agreement. Similarly, in *Martin v. Hinnen*⁹⁷ a prairie fire burned a fence down that had marked a boundary. The defendant asked the plaintiff if he wished to share cost of a survey to put the fence in its proper place. The plaintiff declined and rebuilt the fence at the old location. Subsequently, the plaintiff learned that the fence encroached on his own property and began building a new one in a proper location. Again, the court of appeals found that the plaintiff had not sufficiently consented to or acquiesced in the old fence line for it to become a true boundary. Although both cases came out against those claiming a change of boundary by agreement, evidently the appellate courts agree that if such a boundary agreement is found to exist, it would alter the boundary permanently for both owners and their successors, the Statute of Frauds notwithstanding.

IV. SUMMARY

In most respects, Kansas real estate law has not undergone major change in the past several years. Clarifications, expansions, and minor tinkering have been the dominant themes. Even in zoning and landlord-tenant law, the two areas in which change of some magnitude has been trumpeted, the actual results have been less dramatic than expected. In zoning, the courts need to decide whether to continue to hold zoning amendments to be quasi-judicial acts and, if so, to spell out the full procedural ramifications of this change. In landlord-tenant law the courts must clarify rights under the URLTA and, especially, reexamine classic tort doctrine in light of the changed assumption about the landlord's responsibility for maintenance and repair. The writer of the next summary should have substantial hints of the courts' inclinations in both areas.

⁹⁵ *Crawn v. French*, 7 Kan. App. 2d 672, 646 P.2d 1158 (1982).

⁹⁶ 227 Kan. 32, 605 P.2d 86 (1980).

⁹⁷ 6 Kan. App. 2d 233, 627 P.2d 1140 (1981).