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Property Law

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PROPERTY LAW

I. IMPLIED WARRANTIES TO HOME PURCHASERS LIMITED

In *Arvai v. Shaw*[1] the South Carolina Supreme Court decided that a builder who is not also a seller of a new home does not warrant impliedly the fitness and habitability of the home. Although the supreme court agreed with the court of appeals[2] that no warranty arose in this case, it concluded, unlike the court of appeals, that "whether a house is built for speculation or is custom-built is not determinative."[3] Instead, the determinative factor was that the defendant was merely the builder of the allegedly defective house. After *Arvai*, the only parties who may be liable for the sale of a defective home are those who build and then sell the home as a completed structure (builder-vendors) and those who sell a completed home built by someone else (vendors). A party who builds but who does not also sell a defective home apparently will not be liable for the defects under an implied warranty of fitness. *Arvai* may signal a new conservatism in the court's approach to the extension of implied warranties to home purchasers.[4]

The crucial fact in *Arvai* was that the allegedly defective house was sold before it was constructed. In 1970, Jack Shaw and Jack Shaw Builders, Inc. (Shaw) sold an unimproved lot to Thomas and Margaret Farr. Shaw then built a home on the lot pursuant to plans and specifications provided by the Farrs. The court thus deemed Shaw to be the builder, but not the seller of the home. After moving into the home, the Farrs became disenchanted with their septic tank system and reconveyed the home to Shaw. Shaw then sold the house to James and Francis Semone. The Semones sold the house to the Arvais in September 1976, approximately five years after the Semones had pur-

1. 289 S.C. 161, 345 S.E.2d 715 (1986).
2. 286 S.C. 357, 334 S.E.2d 287 (Ct. App. 1985).
3. 289 S.C. at 164, 345 S.E.2d at 717.
4. For a discussion of the prior development of the implied warranty in South Carolina, see Note, *Implied Warranties in New Home Sales—Is the Seller Defenseless?* 35 S.C.L. REV. 469 (1984).

chased the home from Shaw. Just after moving into the home, the Arvais experienced flooding from a creek located near the rear of the lot.[5] Periodic flooding continued and the Arvais sued Shaw for a breach of an implied warranty of merchantability and fitness for the intended purposes of habitability.[6]

The circuit court granted a summary judgment motion in Shaw's favor. The court of appeals upheld the lower court's dismissal on the sole ground that the reasons underlying extension of an implied warranty to a house built for speculation do not support an implied waranty of fitness for a custom-built home.[7]

In a skeletal decision the supreme court also denied relief to the Arvais. At the heart of the court's decision was a distinction between a "general contractor or other builder" and "the initial vendor" of a home.[8] The court held that a general contractor or builder will not be accountable under an implied warranty for defects in a home because "[t]he determining factor is not whether the defendant actually builds the defective house, but that he places it, by the initial sale, into the stream of commerce."[9] The South Carolina Supreme Court apparently believes that building a home is not the same as selling a home and that the seller of a home is more culpable for defects in that home than is the builder. The court's conclusion is a stark departure from the prior evolution of implied warranties for new homes in South Carolina and in other states.[10]

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5. The flooding apparently was due to the failure of a holding pond built by upstream developers. Although the pond failure did not bear upon the issue before the court of appeals or the supreme court, the fact appears to have weighed heavily in favor of the defendants. Before this appeal, the Arvais had filed suit against the developers, but had entered into a settlement. Brief of Respondents at 2.

6. The Arvais also raised a negligence cause of action which was not preserved for supreme court review. 289 S.C. at 163 n.1, 345 S.E.2d at 716 n.1.

7. The court of appeals noted that *caveat emptor* controlled the law of new home sales prior to World War II when purchasers more closely supervised construction of new homes. The court reasoned as follows:

> The sale of mass-produced homes to unwary consumers who were unable to supervise their construction brought about the decline of *caveat emptor*.
>
> Here, however, a speculative-built house is not involved. Rather, it is a house built . . . according to owner supplied plans and specifications. In this respect, then, the situation is one similar, if not identical, to the construction practice commonly followed before World War II.

286 S.C. at 360, 334 S.E.2d at 288.

8. 289 S.C. at 164, 345 S.E.2d at 716.

9. *Id.*, 345 S.E.2d at 717.

10. For a thorough discussion of the history of the implied warranty, see Haskell,

Arvai contrasts with the previously liberal tendency of South Carolina courts to extend implied warranties of quality to home purchasers. The supreme court first held *caveat emptor*[11] inapplicable to new home purchases in *Rutledge v. Dodenhoff*.[12] In *Rutledge* the court recognized that "the essence of the transaction [of buying a new house] is the purchase of a habitable dwelling and that a knowledgeable inspection by the buyer is impossible."[13] The court therefore held *caveat emptor* "inapplicable to sales *where the vendor is also the builder of a new structure*."[14]

The supreme court expanded the category of parties who may be liable for new home defects in *Lane v. Trenholm Building Co.*[15] In *Lane* the court ruled that the law of sales, not the law of property, should control the sale of a new house. Consequently, a vendor of a new home was held liable for construction defects in the home, even though the vendor had not built the house. The court held that "liability is not founded upon fault, but because [the seller] has profited by receiving a fair price and, as between it and an innocent purchaser, the innocent purchaser should be protected from latent defects."[16] Thus, after *Rutledge* and *Lane*, a purchaser of a defective home would be protected if the seller were a builder-vendor or if the seller were merely a vendor. The only category of defendant in this context remaining to be considered was the builder. *Arvai* apparently settled the question by holding that simply building a home is not enough to trigger an implied warranty that the home will be free from defects.

While *Arvai* does not alter *Lane* or *Rutledge*, *Arvai* does raise new questions about what policies the implied warranty of

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The Case for an Implied Warranty of Quality in Sales of Real Property, 53 GEO. L.J. 633 (1965); Roberts, *The Case of the Unwary Home Buyer: The Housing Merchant Did It*, 52 CORNELL L.Q. 835 (1967); Shedd, *The Implied Warranty of Habitability: New Implications, New Applications*, 8 REAL EST. L.J. 291 (1980).

11. *Caveat emptor* means literally "let the buyer beware." BLACK'S LAW DICTIONARY 202 (5th ed. 1968). The doctrine of *caveat emptor* is based upon the policy that a buyer should inspect property before purchase and negotiate warranties of quality with the seller. *See* Kellogg Bridge Co. v. Hamilton, 110 U.S. 108, 112 (1884).

12. 254 S.C. 407, 175 S.E.2d 792 (1970).

13. *Id.* at 414, 175 S.E.2d at 795.

14. *Id.* at 413, 175 S.E.2d at 795 (emphasis added).

15. 267 S.C. 497, 229 S.E.2d 728 (1976).

16. *Id.* at 503, 229 S.E.2d at 731.

quality now supports.[17] The most culpable party in a sale of a defective home would seem to be the builder who created the defect. After *Arvai*, however, a builder who does not also sell a completed home will not be liable under an implied warranty, but a potentially faultless seller will be held liable.[18] The rationale in *Lane* for holding liable an innocent vendor was a logical extention of *Rutledge*. *Arvai*, however, presents a paradox in the law when viewed against the policies supporting *Rutledge* and *Lane*.

Arvai is also anomalous when viewed in the broader context of the implied warranty's development in England and in other states. The English law still adheres to the concept of *caveat emptor* in the sale of a completed new home[19] because the buyer or his surveyor can inspect the house to determine the home's fitness for occupation.[20] The courts of England, however, laid the foundation for the eventual American implied warranty when they carved an exception to the *caveat emptor* doctrine in situations in which a purchaser bought a home not yet constructed or only partially constructed. One commentator explains that the English courts were in a dilemma when addressing whether an implied warranty should protect the purchaser of a partially completed home because the question presented fell between two bodies of settled law:

> On the one hand, *caveat emptor* clearly applied to the sale of a completed house. On the other, a landowner who retained a builder to construct a house for him was entitled to an implied term that the job would be done in a workmanlike manner with proper materials. . . . In the instance of the sale of an unfinished home the builder-vendor had become so much a "builder" that he lost the usual vendor's protection of *caveat emptor*.[21]

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17. Historically, the implied warranty of quality protected innocent home purchasers against shoddy workmanship. *See generally infra* notes 19-27 and accompanying text.

18. In *Lane*, for instance, the court noted that the vendor of the defective home was not responsible for the defects and "had no better opportunity to inspect for latent defects than the purchaser," but the court nonetheless held the vendor liable. 267 S.C. at 501, 229 S.E.2d at 729.

19. *See, e.g.*, Perry v. Sharon Dev. Co., [1937] 4 All E.R. 390 (C.A.).

20. *Id.* at 395.

21. Roberts, *supra* note 10, at 838 (footnotes omitted).

Because the English jurists viewed a contract for construction or completion of a home as "not merely a contract to sell, but also a contract to do building work, [the English courts felt] it [was] only natural and proper that there should be an implied undertaking that the building work should be done properly."[22] From its inception, then, the implied warranty of a home was a protection against a builder's shoddy workmanship.

When the implied warranty first emerged in American jurisprudence, the concern was also with the building, not with the selling of the defective home. The Ohio Court of Appeals, for example, expressly adopted the English rationale when it became the first state court to imply a warranty of quality in the transaction of a partially completed home.[23] One year later the Supreme Court of Washington also extensively quoted the English cases when adopting the implied warranty for a home under construction at the time of sale.[24] Ironically in *Hoye v. Century Builders* the Washington court cited a South Carolina case[25] for the proposition that a construction contractor impliedly warrants that his work will be "of proper workmanship and reasonable fitness for its intended use."[26] Until this point, the implied warranty was a creature of contract law and *caveat emptor* remained a viable property law concept.

When the two concepts eventually collided, however, policy prevailed over tradition, and the Colorado Supreme Court became the first to hold that the distinction between a partially constructed house and a completed house is "a distinction without a reasonable basis."[27] The Colorado court, therefore, dispensed with the application of *caveat emptor* in transactions of new houses. Thus, what had begun as an implied term in a contract to build a home that the home would be constructed properly had evolved initially into an implied warranty of fitness for

22. [1937] 4 All E.R. at 396.

23. Vanderschrier v. Aaron, 103 Ohio App. 340, 140 N.E.2d 819 (1957).

24. Hoye v. Century Builders, Inc., 52 Wash. 2d 830, 329 P.2d 474 (1958).

25. Hill v. Polar Pantries, 219 S.C. 263, 64 S.E.2d 885 (1951).

26. 52 Wash. 2d at 833, 329 P.2d at 474 (quoting 219 S.C. at 271, 64 S.E.2d at 888). In addition, the South Carolina General Assembly impliedly recognized the existence of a cause of action against the builder of a new structure in S.C. CODE ANN. § 15-3-640 (Law. Co-op. Supp. 1986) which establishes a statute of limitations of 13 years for actions to recover damages for the negligent construction or repair, and for breach of a contract to construct or repair an improvement to real property.

27. Carpenter v. Donahoe, 154 Colo. 78, 83, 388 P.2d 399, 402 (1964).

a home purchased while under construction, and then later, into an implied warranty of fitness for a completed home. When a home was purchased before or during construction, contract law controlled the transaction and the property law concept of *caveat emptor* simply did not apply. When the home was purchased after construction had been completed, the courts concluded that supporting the public policies of the implied warranty was more important than perpetuating the tradition of *caveat emptor*.

In *Arvai* the defendant was a home builder. Even before *caveat emptor* was abolished, a landowner who hired a contractor to build a house could hold the builder liable for defects in the home under a purely contractual implied warranty of workmanlike construction.[28] Nonetheless, the defendant in *Arvai* was held free from liability *because* he was a builder. The logic of this conclusion, when viewed in a historical perspective, is puzzling, and the net effect of the *Arvai* holding is to create for the implied warranty of workmanlike construction an even greater identity crisis. How *Arvai* will affect future actions against builders, then, remains at least interesting, if not also open.

Given the incongruity of *Arvai* with history, the lack of relevant authority in support of the court's conclusions is understandable. The court claimed that most jurisdictions concur that a builder who is not also a vendor of a home will not be held liable under an implied warranty theory. The *American Law Reports* annotations[29] cited in support of this conclusion, however, do not relate to the conclusion. The cases listed in each annotation deal not with the distinction between a builder and a builder-vendor, but rather address the continuing viability of *caveat emptor*[30] and lack of privity as bars to recovery by disgrun-

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28. *See* [1937] 4 All E.R. 390 (C.A.). *Cf.* 219 S.C. 263, 64 S.E.2d 885 (defendant who furnished plans and specifications for construction of commercial frozen food locker plant held liable for damage resulting from defective design).

29. *See* Annotation, *Liability of Builder of Residence for Latent Defects Therein As Running to Subsequent Purchasers From Original Vendee*, 10 A.L.R.4TH 385 (1981); Annotation, *Liability of Builder-Vendor or other Vendor of New Dwelling for Loss, Injury, or Damage Occasioned by Defective Condition Thereof*, 25 A.L.R.3D 385 (1981).

30. In 25 A.L.R.3D 385, *supra* note 29, none of the cases listed in the annotation which deny recovery under an implied warranty theory based their denial on a distinction between a vendor, builder-vendor, and a builder. Most of the decisions denied recovery because of the continued viability of *caveat emptor*. The most recent case listed was decided in 1968, two years before South Carolina rejected the *caveat emptor* doc-

tled home purchasers.[31] South Carolina, of course, is already firmly in line with those jurisdictions which have rejected *caveat emptor* in favor of *caveat venditor*[32] and which allow recovery to subsequent purchasers who are not in privity with the initial vendor of the home.[33] The court also cited *Redarowicz v. Ohlendorf*[34] for the proposition that "the [implied] warranty of habitability has its roots in the execution of a contract for sale."[35] *Redarowicz*, however, dealt with whether a cause of action for latent defects should extend to subsequent purchasers of a home,[36] and states in other dicta that "[i]f construction of a new house is defective, its repair costs should be borne by the responsible builder-vendor *who created the latent defect.*"[37] Such language causes one to wonder if the Supreme Court of Illinois would concur with a result which exonerates a builder because the builder was not also the vendor of a completed home.

Many questions remain in the wake of *Arvai*. Perhaps the most important question, however, is whether *Arvai* signals an erosion in the court's resolve to protect consumers in the home market or whether this decision will stand as an aberration in the development of implied warranties for new homes in South Carolina.

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trine in Rutledge v. Dodenhoff, 254 S.C. 407, 175 S.E.2d 792 (1970). Interestingly, one commentator, describing the state of the law in the mid-1960s, wrote: "Although implied warranties *have been recognized in connection with a contract to construct a new house*, the common-law rule that quality is at the risk of the purchaser in the sale of real property is still the law except in Louisiana, and with respect to new houses, Colorado and probably New Jersey." Haskell, *supra* note 10, at 633 (emphasis added).

31. In 10 A.L.R.4TH 385, *supra* note 29, the annotation addressed the continuing viability of privity as a bar to remote purchasers of a house. Among the cases listed which allowed remote purchasers to recover despite lack of privity is Terlinde v. Neely, 275 S.C. 395, 271 S.E.2d 768 (1980). Although the court in *Arvai* cited Wisconsin as an exception to the majority rule which denies recovery to purchasers from builders, Moxley v. Laramie Builders, Inc. 600 P.2d 733 (Wyo. 1979) is juxtaposed with *Terlinde* in the list of cases allowing recovery to subsequent purchasers of houses. Also, the supreme court in *Terlinde* cited *Moxley* in declaring that allowing privity to persist as a bar to recovery would be "incomprehensible." 275 S.C. at 399, 271 S.E.2d at 770.

32. *See* 254 S.C. at 407, 175 S.E.2d at 792.

33. *See* 275 S.C. at 395, 271 S.E. 2d at 768.

34. 92 Ill. 2d 171, 441 N.E.2d 324 (1982).

35. 289 S.C. 161, 164, 345 S.E.2d 715, 717 (1986) (citing 92 Ill. 2d at 183, 441 N.E.2d at 330).

36. 92 Ill. 2d at 183, 441 N.E.2d at 330.

37. *Id.* (emphasis added).

II. TENANT PROTECTION EXPANDED

In *Holmes v. Rosner*[38] the South Carolina Court of Appeals declined an opportunity to join the majority of states that recognize an implied warranty of habitability in residential leases. The court of appeals, however, did permit the plaintiff to maintain an action based on a landlord's breach of an *express* warranty of habitability or fitness.[39] The court's view of the circumstances that gave rise to the express warranty will provide a new avenue of relief for tenants, and the case as a whole may be a harbinger of the inevitable modernization of South Carolina's law of landlord-tenant relations.

Holmes, a tenant, brought suit to recover for severe burns and other injuries that she suffered when a fire broke out in the kitchen of her apartment. The apartment was part of a duplex built by her landlord nineteen years earlier. Faulty wiring, improperly installed by the landlord, caused the fire. The trial court sustained the landlord's demurrer to all of Holmes' five causes of action, including express and implied warranties of habitability. The court of appeals affirmed the finding on implied warranty, relying on *Young v. Morrisey*,[40] a 1985 South Carolina Supreme Court decision that upheld South Carolina's refusal to imply a warranty of habitability in leases.

On the issue of express warranty of habitability, however, the court of appeals reversed the trial court's finding and remanded the case for further determination because an agent of the landlord had assured Holmes that " 'the building was fit for use as a residence by her family, that it was in good condition and that the [landlord] would do all things necessary . . . to keep and maintain said premises in a safe condition, fit for use as a residence by her family.' "[41] Thus, *Holmes* distinguished between express warranty to maintain leased premises in a safe condition and express warranty of fitness or habitability. The former restricts the tenant to a contractual remedy; the latter

38. 289 S.C. 287, 346 S.E.2d 37 (Ct. App. 1986).
39. *Id.* at 289, 346 S.E.2d at 38.
40. 285 S.C. 236, 329 S.E.2d 426 (1985).
41. 289 S.C. at 289, 346 S.E.2d at 38.

allows recovery for personal injury.[42]

As the first decision to allow a tenant to maintain a personal injury cause of action based on warranty, *Holmes* promises to influence landlord-tenant law in South Carolina. Under *Holmes*, a tenant who sues his landlord for negligently inflicted personal injuries can recover, but only if he can prove conduct sufficient to constitute an express warranty of habitability. What the state courts will accept as express warranties remains unclear, but the language in *Holmes* seems to be commonplace language used by lessors.

Holmes may signal the inevitability that an implied warranty of habitability will be recognized in South Carolina, although the court of appeals appeared restrained by the supreme court's recent decision in *Young*. The next move would seem to be that of the supreme court, prodded perhaps by the new South Carolina Residential Landlord and Tenant Act which was recently enacted by the legislature.[43]

The court of appeals relied on *Young* without analysis in affirming the demurrer to Holmes' implied warranty of habitability claim. In *Young* the South Carolina Supreme Court upheld a trial court's grant of summary judgment on allegations of implied warranty and strict liability.[44] In addition to citing previous state authority,[45] the court offered a list of "compelling

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42. *Id.*

43. South Carolina Residential Landlord and Tenant Act, S.C. CODE ANN. §§ 27-40-10 to -940 (Law. Co-op. Supp. 1986). Section 27-40-440, entitled "Landlord to maintain premises," requires a landlord to "make all repairs and do whatever is reasonably necessary to put and keep the premises in a fit and habitable condition," and to "maintain in reasonably good and safe working order and condition . . . facilities and appliances . . . . No appliance or facilities necessary to the provision of essential services may be excluded." The Landlord and Tenant Act became effective 120 days after it was signed on March 10, 1986.

44. 285 S.C. at 239, 329 S.E.2d at 428.

45. Sheppard v. Nienow, 254 S.C. 44, 173 S.E.2d 343 (1970); Conner v. Farmers & Merchants Bank, 243 S.C. 132, 132 S.E.2d 385 (1963); Timmons v. Williams Wood Products Corp., 164 S.C. 361, 162 S.E. 329 (1932); Mallard v. Duke, 131 S.C. 175, 126 S.E. 525 (1925); *see also* Hatfield v. Palles, 537 F.2d 1245 (4th Cir. 1976) (applying South Carolina law); Williams v. Riley, 56 N.C. App. 427, 289 S.E.2d 102 (1982) (applying South Carolina law); Williams v. Salmond, 29 S.C. 459, 61 S.E. 79 (1908); Cantrell v. Fowler, 32 S.C. 589, 10 S.E. 934 (1890); City Council v. Moorhead, 31 S.C.L. (2 Rich.) 430 (1846).

None of these cases discusses any possible justification for the common-law rule; each defers in strict lockstep to precedent. The earliest case in the chain, *City Council*, offers no precedent, authority, or justification for its holding. In addition, the *City Council* and *Cantrell* cases dealt with tenants who leased houses that were in obvious need of

reasons" devised by a New Jersey court to explain why an apartment cannot be considered a "product" capable of giving rise to liability without fault.[46] Though the court offered analysis for not extending strict liability to landlords, it failed to show any modern justification for the common-law rule of *caveat lessee*, by which the tenant takes a rental property "as is."

Caveat lessee is an anachronism because its historical justifications have become outmoded.[47] The doctrine originated in the Middle Ages when society was agrarian. Arable land was the focus of real estate transactions; dwellings on the land were legally insignificant appendages. Leases, therefore, were treated as conveyances of land, not contracts for living space. As conveyances, leases were governed by the common-law rule of *caveat emptor*; as one court put it, "fraud apart, there is no law against letting a tumbledown house."[48]

As society became urbanized, the city dweller typically became less experienced than his landlord in performing maintenance work on complex living units. In turn, landlords became more familiar with the dwelling unit and the equipment attached to it and were financially better able to discover and cure any faults and breakdowns.[49] Recognizing this reality, courts

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repairs. Thus, the *caveat lessee* doctrine in South Carolina seems to have been "built on the sand" of questionable precedent.

46. 285 S.C. at 240, 329 S.E.2d at 428 (citing Dwyer v. Skyline Apartments, Inc., 123 N.J. Super. 48, 301 A.2d 463, *aff'd mem.*, 63 N.J. 577, 311 A.2d 1 (1973)). The *Young* court declined to take notice of Marini v. Ireland, 56 N.Y. 130, 265 A.2d 526 (1970), a well-reasoned opinion establishing the implied warranty of habitability in New Jersey as applied in *Dwyer*. The *Young* court did cite Annotation, *Modern Status of Rules as to Existence of Implied Warranty of Habitability of Fitness for Use of Leased Premises*, 40 A.L.R.3D 646 (1971), which deals with the *modern* status of rules as to implied warranty.

47. For detailed analyses of the historical justifications of *caveat lessee*, see Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir.), *cert. denied*, 400 U.S. 925 (1970); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974); Lemle v. Breeden, 51 Haw. 426, 462 P.2d 475 (1969); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984); Davis, *After the Warranty: Premises Liability and Property, Tort and Contract Law*, 22 TRIAL 38 (March 1986); Love, *Landlord's Liability for Defective Premises: Caveat Lessee, Negligence or Strict Liability?* 1975 WIS. L. REV. 19; Comment, *The Implied Warranty of Habitability: A Dream Deferred*, 48 UMKC L. REV. 237 (1980).

48. Robbins v. Jones, 143 Eng. Rep. 768, 776 (1863). *But cf.* Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961) (tumble-down houses are a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious owners).

49. 428 F.2d at 1077-79; 10 Cal. 3d at 624, 517 P.2d at 1173, 111 Cal. Rptr. at 709.

carved out limited exceptions which alleviated some of the harshness of the common-law rule.[50] Courts in the 1960s, spurred by legislative housing and safety codes, began to adopt the implied warranty of habitability in a number of well-reasoned opinions.[51] Today a landlord has a duty of safety in the majority of the jurisdictions; indeed, the implied warranty of habitability has been embraced by the appellate courts and legislatures of at least forty-one states and the District of Columbia.[52]

In South Carolina the appellate courts' tenacity in retaining the common-law rules against an implied warranty of habitability in *rental* property is particularly anomalous when compared to the zeal with which the supreme court over a decade ago adopted an implied warranty of habitability in the *sale* of new property. In *Lane v. Trenholm Building Co.*,[53] a 1976 case, the court abolished the doctrine of *caveat emptor*. Justice Ness, for a unanimous court, wrote, "Disparity in the law should be founded upon just reason and not the result of adherence to stale principles which do not comport with current social conditions."[54] The *Lane* court recognized that when a new house is sold, the sale of a product, not a conveyance of land, is involved. *Lane* further established that since a sound price commands a sound commodity, an implied warranty of habitability is within the reasonable expectations of the contracting parties.[55] In *Young*, when confronted with the disparate treatment accorded

50. *See, e.g.*, 51 Haw. 426, 402 P.2d 476 (constructive eviction deemed a legal fiction); Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892) (furnished dwellings rented for a short period of time); King v. Moorhead, 495 S.W.2d 65 (Mo. App. 1973) (landlord fraud).

51. *See* 428 F.2d 1071; 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704; *see also* 51 Haw. 426, 462 P.2d 476; Jack Spring, Inc. v. Little, 50 Ill. 2d 351, 280 N.E.2d 208 (1972); Old Town Dev. Co. v. Langford, 349 N.E.2d 744 (Ind. Ct. App. 1976); Mease v. Fox, 200 N.W.2d 791 (Iowa 1972); Steele v. Latimer, 214 Kan. 329, 521 P.2d 304 (1974); Boston Hous. Auth. v. Hemingway, 363 Mass. 184, 293 N.E.2d 831 (1973); Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

52. *See* Pugh v. Holmes, 486 Pa. 272, 281-82, 405 A.2d 897, 901 (1979). *Pugh* contains an exhaustive listing of 39 jurisdictions which had, by 1979, recognized the implied warranty of habitability. *Pugh* established the implied warranty in Pennsylvania, as did Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984), in Vermont. Therefore at least 41 states and the District of Columbia have embraced the warranty.

53. 267 S.C. 497, 229 S.E.2d 728 (1976).

54. *Id.* at 503, 229 S.E.2d at 730-31.

55. *Id.*

leases and sales in South Carolina, the supreme court rejected the analogy provided in *Lane* and chose to distinguish property which is rented from that which is sold.[56]

The decision in *Holmes* is a step in the right direction for South Carolina's landlord-tenant law. A cause of action based on statements of the landlord's agent is an exception to the rule against implied warranties of habitability that was recognized in *Young*.[57] Thus, the court of appeals in *Holmes* has indicated a willingness to have landlords assume an appropriate degree of liability. Future cases, in conjunction with the impetus provided by the Residential Landlord and Tenant Act, should further modernize South Carolina law in this area.

Charles R. Beans

III. EXPRESS LANGUAGE REQUIRED TO RESTRICT USE OF PROPERTY DEMISED IN LEASE

The South Carolina Court of Appeals underscored the importance of care in drafting and construing leases in *Chassereau v. Stuckey*.[58] In *Chassereau* the court held that a lease for a specific purpose should be regarded as permissive unless express language or an independent agreement requires that it be restrictive.[59] The case comports with previous South Carolina authority, but where previous state cases required that courts consider all available evidence to determine the correct construction of ambiguous language in a lease, *Chassereau* adds the presumption that absent express restrictions, all evidentiary documents should be construed in favor of any lawful use of the property.[60]

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56. 285 S.C. at 241, 329 S.E.2d at 429.

57. *Holmes* quoted *Young*: " 'As a general rule, there is no implied warranty of fitness or habitability in leases. A lessee takes leased premises, *in the absence of an express warranty*, or of fraud or misrepresentation, in the condition and quality in which they are.' " 289 S.C. at 289, 346 S.E.2d at 38 (quoting 285 S.C. at 241, 329 S.E.2d at 429) (emphasis added).

58. 288 S.C. 368, 342 S.E.2d 623 (Ct. App. 1986).

59. *Id.* at 370, 342 S.E.2d at 624. This case did not address a business situation in which the conduct or performance of a certain business formed part of the express consideration or rental of the lease, as when rent payments are based on a fixed percentage of profits from the business.

60. *Id.* Previous South Carolina cases allowed extrinsic facts and circumstances into evidence to help determine intent. *See, e.g.*, Price v. Derrick, 262 S.C. 341, 204 S.E.2d 389 (1974); Richland-Lexington Airport Dist. v. V.I.P. Aviation, Inc., 256 S.C.

Chassereau leased from Stuckey property which had been used as a beer and billiards establishment,[61] for use as an automobile dealership. Chassereau had an attorney prepare a lease.[62] After Chassereau had operated the premises as a car lot for two years, Estelle Ragin sought to sublet the property from him.[63] Because the lease expressly permitted subleasing, Chassereau and Ragin entered into a sublease agreement.[64] Ragin made extensive and costly renovations to the property[65] to operate a nightclub, the Dry Gulch Saloon.

Soon after the Dry Gulch opened, Stuckey filed for and obtained a judgment of eviction against Chassereau from the Richland County Magistrate's Court. Stuckey immediately entered into a new rental agreement with Ragin for the same terms as had been obtained by Chassereau. The new agreement eliminated the original tenant as an intermediary between landlord and subtenant.[66] The magistrate's order evicting Chassereau was later set aside for inadequate service of process, but Ragin would not resume payments to Chassereau. Chassereau, therefore, sued

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572, 183 S.E.2d 448 (1971); Wise v. Picow, 232 S.C. 237, 101 S.E.2d 651 (1958).

61. Final Order at 13.

62. *Id.* at 13, 14. The tenant had the lease prepared because he had to provide a written lease to obtain a loan he was seeking from the Small Business Administration. *Id.* Normally, however, the landlord provides the lease. This change of roles was significant to the parties as they examined the usual rules of construction: construe against the landlord; construe against the drafter. Brief of Appellant at 7; Brief of Respondent at 12, 13. The apparently conflicting rules were not addressed by the trial court, nor by the court of appeals. Final Order at 17.

The lease provided a term of five years, an option to renew, and a rental fee of $500 per month. The troublesome provision read:

> WITNESSETH, That the said Lessor has granted and leased, and by these presents does grant and lease unto the said Lessee the premises at [. . .], same being a metal building and lot 125 feet by 200 feet, to be used primarily as an automobile dealership, with all appurtenances thereto belonging.

Record at 31-33.

63. Final Order at 14.

64. The pertinent provision of the lease read as follows: "[T]he Lessee shall be authorized to sublease any part or all of the building and premises . . . and shall be entitled to all rents and proceeds therefrom." Record at 32.

65. Final Order at 15. Prior to vacating the premises, Chassereau held an auction, which Stuckey attended, of the remainder of his business supplies. Ragin worked to renovate the property for six to seven months before the saloon opened. Stuckey made no protest about the intended use during this time. *Id.*

66. Considering the property's previous use as a pool hall, the ample notice of the proposed change in use, and Stuckey's immediate reassignment of the premises to Ragin, it may be inferred that he did not object to the use of the premises as a drinking establishment; however, he did object to the profit enjoyed by Chassereau.

Stuckey to recover rent collected from Ragin. Stuckey appealed from the lower court's order in favor of Chassereau and asserted that Chassereau had breached his lease with Stuckey by subletting the property.

The opinion of the court of appeals cited *Corpus Juris Secundum* for the proposition that the phrase in the lease "to be used primarily as an automobile dealership" was permissive rather than restrictive.[67] The court did not refer in its decision to a line of South Carolina cases that mandated a "totality of the circumstances" analysis of lease provisions. In failing to note this prior line of cases, the court of appeals ignored a South Carolina Supreme Court ruling that to determine intent of parties to a lease, four factors must be regarded: (1) the subject matter; (2) the surrounding circumstances; (3) the situation of the parties; and (4) the object in view and intended to be accomplished at the time.[68] The *Chassereau* court also did not refer to previous cases that have held that a lease must be construed as a whole in order to determine the meaning of one of its clauses.[69]

The importance of *Chassereau* is two-fold. First, the case is

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67. 51C C.J.S. *Landlord and Tenant* § 337(b) (1975). The first sentence of the third paragraph of the opinion of the court of appeals is attributable to 51C C.J.S. *Landlord and Tenant* § 232(2) (1975); the third sentence paraphrases § 232(5).

The Georgia Court of Appeals decided a case with a nearly identical fact pattern in Cox v. Ford Leasing Dev. Co., 170 Ga. App. 81, 316 S.E.2d 182 (1984). In *Cox* the lease provided for use of the property as an automobile dealership. The landlord contended that this constituted a covenant to use the premises for this purpose. The court of appeals upheld the trial court's finding that unless express language is present, the recited use is descriptive, i.e., permissive and not restrictive. *Id. Cf.* Commercial Auto Loan Corp. v. Keith, 79 Ga. App. 268, 53 S.E.2d 318 (1949); Lawrence v. White, 131 Ga. 840, 63 S.E. 631 (1909).

Neither the parties nor the court mentioned the line of analogous cases holding that deed restrictions concerning use of real estate should be strictly construed and all doubts resolved in favor of free use of property, unless the restrictions are obvious and unambiguous. *E.g.*, Hoffman v. Cohen, 262 S.C. 71, 202 S.E.2d 363 (1974); *accord* Baltz v. R. V. Chandler & Co., 248 S.C. 484, 151 S.E.2d 441 (1966).

68. Price v. Derrick, 262 S.C. 341, 204 S.E.2d 389 (1974) (use of property for a curb market and residence held not inconsistent with lease term "for business purpose"); *accord* Richland-Lexington Airport Dist. v. V.I.P. Aviation, Inc., 256 S.C. 572, 183 S.E.2d 448 (1971); Wise v. Picow, 232 S.C. 237, 101 S.E.2d 561 (1958); Brady v. Brady, 222 S.C. 242, 72 S.E.2d 193 (1952).

Stuckey died during the litigation. The trial court, therefore, was unable to consider much of the testimony concerning the intent of the parties because of the "Dead Man's Statute." Final Order at 16; *see* S.C. CODE ANN. § 19-11-20 (Law. Co-op. 1985).

69. *See* 256 S.C. 572, 183 S.E.2d 448 (1971); United States Rubber Co. v. White Tire Co., 231 S.C. 84, 97 S.E.2d 403 (1957); 222 S.C. 242, 72 S.E.2d 193 (1952).

useful as a guide to the construction of leases: a magistrate adjudicating an eviction proceeding based on an alleged breach of a lease condition merely needs to look for express language establishing the restriction. If such language is not present, or is ambiguous, then the recited use is permissive and no breach of condition has taken place.[70] Second, the holding reemphasizes the importance of careful legal drafting to landlords who wish to place restrictions on the use of their property. The drafter of a lease must use precise and express language outlining restrictions, and the restrictions must not contradict any other provision of the lease.

Charles R. Beans

IV. Equitable Deviation Extended to Eliminate Racial Restriction in Trust

The South Carolina Court of Appeals held in *Colin McK. Grant Home v. Medlock*[71] that the doctrine of equitable deviation allows a court to amend the terms of a charitable trust when changed circumstances require an amendment to effectuate the purpose of the trust.[72]

The Colin McK. Grant Home is a corporation chartered by Colin Grant in 1920 " '[t]o provide a home for Elderly white Presbyterians of Charleston, South Carolina.' "[74] When Mr. Grant died in 1921, he left the residue of his estate to the Home and directed that the Home be for white Presbyterians of Charleston who were over forty and in reduced circumstances.[75]

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70. This does not foreclose other grounds for eviction. After this case was decided, the subtenant fell behind in rent payments to the tenant. Later, Stuckey's executrix obtained a proper eviction order against Chassereau and hence Ragin. Interview with Robert J.Hallman, Esq. (October 1, 1986).

71. __ S.C. __, 349 S.E.2d 655 (Ct. App. 1986), *cert. denied*, No. 0804, Davis Adv. Sh. No. 12 (S.C. April 4, 1987).

72. *Id.* at Though the principle of equitable deviation is well-established in South Carolina, the court, following the holdings of other jurisdictions, extended the principle to permit the elimination of racial restrictions from the terms of a trust when circumstances had changed since the establishment of the trust.[73]

73. *Id.* at __, 349 S.E.2d at 660.

74. *Id.* at __, 349 S.E.2d at 656.

75. Mr. Grant's will directed that the home be used as follows:

for white persons in reduced circumstances, both men and women, who by faith and profession are Presbyterians and who may be admitted to said Home

Mrs. Grant died in 1923 and bequeathed all of her residuary estate to the Home "established in memory of her husband, in accordance with the rules and regulations for its management in force at the time of her death."[76]

The codicil to Mr. Grant's will provided that each descendant, to the fourth generation, of his sister Mrs. Elizabeth Rose be entitled to reside in half of one of the foundation's houses. At the time of this lawsuit, the neighborhood in which the Home was located had deteriorated and occupancy of the Home had declined drastically. Because of these conditions, the trustees wished to sell the Home's real property and use the proceeds to create a housing subsidy fund for the beneficiaries of the trust.[77]The trustees brought suit against Mr. Grant's heirs when they refused to renounce their rights under the will and to allow the trustees to change the terms of the trust. The heirs maintained that the trust had failed in its purpose and, therefore, should be dissolved, with the heirs to receive the proceeds.[78] They further claimed that the trust should be dissolved because the Home "practiced racial discrimination in violation of the public policy and laws of this State and of the United States."[79]

The master in equity and the circuit court found for the trustees. The lower courts amended the administrative terms of the trust through the principle of equitable deviation and held that the property could be sold and the proceeds could be used to establish a housing fund for the trust beneficiaries.[80] The court of appeals affirmed the lower court's holding.[81]

Two doctrines permit courts to amend the terms of a trust. The first of these doctrines, *cy pres*,[82] has been rejected consist-

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under such rules as may be established by the Trustees of said Home. Provided that . . . such persons shall be over forty years of age and shall have been residents of the City of Charleston for at least five years.

Id. at ___, 349 S.E.2d at 656-57.

76. *Id.* at ___, 349 S.E.2d at 657.

77. *Id.* at ___, 349 S.E.2d at 657.

78. *Id.* at ___, 349 S.E.2d at 657.

79. *Id.* at ___, 349 S.E.2d at 657.

80. *Id.* at ___, 349 S.E.2d at 657.

81. *Id.* at ___, 349 S.E.2d at 657; *see infra* note 86.

82. When a court finds that changed circumstances have caused a charitable trust to be impractical or impossible to administer according to its literal terms, the court may, through the doctrine of *cy pres*, reform the trust to accomplish its general purposes. Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

ently in South Carolina.[83] The other doctrine, equitable deviation, is well-established.[84] Equitable deviation "permits the strict terms of a trust to be altered when changed circumstances so require to effectuate the trust's purpose."[85]

In applying equitable deviation in *Colin McK. Grant*, the court examined Mr. Grant's intention in creating the trust. The court deferred to the findings of the master and the circuit court "that the primary intent of the settlor was to provide housing for elderly Charlestonian Presbyterians of reduced circumstances."[86] The heirs had alleged that because of the racial restriction in the trust, the trust should fail. The court, however, found that because of changed circumstances since the creation of the trust,[87] equitable deviation permitted the court to eliminate the racial restriction and uphold the trust.[88] The court determined that this restriction was not the intention of Mr. Grant and was not essential to the trust's primary requirements.

Since no South Carolina court had ever before addressed the issue of elimination of a racial restriction, the court of appeals relied on cases in other jurisdictions which had struck sim-

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83. __ S.C. at __, 349 S.E.2d at 657; *see* South Carolina Nat'l Bank v. Bonds, 260 S.C. 327, 195 S.E.2d 835 (1973); Mars v. Gilbert, 93 S.C. 455, 77 S.E. 131 (1912); Pringle v. Dorsey, 3 S.C. 502 (1872).

84. *See* cases cited *supra* note 83.

85. __ S.C. at __, 349 S.E.2d at 658; *see* 260 S.C. 327, 195 S.E.2d 835; 93 S.C. 455, 77 S.E.2d 131.

86. __ S.C. at __, 349 S.E.2d at 658. When the circuit court concurs in the master's findings of fact, a reviewing court cannot disturb these findings unless there is no evidentiary support for such findings or such findings are against the preponderance of the evidence. *See* Townes Assocs. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976); *Ex parte* Guaranty Bank & Trust Co., 255 S.C. 16, 177 S.E.2d 358 (1970). In *Colin McK. Grant* the court found that "the record in the case amply supports the findings of the master and the circuit judge." __ S.C. at __, 349 S.E.2d at 658.

87. At the time of this lawsuit, the surrounding neighborhood had deteriorated severely. There was a high crime rate and there were no nearby shopping facilities. At the time of the hearing, only three people lived in the house. __ S.C. at __, 349 S.E.2d at 657. Moreover, since the establishment of the trust, circumstances had changed "to warrant elimination of the racial restriction." *Id.* at __, 349 S.E.2d at 659.

> In the past sixty years racial relations have changed significantly, and discrimination in housing has become illegal. Segregation is no longer a way of life in Charleston. In addition, the Presbyterian Church itself has undergone significant change . . . . In 1983 the Presbyterian Church of the United States and the Presbyterian Church in the United States merged, and as a result, the churches in Charleston are now integrated.

Id. at __, 349 S.E.2d at 659-60.

88. *Id.* at __, 349 S.E.2d at 660.

ilar restrictions from the terms of a trust.[89] The court found that "[t]he expansion of a trust's class of beneficiaries is neither novel nor beyond the scope of equitable deviation."[90] The court justified its expansion of the doctrine of equitable deviation in the present case through the intent of Mr. Grant, noting that the primary duty of a court in construction of a will is to determine and to effectuate the testator's intent.[91] A court, however, can use discretion when applying this intent.[92] "In trying to effectuate this intention . . . there is no question that where conditions have substantially changed, the court is allowed considerable discretion."[93]

In arguing that the trust should fail because of its racial restriction, the heirs had relied primarily on *City of Columbia v. Monteith*.[94] The court of appeals, however, found that though the trust in *Monteith* was created for indigent white children, the *Monteith* court "never addressed the racial restriction";[95] therefore, *Monteith* did not apply. In *Monteith* the testatrix left to the City of Columbia property on which there was an orphanage. She directed that there be an industrial school at this orphanage "for the children of indigent white persons . . . wherein the children would be trained for domestic service."[96] The City of Columbia brought suit to use the property as a regular school unit in which students would learn industrial and domestic training. The South Carolina Supreme Court held that "under the will, there is no authority to use the property for any class except the children of indigent white persons, and to use it for others would be unauthorized and necessarily subversive of the testatrix's intention."[97] The *Monteith* court did not address the racial restriction because the court was able to analyze the trust

89. *Id.* at __, 349 S.E.2d at 660. The court relied upon Wachovia Bank & Trust Co., N.A. v. Buchanan, 346 F. Supp. 665 (D.D.C. 1972), *aff'd*, 487 F.2d 1214 (D.C. Cir. 1973); Bank of Del. v. Buckson, 255 A.2d 710 (Del. Ch. 1969); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Ct. App. 1969); Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Ct. App. 1966).

90. __ S.C. at __, 349 S.E.2d at 660.

91. Bankers Trust v. Truesdale, 269 S.C. 191, 237 S.E.2d 45 (1977).

92. South Carolina Nat'l Bank v. Bonds, 260 S.C. 327, 195 S.E.2d 834 (1973).

93. *Id.* at 337, 195 S.E.2d at 840.

94. 139 S.C. 262, 137 S.E. 727 (1926).

95. __ S.C. at __, 349 S.E.2d at 659.

96. 139 S.C. at 266, 137 S.E. at 728.

97. *Id.* at 284, 137 S.E. at 733.

solely on its requirement of indigency.

In *Colin McK. Grant* the court of appeals found that it could uphold Mr. Grant's intention even though the court eliminated the racial restriction. By striking the racial restriction despite Mr. Grant's express language in the creation of the trust to provide housing for "white Presbyterians," the court of appeals liberally construed Mr. Grant's intention.

In eliminating the racial restriction, the court avoided the issue of state action. The heirs had alleged that the trust should be invalidated because it violated anti-discrimination laws. The discrimination embodied in the terms of Grant's trust is legitimate if it is conducted privately; however, when the state engages in such discrimination, the equal protection clause of the fourteenth amendment is invoked.[98] The issue arises when a governmental entity participates so heavily in private discrimination that the discrimination becomes state action. In *In re Estate of Wilson* the New York Court of Appeals examined whether a court engaged in state action when it enforced the discriminatory terms of a trust, thus permitting the discrimination to occur.[99] The court held that such enforcement was not state action.[100] In *Colin McK. Grant* the South Carolina Court of Appeals did not address the issue and, instead, struck the restriction from the terms of the trust.

In *Tinnin v. First United Bank*,[101] the Mississippi Supreme Court examined a case similar to *Colin McK. Grant*. The testator in *Tinnin* created a trust for students who were "of the Caucassion [sic] race and . . . none other."[102] The bank, as trustee, made loans from the trust without regard to race or color, and the testator's heirs sued, alleging the bank's "administration of the trust was contrary to the terms of" the testator's will.[103] Though the Mississippi court applied both the *cy pres* and the equitable deviation doctrines, the court in *Tinnin* examined the same issue of intent that the court of appeals analyzed in *Colin McK. Grant*. The Mississippi court focused on whether, "given

98. *In re* Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983).

99. *Id.*

100. *Id.* at 479-80, 452 N.E.2d at 1237, 465 N.Y.S.2d at 909.

101. 502 So. 2d 659 (Miss. 1987).

102. *Id.* at 661.

103. *Id.* at 662.

the options of administration of the trust on a non-discriminatory basis or dismantling the trust and delivery of its assets to the [heirs]," the testator would have preferred one of these options over the other.[104] The court found that "while charitable trusts are favored by the law, courts may not ignore the testator's intent in order to give effect to doubtful trust provisions."[105] The Mississippi court further stated that the central issue in these cases is whether the unenforceable racial exclusion was " 'incidental' or 'integral' to the testator's purpose."[106] The *Tinnin* court, however, held that the testator's express language and the historical context of the will indicated the racial limitation was not idly inserted.[107] The court then vacated the lower court's judgment striking the racially restrictive clause and remanded the case. While this is an interesting analysis, it is not the interpretation of the South Carolina Court of Appeals.[108]

In cases involving trusts that include racially restrictive clauses, some jurisdictions uphold the trust by striking the racial restriction.[109] Other jurisdictions, however, have invalidated such trusts because the racial restrictions are contrary to public policy and to the laws of the United States.[110] In *Colin McK. Grant* the South Carolina Court of Appeals set a broader precedent than that which existed under previous standards in the state: the court used equitable deviation to amend the administrative terms of a charitable trust (through eliminating its racial restrictions) to effectuate the terms of the trust.

Janet C. Brooks

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104. *Id.* at 667.
105. *Id.* at 668.
106. *Id.*
107. *Id.*
108. ___ S.C. at ___, 349 S.E.2d at 660.
109. *See* United States v. Hughes Memorial Home, 396 F. Supp. 544 (W.D. Va. 1975); Wachovia Bank & Trust Co. v. Buchanan, 346 F. Supp. 665 (D.D.C. 1972), *aff'd*, 487 F.2d 1214 (D.C. Cir. 1973); *In re* Will of Potter, 275 A.2d 574 (Del. Ch. 1970); Bank of Del. v. Buckson, 255 A.2d 710 (Del. Ch. 1969); Trammell v. Elliot, 230 Ga. 841, 199 S.E.2d 194 (1973); Wooten v. Fitz-Gerald, 440 S.W.2d 719 (Tex. Civ. App. 1969).
110. *See* Evans v. Newton, 221 Ga. 870, 148 S.E.2d 329 (1966), *aff'd sub nom.* Evans v. Abney, 396 U.S. 435 (1970); La Ford v. City of Detroit, 357 Mich. 362, 98 N.W.2d 530 (1959).