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Article 7

Real Property

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publicizing of her illegitimate status. After resolving numerous procedural questions, the court ruled that:

(1) A putative father has the constitutional right[42] to establish his status as the parent of an illegitimate child, and therefore has some parental rights and duties which may be determined by means of a declaratory judgment.[43]

(2) While the mother has no cause of action for breach of promise to marry in Wisconsin,[44] she does have a cause of action for seduction.[45]

(3) While generally Wisconsin does not recognize a cause of action for invasion of privacy, the exception for an intentional causing of emotional distress permits the cause of action as pleaded in this case.[46]

(4) Due to public policy and possible social ramifications, an illegitimate child has no cause of action against her natural father for "wrongful birth."[47]

The complex substantive and procedural questions involved in this case were remanded for further proceedings.

JOHN W. KNUTESON

REAL PROPERTY

I. LANDLORD AND TENANT

In the 1973 term the Wisconsin Supreme Court decided two cases involving the law of landlord and tenant, concerning the landlord's right to receive rent. In *State ex rel. Building Owners & Managers Association of Milwaukee, Inc. v. Adamany*,[1] a group of property owner-landlords brought an original action in the supreme court seeking a declaratory judgment on the constitution-

42. The court relied upon two recent cases, Stanley v. Illinois, 405 U.S. 645 (1972); State ex rel. Lewis v. Lutheran Social Services, 59 Wis. 2d 1, 207 N.W.2d 826 (1973).

43. WIS. STAT. § 269.56 (1971); 62 Wis. 2d at 305-307, 215 N.W.2d at 15-16.

44. WIS. STAT. § 248.01 and § 248.02 (1971).

45. 62 Wis. 2d at 310-312, 215 N.W.2d at 18-19; 43 MARQ. L. REV. 341, 356 (1960).

46. *Id.* at 315, 215 N.W.2d at 20, citing Alsteen v. Gehl, 21 Wis. 2d 349, 124 N.W.2d 312 (1963).

47. 62 Wis. 2d at 316-318, 215 N.W.2d at 21-22.

1. 64 Wis. 2d 280, 219 N.W.2d 274 (1974).

ality of section 539 of chapter 90, Laws of 1973[2] and an injunction against enforcement of the statute. Section 539 was enacted for the ostensible purpose of passing along to tenants the benefit of property tax reductions which property owners were expected to receive from pending legislation.[3] It required that every owner of rental property reduce his lessee's rent obligation by the amount by which the property taxes paid on that property in 1972 exceeded the property taxes paid in 1973.

In this action, which was originally four separate cases which were consolidated for hearing, the plaintiffs challenged the constitutionality of the rent reduction law on nearly every conceivable ground. Reasoning from the well settled premise that all legislation is to be presumed constitutional until unconstitutionality has been proven beyond a reasonable doubt,[4] the court rejected the plaintiffs' first contention that the statute served no public purpose. It held that the attempt by the legislature to equitably distribute anticipated tax concessions was, at least arguably, in furtherance of a legitimate state interest. Similarly, the court rejected the argument that the rent reduction law constituted a property tax which did not apply uniformly to all property as required by the Wisconsin Constitution.[5] The court reasoned that since the statute did not provide for the collection and disbursement of funds by the state, it was not a tax within the accepted definition of the term, and the uniformity rule did not apply.[6]

The ultimate ruling that section 539 was unconstitutional was based on the finding that enforcement of the law would impair the obligation of contracts in violation of the United States and Wisconsin Constitutions.[7] The court applied a strict interpretation of

2. Wis. Laws 1973, ch. 90, § 539 provided:

Section 539. **Rent reductions due to property tax relief.** On or before January 15, 1974, each owner of property in this state which is rented for use by others shall reduce that portion of the annual rent due to property taxes on that property by a dollar amount equal to the amount, if any, by which taxes paid devoted to property for 1972 exceed property taxes paid on that property for 1973. If the property includes more than one rental unit the amount of reduction shall be in the same proportion that the rent from that unit bears to the rent of the entire property.

3. Although the intention or purpose of the legislature is nowhere stated, the court relied on the statements made in Executive Budget Policy Paper No. 31, February 1973.

4. State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 205 N.W.2d 784 (1973); Gottlieb v. Milwaukee, 33 Wis. 2d 408, 147 N.W.2d 633 (1967).

5. WIS. CONST. art. VIII, § 1.

6. State ex rel. Building Owners & Managers Ass'n. of Milw. v. Adamany, 64 Wis. 2d at 289, 219 N.W.2d at 279.

7. U.S. CONST. art. I, § 10 provides in part:

the contract clauses which had been adopted in earlier decisions of the United States Supreme Court and the Wisconsin court[8] and concluded that:

> Because sec. 539 would require the landlords in these leases to collect less rent than the leases obligate the renters to pay, the enforcement of sec. 539 impairs the contractual obligation on these leases in violation of the United States and Wisconsin Constitution.
>
> Sec. 539 would not merely affect the remedy to which a party might resort for satisfaction of the contract, but would impair the very consideration that was agreed upon. The lessor would receive less rent than he bargained for.[9]

Although it is well settled that contractual obligations enjoy constitutional protection, there is another, equally well settled principle that rights secured by contracts are not absolute but may be amended or abrogated by a valid exercise of the state's police power.[10] The Wisconsin rule in this regard was stated in *Kuhl Motor Co. v. Ford Motor Co.*[11] and reaffirmed by the court in *Adamany*.

> This court adheres to the basic philosophy of *Kuhl*, . . . that an unequivocal legislative declaration of public policy, made either before or after the execution of a contract, becomes a part of that contract if the legislature makes it clear that such is its intention and if it can be determined, either by recitals in the legislation or by judicial notice, that vital public interests will be impaired if the legislation is not given effect and vital interests will be enhanced by enforcement of the legislation.[12]

The court concluded that under the *Kuhl* doctrine the rent reduction law and the impairment of contracts which would result from its enforcement could not be justified as a valid exercise of

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> No state shall enter into any treaty, alliance, or confederation, grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility.

WIS. CONST. art. I, § 12 provides:

> No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed, and no conviction shall work corruption of blood or forfeiture of estate.

8. In re Cranberry Creek Drainage District, 202 Wis. 64, 231 N.W. 588 (1930).
9. 64 Wis. 2d at 291, 219 N.W.2d at 280.
10. Berman v. Parker, 348 U.S. 26 (1954).
11. 270 Wis. 488, 71 N.W.2d 420 (1955).
12. 64 Wis. 2d at 299, 219 N.W.2d at 284.

the state's police power. Neither the drafters of the law nor its proponents in this case satisfactorily demonstrated to the court that exigent circumstances involving the public interest required such an exercise of the police power, at the expense of constitutionally protected obligations. It should be noted that although the court was highly critical of the rent reduction law, its criticism was directed primarily at the legal insufficiency of the statute itself rather than the policy of providing rent relief to tenants, and the decision in *Adamany* does not foreclose the possibility of a similar, but properly drafted, statute to achieve that purpose.[13]

Where two or more persons have an interest in the same real estate, and each claims the rents from that property, the accepted rule is that the party entitled to possession of the property has the right to receive the rents.[14] A number of Wisconsin cases have extended the applicability of this rule to the situation in which a property owner has pledged the rents from his property as additional security for a mortgage. Those cases hold that the mortgagee does not automatically become entitled to the pledged rents at the occurrence of default but must actually take possession of the property in a foreclosure action before such a right accrues.[15] In *Lincoln Crest Realty, Inc. v. Standard Apartment Development of West Allis, Inc.*,[16] the court considered for the first time whether the rule is equally applicable to the situation in which a lessee has pledged the rents from subleases to his lessor as security for the lease.

Standard Apartment Development had contracted with Lincoln Crest Realty to build, finance and manage an apartment complex under a twenty-five year lease. An assignment clause in the lease provided that upon termination of the lease or a default on the part of the lessee, the lessor, Lincoln Crest, would be entitled to all of the rents received from the operation of the apartments. To acquire sufficient operating capital, Standard borrowed money from Midland National Bank and executed a second assignment

13. 64 Wis. 2d at 302, 219 N.W.2d at 286.

14. RESTATEMENT OF PROPERTY § 119 (1932):

> The owner of a possessory estate for life, during the continuance of such estate has the privilege of taking and receiving all issues and profits derived from the land.

Although this section applies to possessory life interests, it illustrates the common law distinction between possessory and non-possessory interests in land relative to the right to receive rents and profits.

15. Grether v. Nick, 193 Wis. 503, 213 N.W. 304 (1927); Wuorinen v. City Federal Savings & Loan Ass'n., 52 Wis. 2d 722, 191 N.W.2d 27 (1971).

16. 61 Wis. 2d 4, 211 N.W.2d 501 (1973).

of rents as security for the loan. This second assignment was made with the approval of Lincoln Crest and upon the express condition that Midland's rights under the assignment would remain subordinate to those of Lincoln Crest.

When Standard failed to meet its obligations under the lease, Lincoln Crest issued a five-day termination notice which was to expire on January 26, 1971. Standard neither paid its rent nor surrendered the leased premises on that date, and on February 2, 1971 Lincoln Crest commenced an action seeking repossession of the apartments and a judgment terminating the lease. Standard had also defaulted on the loan from Midland, and on February 3, 1971 the bank appropriated all of the funds in Standard's operating account, consisting largely of rents, as a setoff against the balance due on the note. The trial court recognized that Midland had merely exercised the common-law right of a creditor to go against the debtor's property in his possession and had not exercised any rights under the assignment. However, the court found that the rent receipts were not subject to Midland's setoff because title to them had vested in Lincoln Crest by operation of the assignment prior to the date of the setoff.

The supreme court held that the rule requiring actual possession before a mortgagee can claim pledged rents was equally applicable in the situation in which a pledge of rents has been given to secure a lease. This is true even though a lessor is the holder of title, whereas a mortgagee is only a lienholder under Wisconsin's lien theory of mortgages.[17] The court, relying heavily on a California decision,[18] concluded that the right to rents is an incident of possession and not a question of title. As stated by the court, "The lessor does not have the right to rents and profits even though they have been assigned until such time as he gains possession, either actual or constructive, or by the appointment of a receiver."[19]

In this case, Lincoln Crest had neither taken possession of the property nor secured the appointment of a receiver prior to Midland's setoff, and according to the above stated rule, the rents continued to belong to Standard and were subject to appropriation by Midland.

17. *Id.* at 12, 211 N.W.2d at 505.

18. Childs Real Estate Co. v. Shelburne Realty Co., 23 Cal. 2d 263, 143 P.2d 697 (1943).

19. Lincoln Crest Realty, Inc. v. Standard Apartment Development, Inc., 61 Wis. 2d at 11, 211 N.W.2d at 504.

However, the court recognized that in certain situations, such an assignment would effectively transfer the rents to the lessor before he has repossessed the property. The right to rents will ripen prior to repossession when the circumstances which will activate the assignment are written with such specificity as will enable a court to enforce the provision.

> We hold that, in a lease agreement where there is an assignment of rents and profits, that assignment becomes operative and effective only when the lessor takes possession of the property or at such time and under such circumstances as are detailed with specificity in the agreement to a degree that a court may determine with certainty the effective date of the assignment of rents and profits prior to the taking of possession, actual or constructive.[20]

The assignment provision in Lincoln Crest's lease had listed a number of occurrences which would activate the assignment of rents, most of which lacked sufficient specificity to effectively transfer title to the rents without repossession of the property.[21] But the court conceded that the provision that the assignment would become operative upon the termination or cancellation of the lease would effectively transfer the rents to Lincoln Crest prior to repossession if the trial court had declared the lease to be terminated on a certain date. In such a case, Lincoln Crest would acquire all of the rents collected subsequent to that date, but the rents collected previous to the termination date would be subject to Midland's setoff.

Accordingly, the trial court's order directing Midland to turn over the funds from Standard's account was overruled, and the case was remanded for a determination of the precise date that the lease was terminated.

II. CONDEMNATION AND EMINENT DOMAIN

Although few would challenge the state's general authority to limit private rights in land when it is in the public interest to do

20. *Id.* at 15, 211 N.W.2d at 507.

21. The particular provision involved provided:

> [S]uch assignment shall become operative and effective only in the event that this lease and the terms thereof shall be terminated or cancelled pursuant to the terms and conditions hereof, or in the event of the issuance and execution of a dispossess warrant or other re-entry or repossession by Landlord under the provisions hereof, or in the case of an event of default on the part of Tenant.

so, the question of when such a limitation on private rights is reasonably required is the subject of a great many disputes; *e.g.*, the case of *Posnanski v. West Allis*.[22]

Wisconsin Statute section 66.05(1)(a) gives the governing body or building inspector of every municipality the authority to order the razing of any private building which is in a dangerous state of disrepair if it is determined that the cost of restoring the building to an acceptable condition would be "unreasonable." Subdivision (b) of section 66.05(1) prescribes a test for determining whether or not the cost of repairs is "unreasonable" so as to foreclose the option of restoring the building rather than razing it. Section 66.05(1)(b) provides:

> Whenever a municipal governing body, inspector of buildings or designated officer determines that the cost of such repairs would exceed 50 per cent of the assessed value of such building divided by the ratio of the assessed value to the recommended value as last published by the state supervisor of assessments for the municipality within which such building is located, such repairs shall be presumed unreasonable and it shall be presumed for the purpose of this section that such building is a public nuisance.

The plaintiff, Mary T. Posnanski, brought this action for judicial review of an order of the building inspection department of West Allis directing that she raze a building which she owned in that city. At the hearing, the defendant municipality satisfactorily demonstrated that to place the structure in an acceptable condition would require the expenditure of a sum in excess of fifty per cent of its value. Accordingly, the lower court found that the building was in an unreasonable state of repair, and the defendant had the authority to order its removal under section 66.05(1)(a).

On appeal, the plaintiff challenged the constitutionality of the fifty per cent of value test prescribed in section 66.05(1)(b) but did not challenge the constitutionality of section 66.05(1)(a) which had been established in an earlier decision.[23] The plaintiff contended that the statutory test imposed an arbitrary and rigid standard which did not take into consideration possible mitigating circumstances.

The court rejected the plaintiff's challenge and based its determination in a literal interpretation of the statute's wording. Since

22. 61 Wis. 2d 461, 213 N.W.2d 51 (1973).

23. Appleton v. Brunschweiler, 52 Wis. 2d 303, 190 N.W.2d 545 (1971).

the statute is phrased in terms of creating a rebuttable presumption of unreasonableness, it cannot be maintained that it establishes an arbitrary standard in violation of constitutional principles. So construed, the statute would not prevent the restoration of historic or cultural landmarks at an expense in excess of fifty per cent of their value. Furthermore, any property owner faced with an application of the statue would have the opportunity to rebut the presumption of unreasonableness.

The dispute in *Jantz v. State*[24] arose out of a very limited fact situation, but the supreme court's decision is nevertheless significant because of the distinction made between the state's power of eminent domain and the state's police power in relation to private interests in land. A property owner brought this action against the state seeking compensation for damages arising out of a highway improvement project which required a partial taking of land and a contemporaneous change of road grade. A portion of the plaintiff's property had been raised substantially, and although no additional land had been taken, the change of grade was alleged to have decreased the commercial value of the property.

The property owner argued that the change of grade and the widening of the road constituted a single action by the state. Where a single exercise of the state's power of eminent domain necessarily involves a change of grade, Wisconsin Statute section 32.09(6)[25] entitles the property owner to compensation for all of the damage caused thereby.

In opposition, the state contended that since the widening of the one road did not necessarily entail the grade change of the other, two separate and distinct actions had been taken by the state. Where a change of grade does not require a taking of property, Wisconsin Statute section 32.18[26] controls, and damages are ordi-

24. 63 Wis. 2d 404, 217 N.W.2d 266 (1974).

25. WIS. STAT. § 32.09(6) provides in part as follows:

(6) In the case of a partial taking the compensation to be paid by the condemnor shall be determined by deducting from the fair market value of the whole property immediately before the date of evaluation, the fair market value of the remainder immediately after the date of evaluation, . . . to the following items of loss or damage to the property where shown to exist:

. . .

(f) Damages to property abutting on a highway right of way due to change of grade where accompanied by a taking of land.

26. WIS. STAT. § 32.18 entitled **Damage caused by change of grade of street or highway where no land is taken; claim; right of action,** provides in part as follows:

Where a street or highway improvement project undertaken by the highway commission, a county, city, town or village, causes a change of grade of such street

narily not compensable. In such a situation, the state's action is viewed as an exercise of its police power which permits injury without compensation.[27]

In *Jantz*, the supreme court affirmed the trial court's decision that the change of grade and the widening constituted two separate state actions. Accordingly, the plaintiff was duly compensated for the loss suffered by reason of the partial taking under eminent domain authority, but was denied recovery for the loss which resulted from the exercise of the police power.

III. ZONING

Two decisions of the past term have clarified significantly the Wisconsin position regarding the procedure whereby property owners can seek judicial review of municipal zoning ordinances and orders. In *Kmiec v. Spider Lake*[28] the plaintiffs had purchased a large section of unzoned property to be developed for recreational purposes. After considerable improvements had been made, the town of Spider Lake adopted a zoning plan which classified the plaintiffs' property as an agricultural district. Following two unsuccessful attempts to get the property reclassified, an action was commenced in the circuit court seeking a declaratory judgment on the constitutionality of the zoning ordinance. The plaintiffs argued, and the trial court agreed, that the classification of the plaintiffs' property as an agricultural district was an exercise of municipal authority without logical basis which deprived the owners of the value of their property in violation of the Wisconsin and United States Constitutions.[29] The issues presented on appeal were:

> 1. Whether plaintiffs should have been required to exhaust their administrative remedies before commencing this declaratory judgment action?
> 2. Whether the classification of plaintiffs' property as A-1, agricultural district has no logical basis and is utterly unreasonable, as determined by the trial court?[30]

In regard to the second issue, the court affirmed the trial

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or highway . . . but does not require a taking of any abutting lands, the owner of such lands at the date of such change of grade may file with the highway commission . . . a claim for any damages to said lands occasioned by such change of grade. . . .

27. Schneider v. State, 51 Wis. 2d 458, 187 N.W.2d 172 (1971).

28. 60 Wis. 2d 640, 211 N.W.2d 471 (1973).

29. WIS. CONST. art. I, § 13, U.S. CONST. amend. XIV.

30. Kmiec v. Spider Lake, 60 Wis. 2d at 644, 211 N.W.2d at 472.

court's decision that the zoning ordinance was unconstitutional[31] as applied to the plaintiffs' property. This determination was based on two considerations. First, since the property had not been farmed for eleven years and was actually unsuitable for farming, the classification was utterly unreasonable. Secondly, the classification had substantially diminished the value of the property.

On the first issue, it was argued by the defendant municipality that the state courts were without jurisdiction to render declaratory relief because the plaintiffs had not exhausted the available administrative remedies. The exhaustion of remedies doctrine, as applied in zoning matters, requires that where relief from zoning ordinances is sought, the property owner may not resort to the courts until all of the remedies provided by the municipal zoning authority have been exhausted.[32] While recognizing the continuing validity of the exhaustion of remedies doctrine in most situations, the court held that it was inapplicable when the constitutionality of a particular zoning ordinance has been challenged. A municipal administrative agency is ill equipped and unauthorized to resolve the issue of law which is raised by a challenge to the constitutional validity of a zoning ordinance.[33] Therefore, it was appropriate for the plaintiffs to seek relief in the form of a declaratory judgment.

Master Disposal, Inc. v. Menomonee Falls[34] arose out of a nearly identical fact situation and involved many of the same considerations presented in *Kmiec*. The plaintiff had purchased ten acres of swampland in the village of Menomonee Falls which was to have been used an an industrial landfill site. At the date of purchase, the village zoning ordinances classified the property as "wetland" and provided that filling was permissable if approved by the plan commission. After the plaintiff was initially denied permission but before the commission's ruling could be appealed, the property was rezoned and reclassified as "floodplains." Under the new classification the property could not be filled under any circumstances, and the plaintiff was foreclosed from any further administrative relief. The plaintiff commenced an action in the circuit court for a declaratory judgment on the issue of procedural due process. The plaintiff appealed from an order granting the defendant's motion for summary judgment.

31. *Id.* at 652, 211 N.W.2d at 477.
32. Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952).
33. 60 Wis. 2d at 646, 211 N.W.2d at 473.
34. *Id.* at 653, 211 N.W.2d at 477.

On its own initiative the supreme court raised the issue of whether or not the plaintiff had invoked the state courts' jurisdiction to review the decision of the Menomonee Falls zoning board of appeals, and concluded that it had not. Wisconsin Statute section 62.23(7)(e)[35] provides that the appropriate procedure for obtaining a judicial review of a decision by a municipal zoning board is by petition for a writ of certiorari. A number of earlier Wisconsin decisions have held that the writ of certiorari is the exclusive remedy to challenge the action of a municipal zoning authority.[36]

The court affirmed the position taken in the earlier Wisconsin cases, and ruled that the writ of certiorari is the exclusive remedy available to a property owner who wishes to challenge the decision of a municipal zoning body or the constitutionality of the proceeding in which the decision was reached. Accordingly, both the trial court and the supreme court were without jurisdiction to render the requested declaratory judgment, and the plaintiff's appeal was dismissed.

There is a crucial distinction which explains the apparent inconsistency of these two decisions. The plaintiff in *Master Disposal* challenged the constitutionality of the zoning board's application and enforcement of an ordinance. In that situation, the exclusive means of obtaining judicial review is the writ of certiorari which will issue only after all administrative remedies have been exhausted.[37] In contrast, the plaintiffs in *Kmiec* challenged the constitutional validity of the zoning ordinance itself. In that situation, a significant issue of law is raised which a zoning board has no authority to resolve. Consequently, the exhaustion of remedies doctrine is inapplicable, and judicial review of the ordinance may be obtained in a declaratory judgment proceeding.[38]

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35. WIS. STAT. § 62.23(7)(e) provides in part:

10. Any person or persons, jointly or severally aggrieved by any decision of the board of appeals . . . may present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. . . .

11. Upon the presentation of such petition the court may allow a writ of certiorari directed to the board of appeals in order to review such decision of the board of appeals. . . .

36. Fersh v. Schroedel, 241 Wis. 457, 6 N.W.2d 176 (1942); State ex rel. Martin v. Juneau, 238 Wis. 564, 300 N.W. 187 (1941).

37. Master Disposal, Inc. v. Menomonee Falls, 60 Wis. 2d at 659, 211 N.W.2d at 480.

38. *Id.*

IV. TORT LIABILITY

A. Slander of Title

The common law recognized a cause of action in favor of a property owner against another who had falsely and maliciously asserted a claim on his title.[39] This common law rule was recently codified in Wisconsin Statute section 706.13, which provides:

> **Slander of title.** In addition to any criminal penalty or civil remedy provided by law, the execution, placing of record or both of any instrument relating to the title to land, knowing the matter represented in such instrument to be false, spurious or sham, and intending thereby falsely to cloud or encumber the title, shall subject the person so executing or recording the same to liability in tort for damages, recoverable at the suit of any person interested in the land whose title is thereby impaired, in the penalty sum of $1,000, plus any actual damages caused thereby.

Although the heavily confused facts of *Schlytter v. Lesperance*[40] and the narrow issue resolved are not themselves noteworthy, the case is significant as the first judicial interpretation of section 706.13. The plaintiffs had purchased investment property from the defendants. The defendants later alleged that the deed had actually been a mortgage and recorded an affidavit with the register of deeds in which they asserted their claim to the plaintiffs' property. The plaintiffs commenced an action to quiet title to the property, but during the trial the complaint was amended to include a cause of action for slander of title pursuant to section 706.13 which had since become effective. Although not entirely clear from the record on appeal, it appears that the trial court quieted title to the property in the plaintiffs, but sustained the defendants' demurrer to the claim for the $1,000 penalty on the ground that section 706.13 could not be applied retroactively. However, the trial court rejected the defense of the statute of limitations, and found that the plaintiffs were entitled to recover actual damages for slander of title under the common law rule.

While expressing its frustration with the inconclusive trial court record,[41] the supreme court ultimately held that section 706.13

39. Feiten v. City of Milwaukee, 47 Wis. 494, 2 N.W. 1148 (1879); 53 C.J.S. *Libel and Slander* §§ 276, 278 (1948).

40. 62 Wis. 2d 661, 215 N.W.2d 552 (1974).

41. It appears that the trial court's final judgment was amended after the defendants had filed their notice of appeal, and the court was unable to clearly determine the issues on appeal.

could not be applied retroactively so as to entitle the plaintiffs to the $1,000 penalty. The court further held that the plaintiffs' common law action for slander of title was subject to the defense of the statute of limitations, since the enactment of section 706.13 could not revive a cause of action against which the statute had run. Accordingly, the case was remanded to determine the existence of a common law cause of action and the applicability of the statute of limitations.[42]

In the court's comparison of the common law cause of action for slander of title and the new statutory cause of action, several statements are made which unfortunately raise a potentially troublesome question in regard to the element of actual damages. The opinion states:

> We think there exists a cause of action for a malicious, intentional slander of title at common law and that sec. 706.13, Stats., *so far as damages are concerned*, was merely declaratory of the common law[43] . . . . The section, being merely declaratory of the common law, did not create a cause of action nor did it destroy the common law cause of action.[44] (Emphasis added)

It would appear well settled that at common law an essential element of a cause of action for slander of title is that the property owner must have sustained actual, pecuniary loss as a direct result of the slander of his title. Without the element of special damage, no cause of action for slander of title exists.[45] In what appears to be the only other Wisconsin case on the subject of slander of title, it was stated that:

> Such an assault upon the title of another, to be actionable, must be made maliciously and without probable cause. If so made, it may amount to slander of title and be actionable, and the damages may be increased by unnecessary delay in prosecuting the action. The rule is that "language concerning a thing is actionable when published maliciously, *i.e.*, without lawful excuse, if it also occasions damage to the owner of the thing."[46]

In contrast, section 706.13 is phrased in terms which clearly

42. Schlytter v. Lesperance, 62 Wis. 2d at 666, 215 N.W.2d at 555.

43. *Id.* at 666, 215 N.W.2d at 554.

44. *Id.* at 667, 215 N.W.2d at 555.

45. Feiten v. City of Milwaukee, 47 Wis. 494, 2 N.W. 1148 (1879); 53 C.J.S. *Libel and Slander* §§ 276, 278 (1948).

46. 47 Wis. at 498, 2 N.W. at 1150.

imply that an action may be maintained for recovery of the $1,000 penalty alone, and that actual damages are only an additional, optional item of recovery. It is submitted that if section 706.13 is to be construed as allowing the recovery of the penalty sum in the absence of actual damage, then the enactment of this statute created a cause of action where none existed at common law, contrary to the language in *Schlytter*.

B. Interference with Ground Water

Sinse the decision of *Huber v. Merkel*[47] in 1903, the Wisconsin rule relative to unchanneled ground water has been that the owner of land has an absolute license to use or waste the water which flows beneath his land without incurring liability for any injury caused to adjoining landowners. In *State v. Michels Pipeline Construction, Inc.*,[48] the court finally overruled the outmoded *Huber* rule, and recognized a cause of action in favor of those who suffer unreasonable harm because of the lowering of their water table.

The defendant, Michels Pipeline Construction, had been engaged by the Metropolitan Sewerage Commission of Milwaukee to install a sewer in the city of Greenfield along a construction easement granted for that purpose by the county. To facilitate the laying of the pipeline, a large quantity of water was pumped out of various wells in the area in order to lower the water table to a depth of forty feet. As a direct result, many private wells in the area were dried up, and the subsidence of the soil caused the cracking of foundations and driveways. The state, on behalf of numerous property owners affected by the defendants' action, brought a public nuisance action to require that the sewer be constructed in a manner which would not cause damage. The trial court correctly interpreted the *Huber* ruling, and held that no cause of action existed for interference with ground water.

On appeal, the supreme court considered at length the question of whether the defendants' action could properly constitute a "public nuisance" in view of the fact that private property rights rather than a public interest were involved. The court reviewed a long line of Wisconsin cases which have held that the scope of the injury rather than the type of injury will determine whether a nuisance is public or private.[49] Consequently, the court concluded that since a

47. 117 Wis. 355, 94 N.W. 354 (1903).
48. 63 Wis. 2d 278, 217 N.W.2d 339 (1974).
49. Boden v. Milwaukee, 8 Wis. 2d 318, 99 N.W.2d 156 (1959); Hartung v. Milwaukee

sufficiently large number of persons had been affected, the complaint had properly alleged a public nuisance.

The court's ultimate conclusion that the *Huber* rule could no longer be supported was based on three principal considerations. First, it was determined that although the ruling in *Huber* purported to follow the prevalent English or common law rule of its day, it had actually gone beyond that rule in providing that even a malicious interference with ground water did not affect the rule of non-liability.[50] For this reason, the case has received severe criticism from many authorities.[51]

Secondly, the underlying rationale for the rule was that the flow pattern of ground water was too mysterious and unpredictable to be regulated or to serve as the basis of liability for interference as had been done in the case of surface streams.[52] The court recognized that modern scientific knowledge would no longer support the arbitrary distinction between surface and ground waters or the *Huber* rule of non-liability since

> . . . a cause and effect relationship can be established between a tapping of underground water and the level of the water table in the area so that liability can be fairly adjudicated consonant with due process. Our scientific knowledge also establishes the interdependence of all water systems.[53]

Thirdly, the common law position of absolute ownership of ground water can no longer be considered the prevalent view in this country since twenty-eight states have rejected it in favor of more modern rules which impose liability for unreasonable interference with ground water which adversely affects others.

In deciding which of several alternative rules should be adopted in place of the *Huber* rule, the court considered in detail those adopted in other states,[54] but selected instead the rule set forth in Section 858A of the Restatement (Second) of Torts (Tentative Draft No. 17, 1971) which provides:

> **Non-liability for use of ground water - exceptions**
>
> A possessor of land or his grantee who withdraws ground

County, 2 Wis. 2d 475, 87 N.W.2d 799 (1957); Schiro v. Oriental Realty Co., 272 Wis. 537, 76 N.W.2d 355 (1956).

50. State v. Michels Pipeline Construction, Inc., 63 Wis. 2d at 289, 217 N.W.2d at 344 (1974).

51. *Id.*

52. *Id.*

53. *Id.* at 291, 217 N.W.2d at 345.

54. *Id.* at 298, 217 N.W.2d at 349.

water from the land and uses it for a beneficial purpose is not subject to liability for interference with the use of water by another, unless

(a) The withdrawal of water causes unreasonable harm through lowering the water table or reducing artesian pressure,

(b) The ground water forms an underground stream, in which case the rules stated in sec. 850A to 857 are applicable, or

(c) The withdrawal of water has a direct and substantial effect upon the water of a watercourse or lake, in which case the rules stated in secs. 850A to 857 are applicable.

Thus, the Restatement rule continues to recognize the right of a property owner to utilize ground water without incurring liability, but imposes certain limitations which appear enforceable, yet flexible enough to apply fairly in a wide variety of circumstances.

ERIC J. VAN VUGT

TAXATION

I. TAXATION AND THE MARITAL RELATIONSHIP

After only a very few years experience with the federal income tax as originally enacted, legislators were made acutely aware of the different tax results between married individuals living in separate property states and those living in community property states. Under the community property theory, all income earned by married couples was split equally between them. Naturally the tax burden was considerably lower than that sustained in separate property states where one party earned all or substantially more of the income than the other. The remedy for such unequal taxation was to adopt income splitting in the form of the joint return as part of the Internal Revenue Code.[1] The joint return affords similar treatment to married individuals respective of state law.[2]

A. Income Splitting

Prior to 1965, income taxation in Wisconsin made no reference to the federal tax base. The Wisconsin Legislature enacted an income tax "simplification law"[3] in July of 1965 which provided

1. INT. REV. CODE OF 1954, § 6013.
2. McClure v. United States, 228 F.2d 322 (4th Cir. 1955).
3. Wis. Laws 1965, ch. 163.