

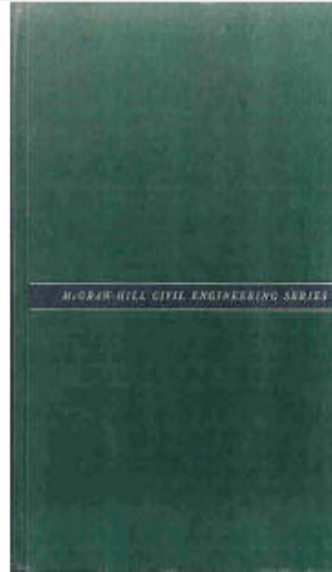
LEGAL ASPECTS OF ENGINEERING & CONSTRUCTION

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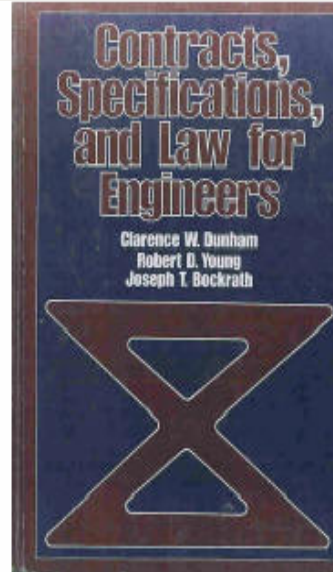
Contracts and the Legal Environment for Engineers and Architects
Joseph T. Bockrath and Fredric L. Plotnick - McGraw-Hill



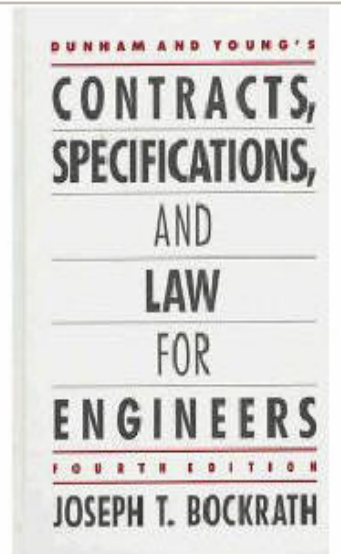
First Edition 1958



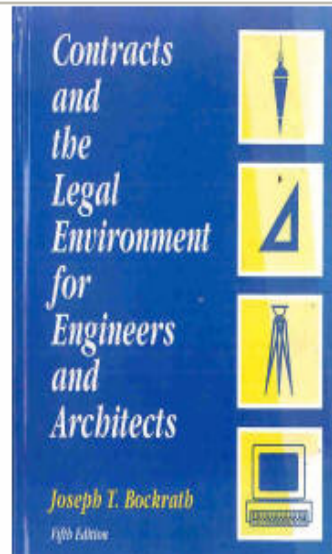
Second Edition 1971



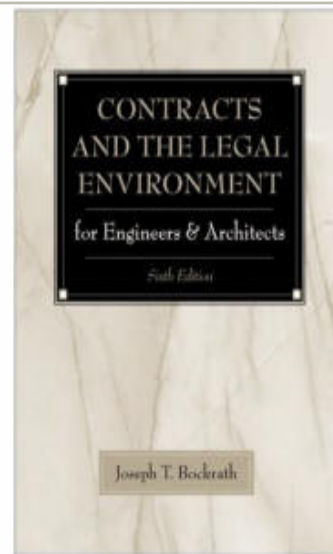
Third Edition 1979



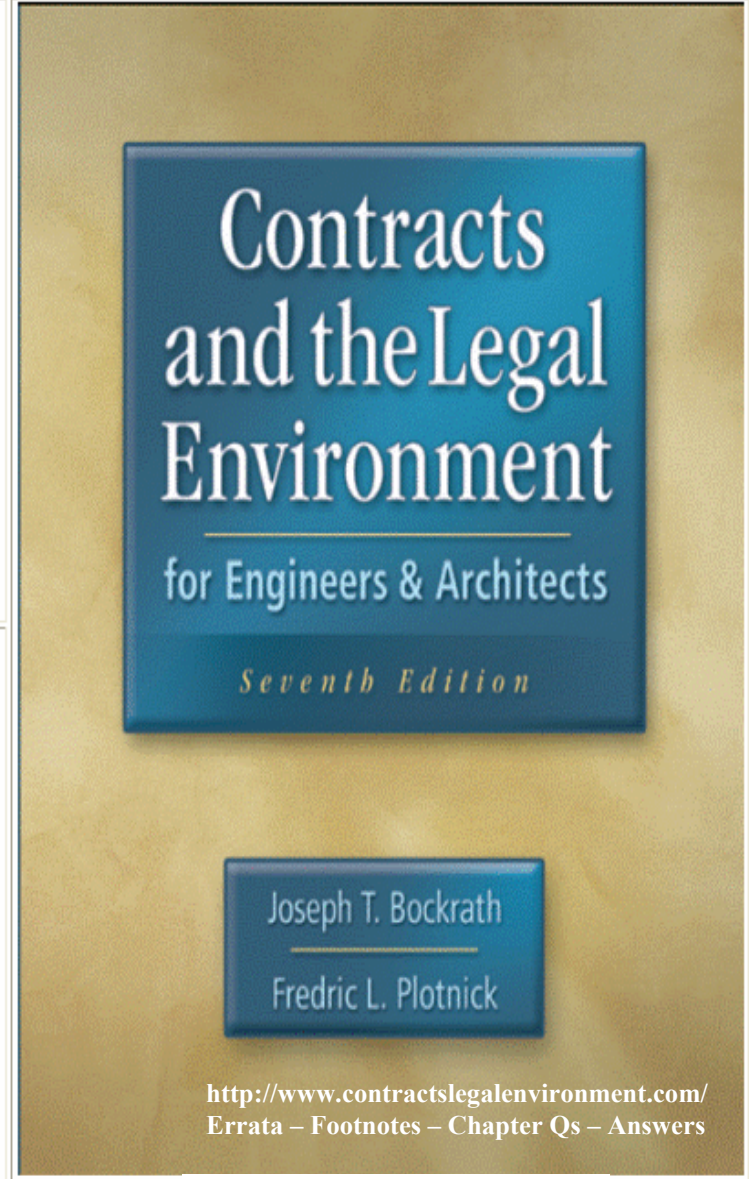
Fourth Edition 1986



Fifth Edition 1994



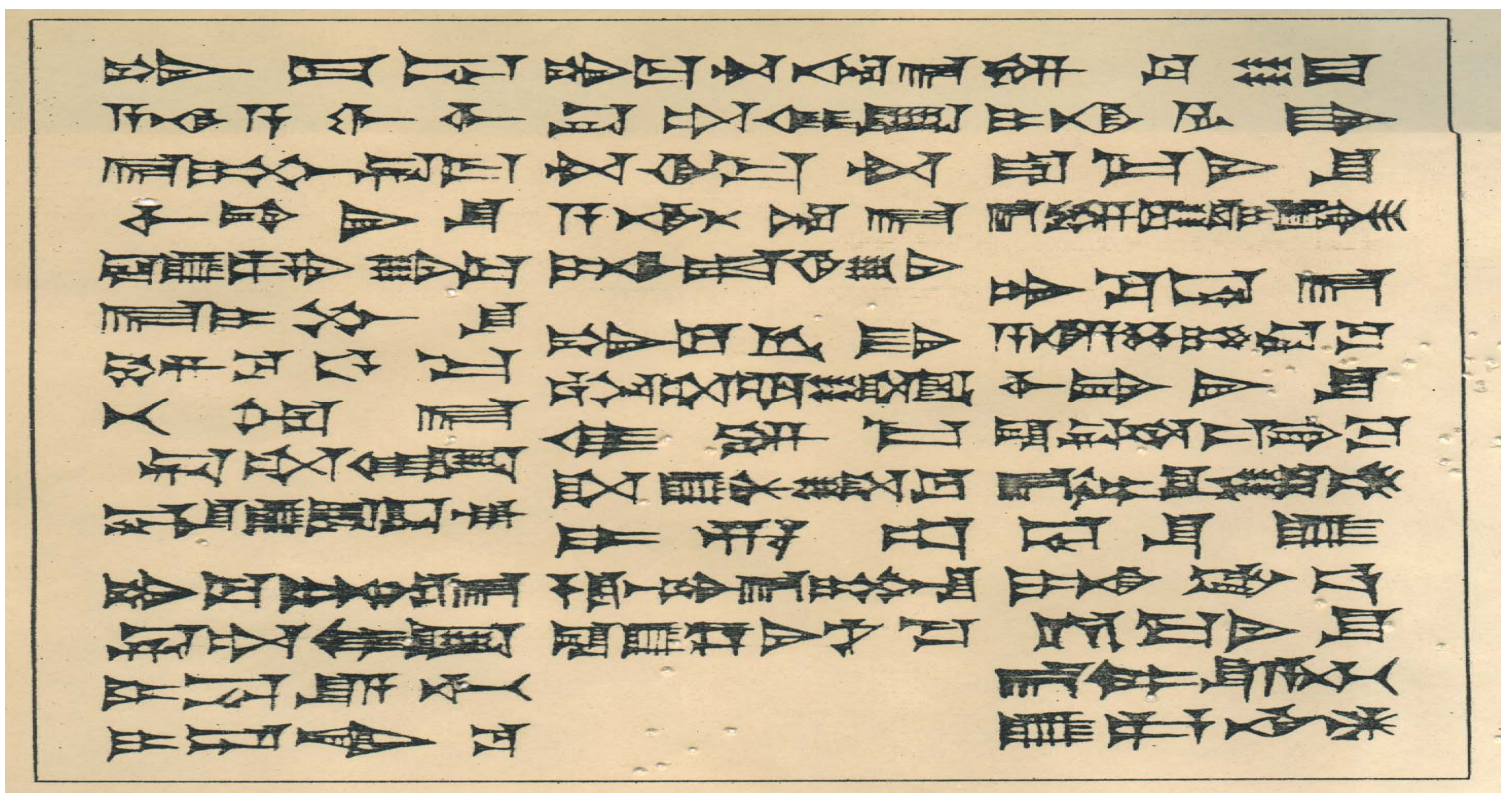
Sixth Edition 2000



Seventh Edition 2010

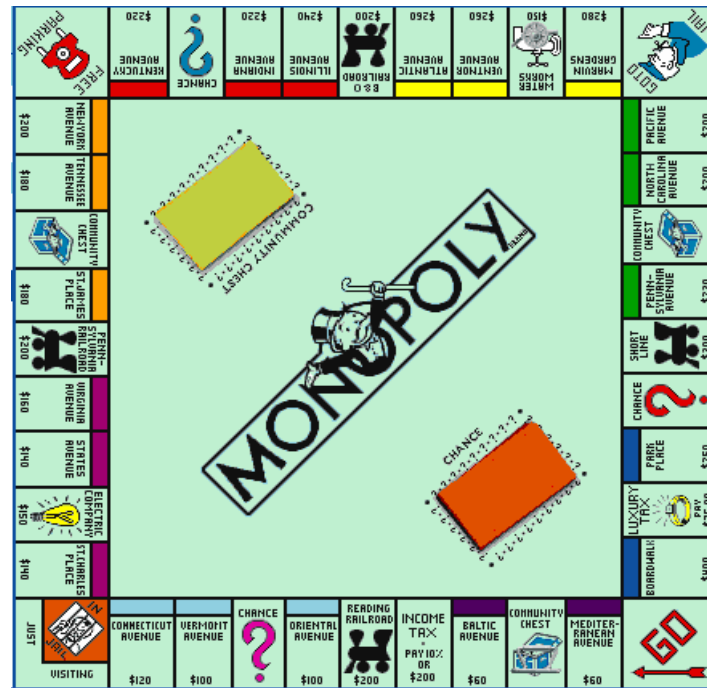
<http://www.contractslegalenvironment.com/>
Errata – Footnotes – Chapter Qs – Answers

OUTLINE FOR FIRST SESSION ON LAW



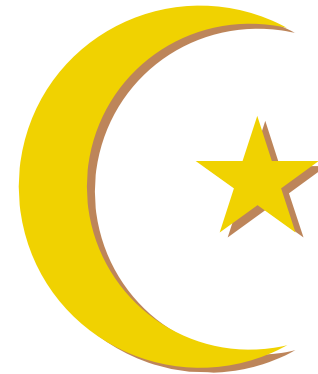
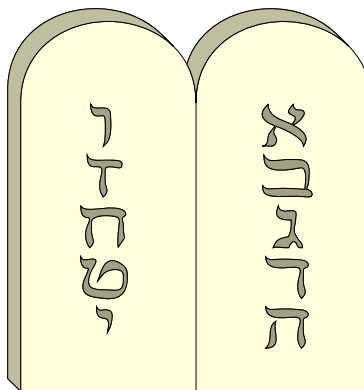
TYPES OF LAW

- LAW = Rules of the game
 - Law & Order v. Justice
 - Order = Precedence = You should act based upon how others were judged
 - Bad Cases -- Bad Law



TYPES OF LAW

- Law v. Moral Code v. Social Code
 - Why is a contract enforceable?
 - Why is a contract enforceable and not a promise?
 - When is a promise enforceable?
 - Why is telling a lie under oath punishable?
 - Why is telling a lie not under oath not punishable?
 - When is telling a lie not under oath punishable?

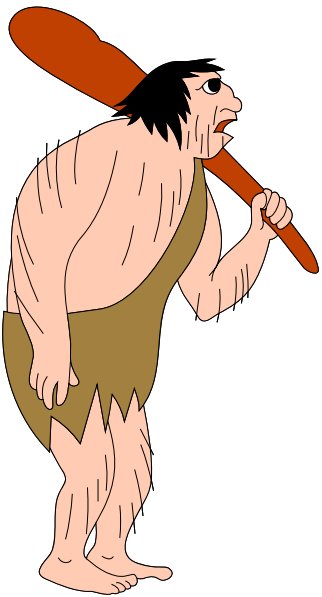


TYPES OF LAW

- Law v. Moral Code v. Social Code

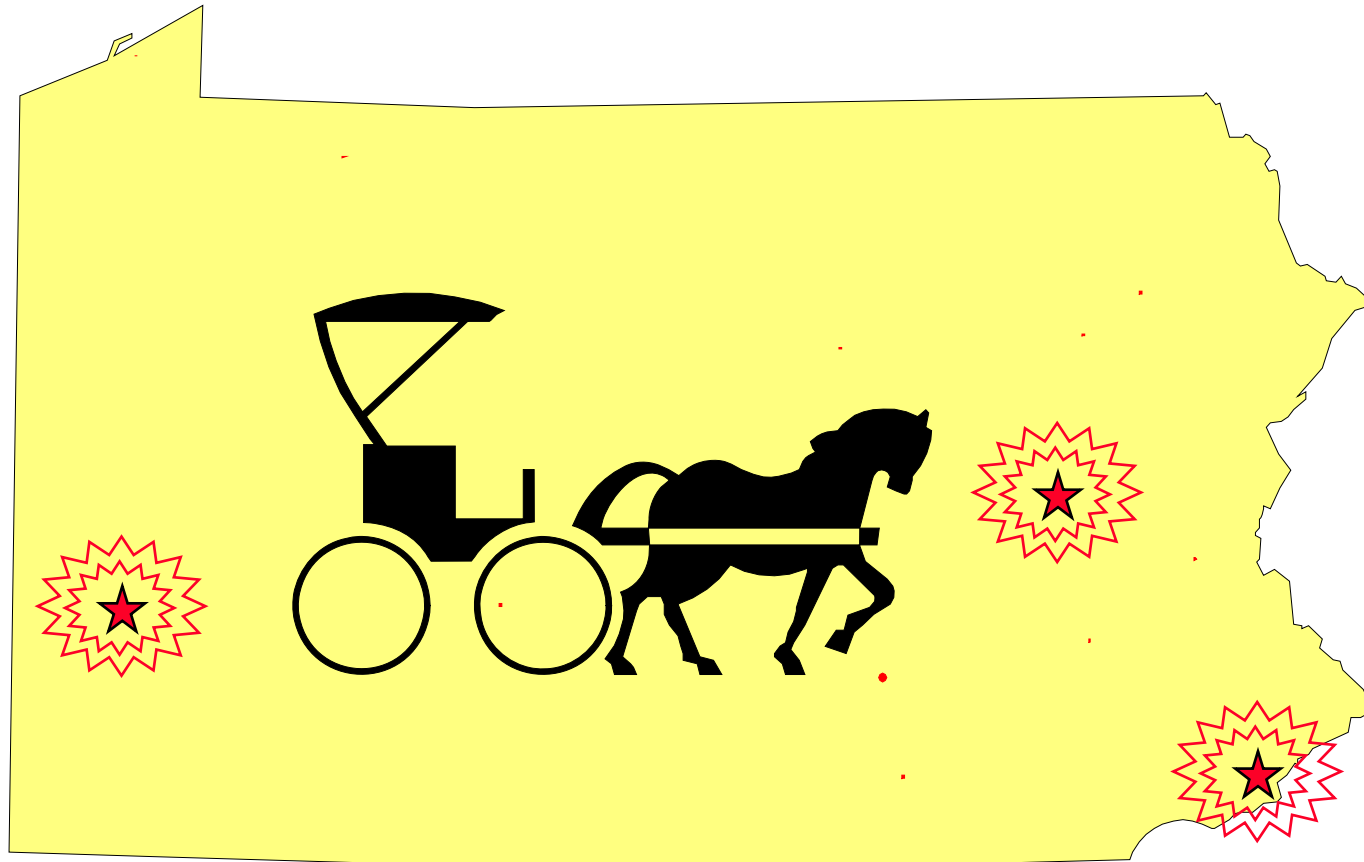
- Should society punish:

- persons committing murder of humans, mammals or insects?
 - persons consuming chocolate, cigarettes, alcohol, marijuana or heroin?
 - persons committing fornication outside of marriage?
 - persons using "curse words" within common speech?
 - persons verbally abusing others by using "curse words?"
 - persons using racially charged epithets before the target group?
 - persons privately telling racial/ethnic jokes?
 - persons who publicly spit, sneeze, belch, cough or yawn?
 - persons who slurp their soup or use the wrong fork?



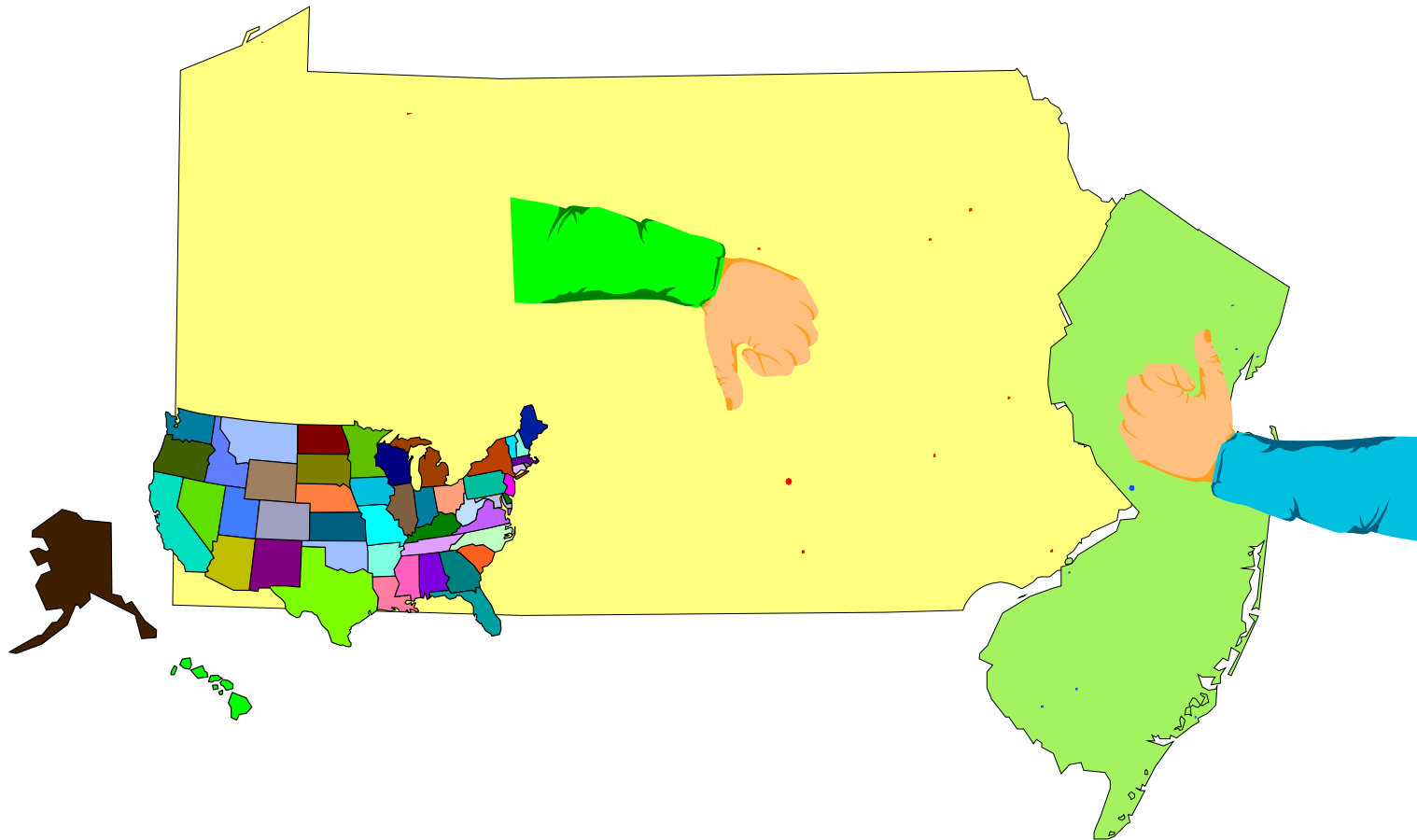
TYPES OF LAW

- Common v. Statutory Law
 - Common law - Precedent: Once decision made ...



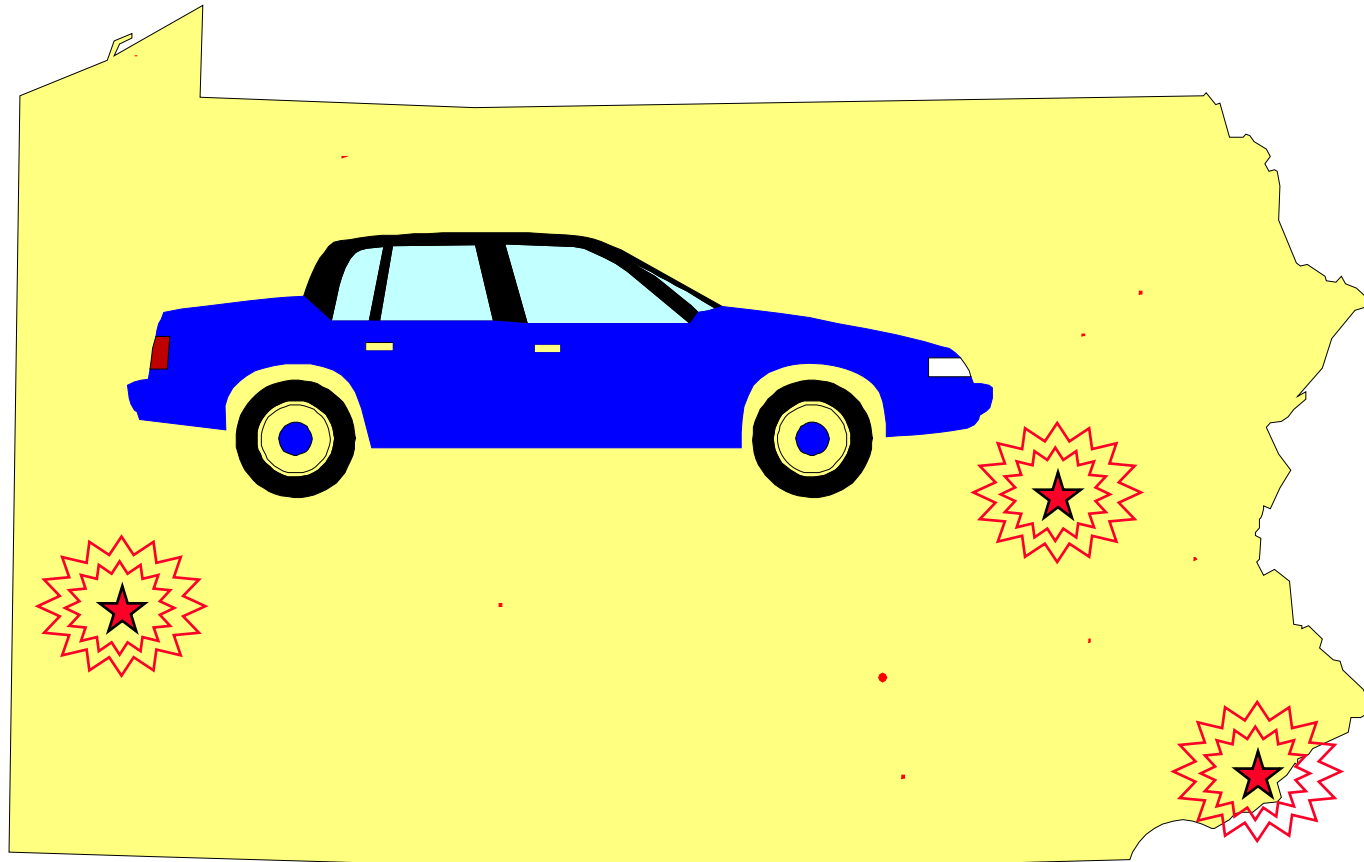
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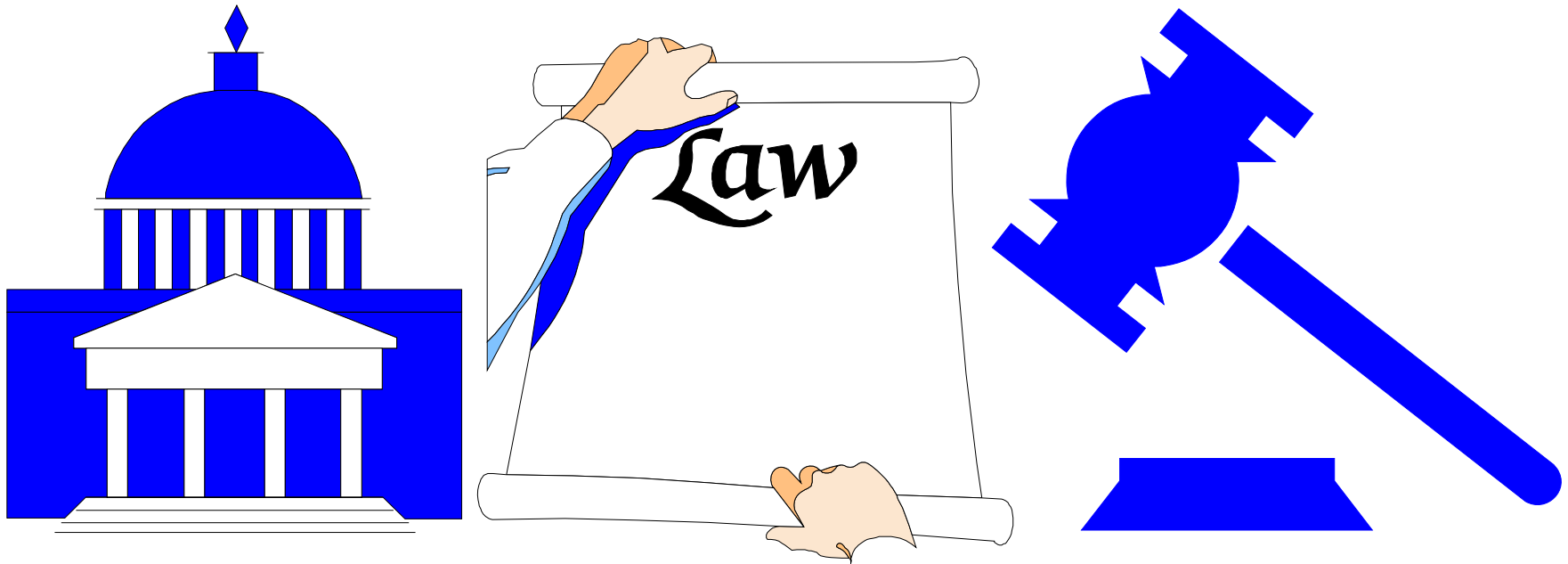
TYPES OF LAW

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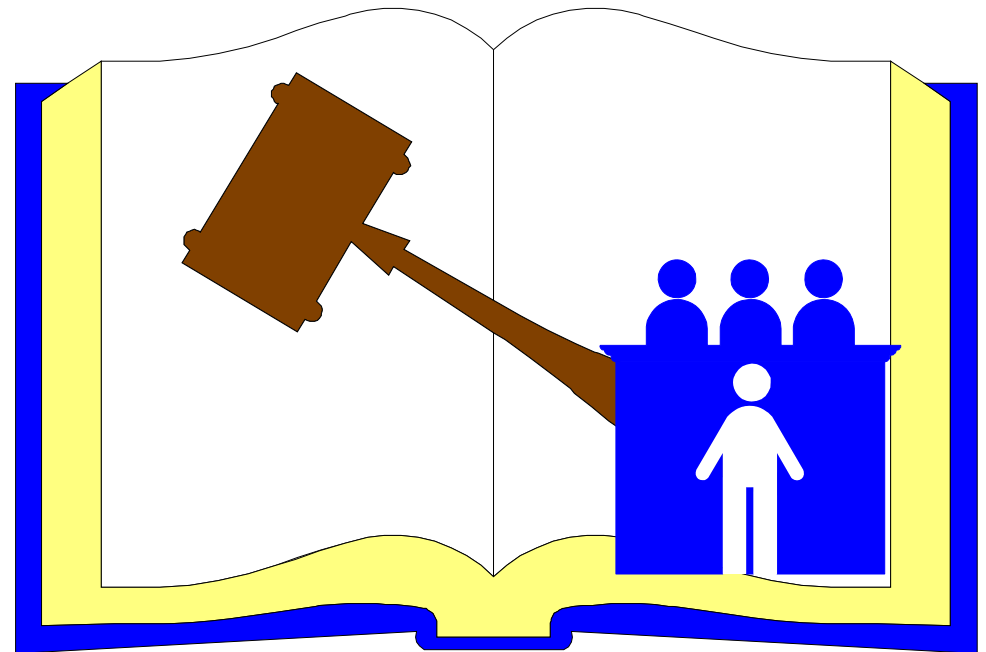
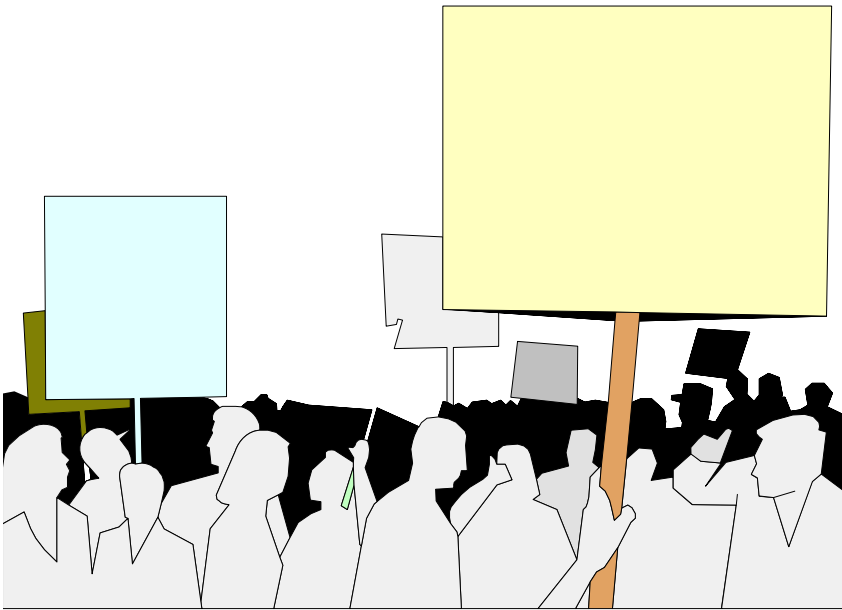
TYPES OF LAW

- Common v. Statutory Law
 - Common law - Precedent: Once decision made ...
 - Statutory law - Fiat of the Sovereign = the State
 - Statutory law supersedes common law, but
 - Court interprets statutes thus can supersede statutes



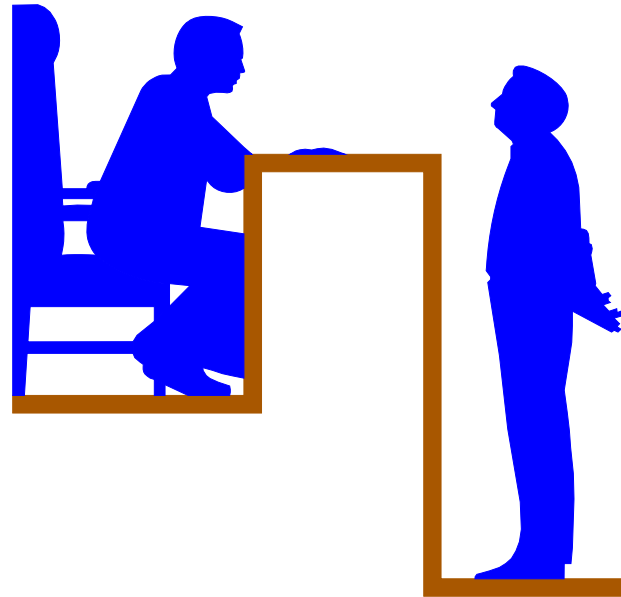
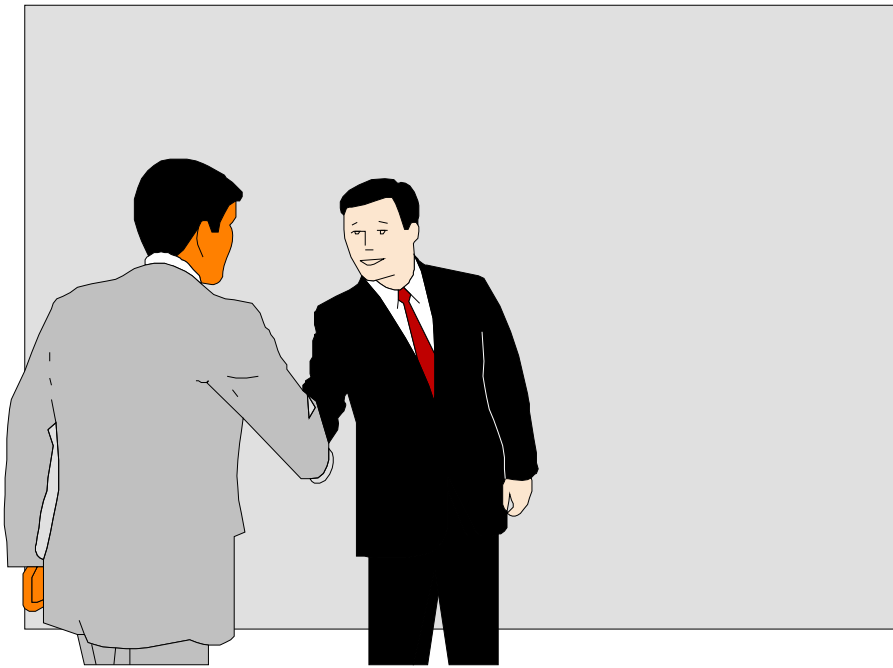
TYPES OF LAW

- Common Law v. Civil Law Systems
 - Common - from the people/common wisdom/precedent/trial & error
 - Civil - from the experts/utopia/definitive-code/no-decisions



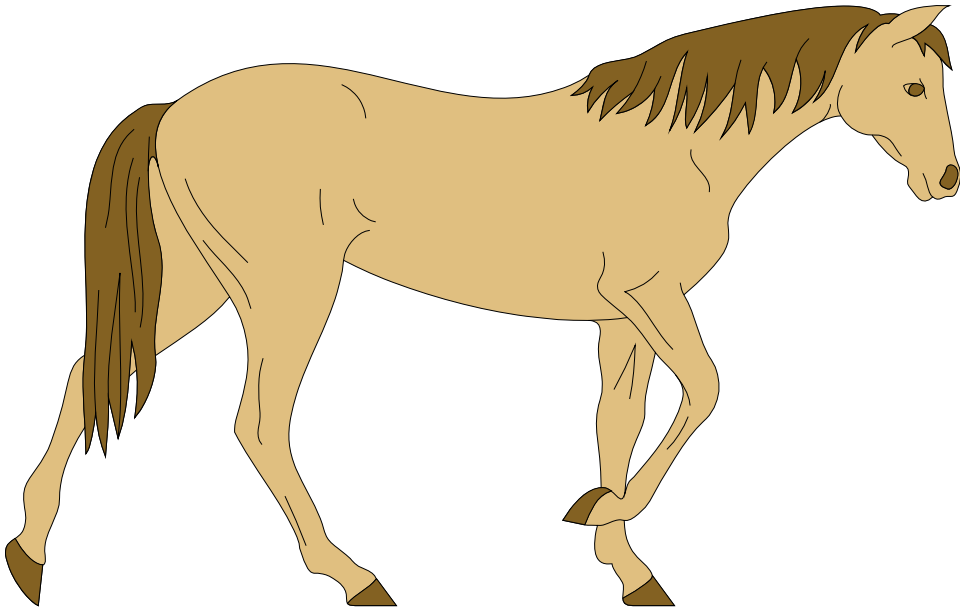
TYPES OF LAW

- Substantive v. Procedural Law
 - Substantive - how people should act
 - Procedural - how people may judicially enforce substantive law



TYPES OF LAW

- Common law v. Equity Courts - justice for all v. justice for one
 - circumscribes Court of Law w/o overruling
 - example: judgment is valid - but enforcement prohibited
 - acts *in personam* and not *in rem*



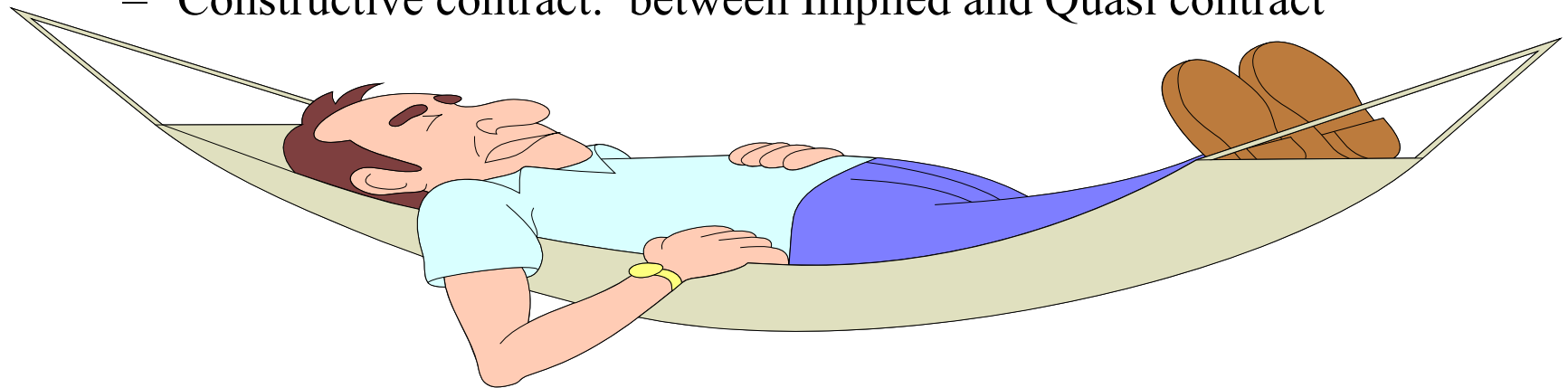
OUTLINE FOR SESSIONS ON CONTRACTS

A stylized illustration of a scroll. The scroll is white with a black outline, partially unrolled. At the bottom right, there is a red ribbon seal with a yellow sunburst emblem in the center. The text "TYPES OF CONTRACTS" is written across the middle of the scroll in a black, serif font.

TYPES OF CONTRACTS

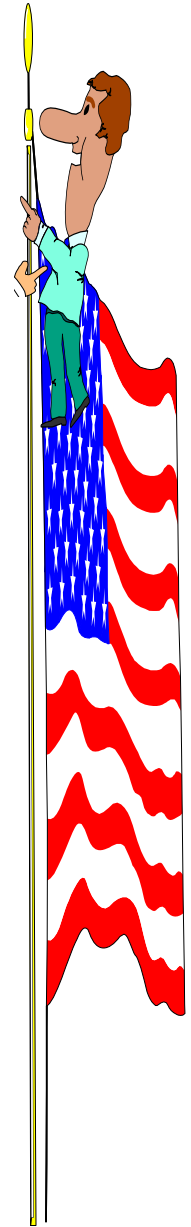
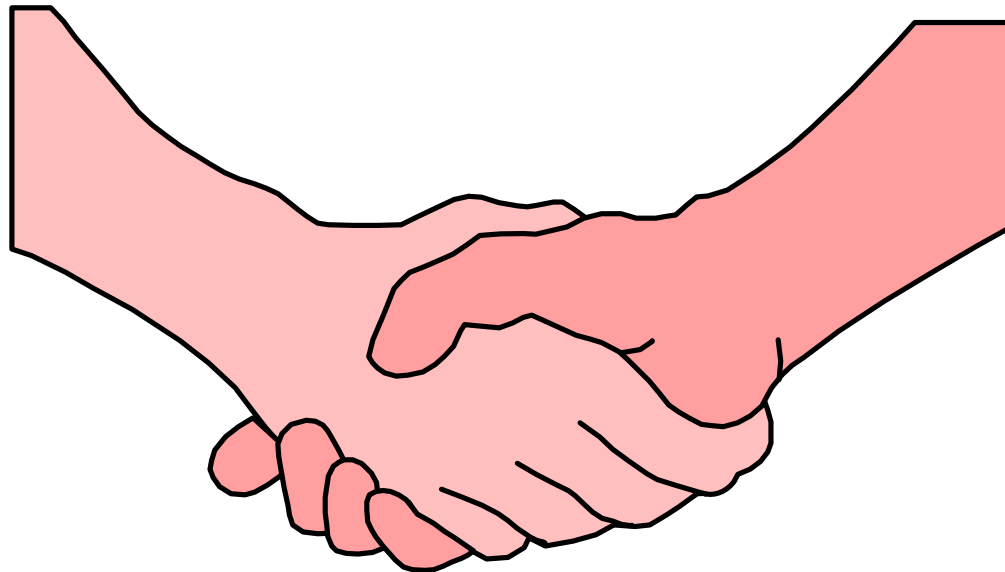
Express v. Implied v. Quasi Contracts

- Express: Written v. Oral: Both valid - Question of Proof
 - Parol: In writing, but essential portion being only oral
- Implied: Actions speak louder than words
 - Implied in fact: from the conduct of the parties
 - Implied in law: Quasi contract; but see implied condition
- Quasi: Fiction imposed by Court to assure equity
 - Constructive contract: between Implied and Quasi contract



Unilateral v. Bilateral Contracts

- Unilateral: Action in response to a promise
 - Completion of action is the acceptance of the offer
 - Cannot revoke the offer while action being executed
 - Cf. UCC 2-206(2): Duty to notify start within reasonable time
- Bilateral: Promise in response to a promise



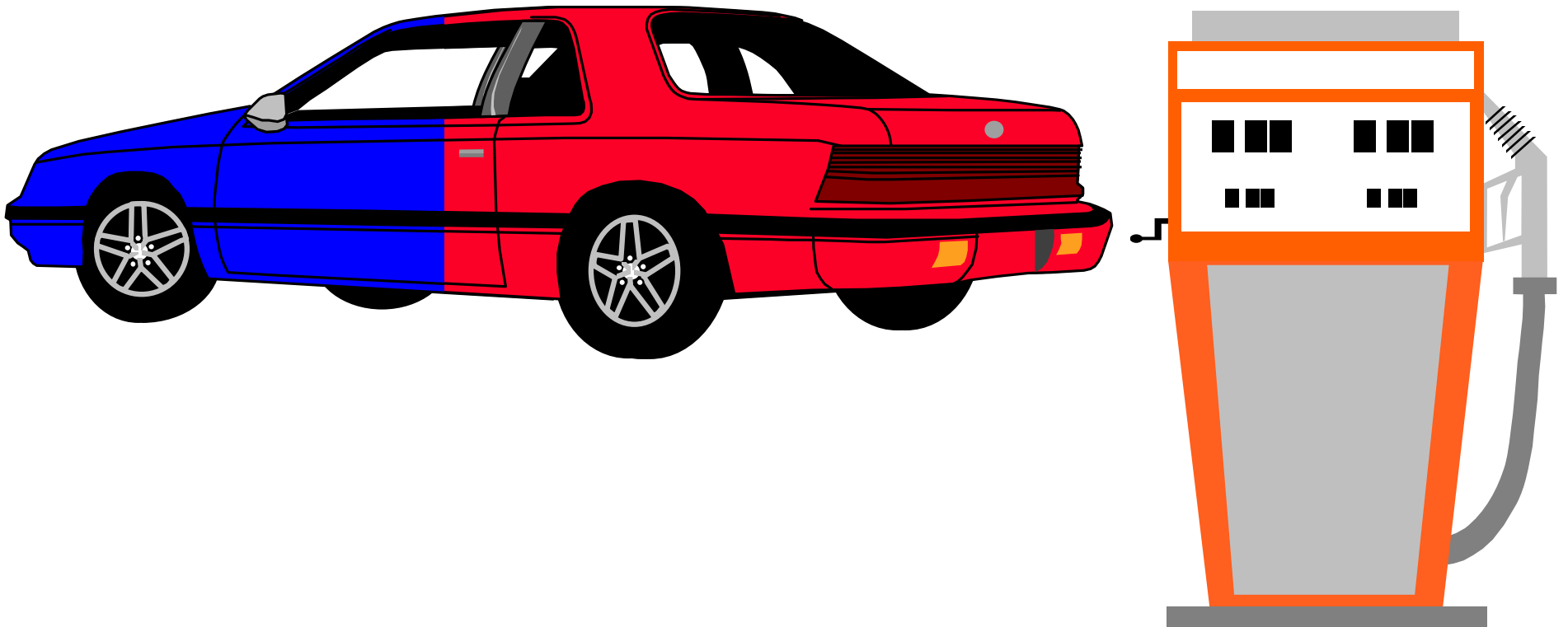
Parties to the Contract

- Two parties or more? – Problems with 3 or more parties
 - who is responsible to whom? who has a remedy for breach against whom?
 - how may we construe amendments or side agreements?
- Joint v. Several v. Joint and Several contracts
 - *Joint* if joint benefit to 2 or more parties to multiple party contract – presumed
 - must bring suit against all – release of one releases all
 - *Several* if separate obligations due to or from each party – must specify
 - Same as separate individual contracts – Obligation only to pro-rata share
 - *Joint and Several* renders individual party liable for entire joint obligation
 - Individual may join other joint parties or bring action for contribution



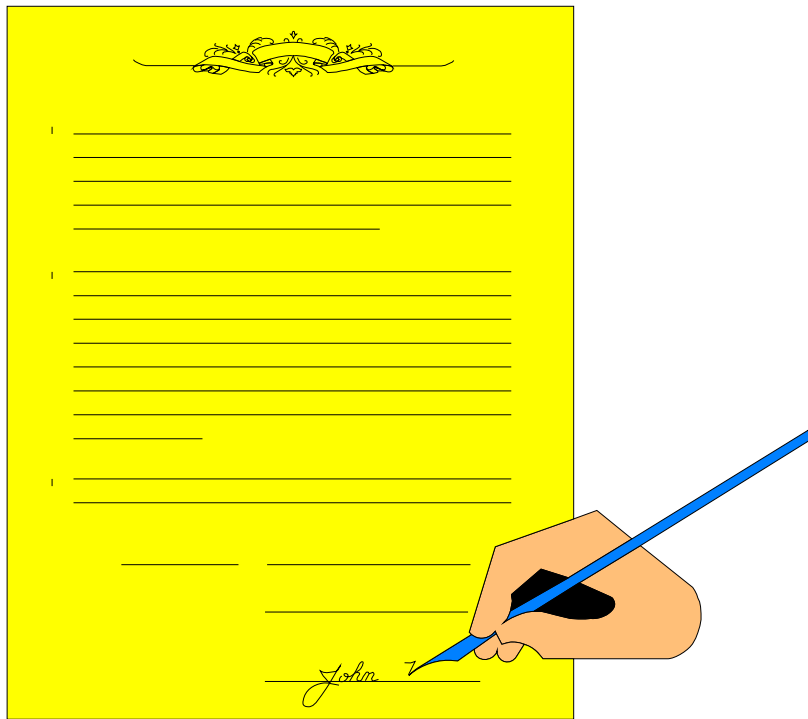
Entire v. Severable Contracts

- Entire: Completion of all duties essential before payment is earned
- Severable: Completion of part entitles payment for part



Executory v. Executed Contracts

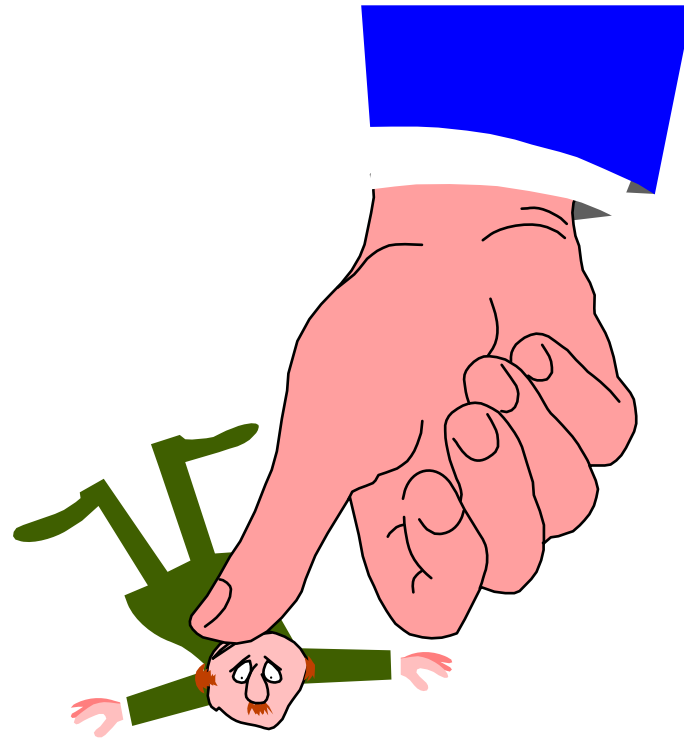
- Executory: Contract "signed" but some obligations outstanding
- Executed: Obligations of all parties performed



Contracts of Negotiation v. Adhesion

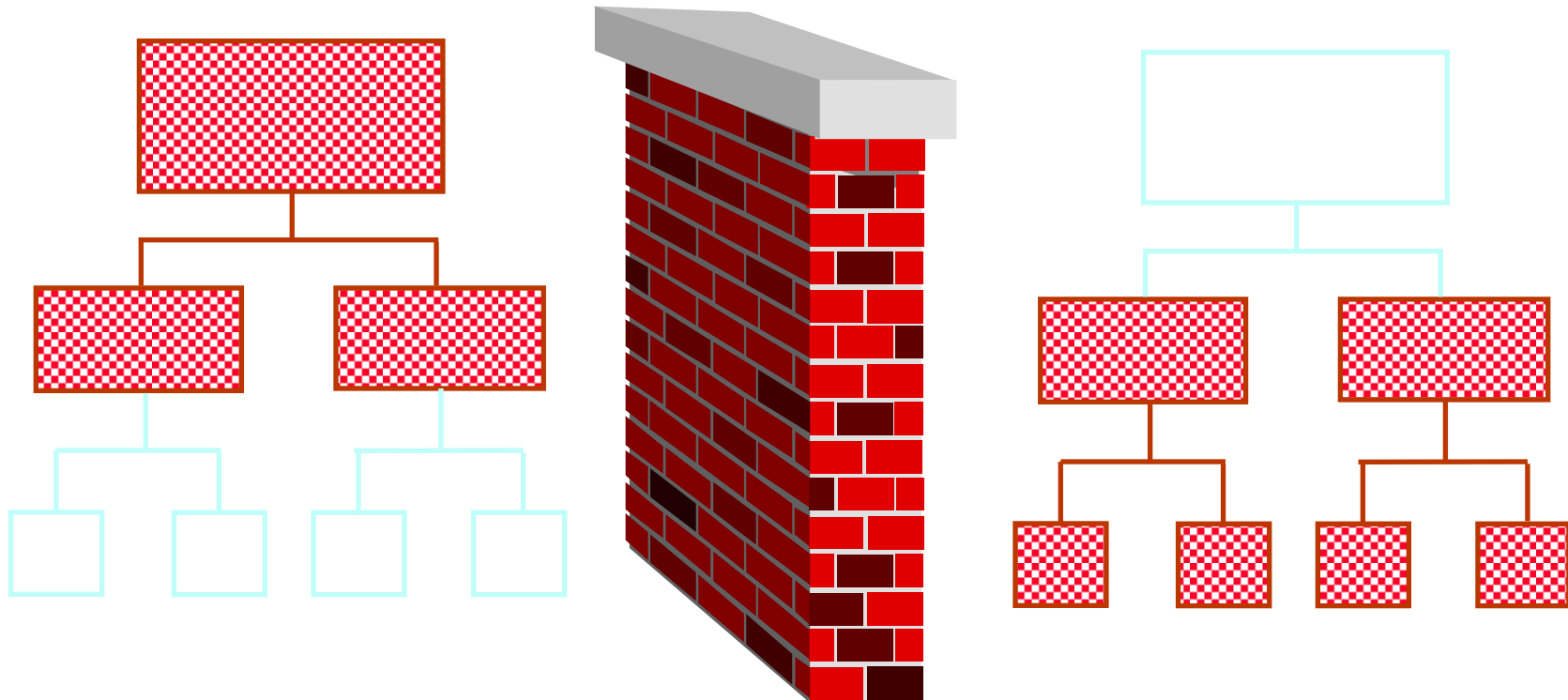
- hard bargaining v. no bargaining -

- "Two alert individuals, mindful of their self-interest... ."
- "Take it or leave it" of necessities with no recourse

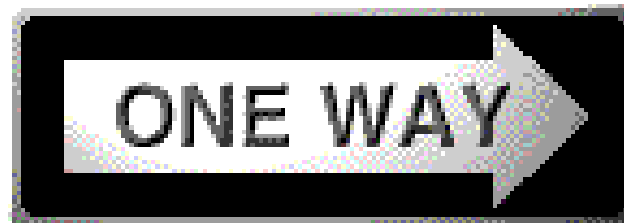
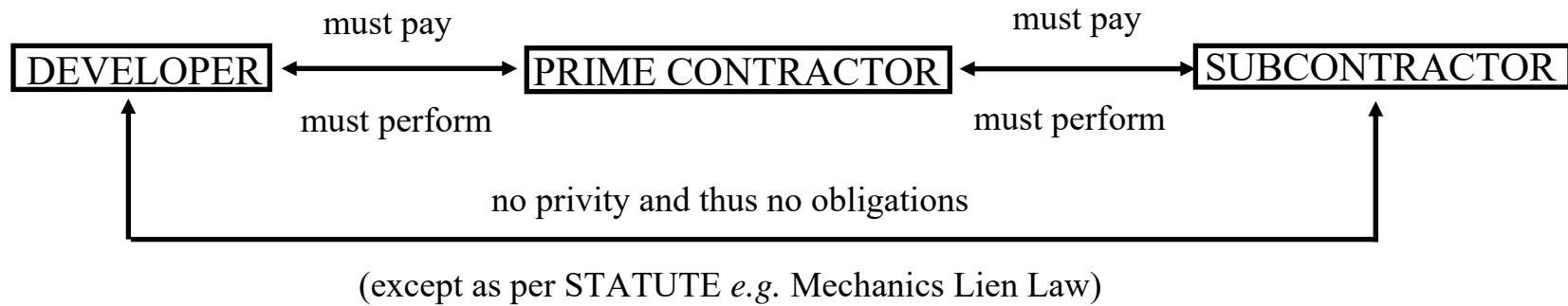


Prime Contract v. Subcontract

- Prime Contract: Between Developer and (Prime) Contractor
- Subcontract: Between Prime Contractor and Subcontractor
- Privity: Existence of a contract directly between two parties



Prime Contract v. Subcontract



Enforceable v. Voidable v. Void Contracts

- Enforceable: Subject to Court adjudication if breached
- Unenforceable: Valid but enforcement not assisted by the Court
 - examples: Statute of frauds, limitations; laches
- Voidable: Enforceable ONLY at option of protected party
 - examples: Youth, mental impairment, duress, fraud
- Void: Not recognized or enforceable by a Court
- Valid: Enforceable or unenforceable or voidable
- Invalid: Void
 - examples: Illegality, non-recognition of entity, self
 - special problem for intervening illegality or destruction of subject matter:
 - How to allocate expenses to date? Surviving implied contract

Transactional Analysis

- Special treatment of contracts involving:
 - land
 - still caveat emptor - cf. consumer
 - goods
 - implied warranty
 - services
 - duty of reasonable care
 - professional services
 - community standard > national standard
 - insurance
 - benefit to the public policy



FACTUAL PATTERN FOR EXAM QUESTION

- The written contract between R and S reads: “R is to install an oil heating system for which S is to pay \$5000. R is also to supply oil during the next heating season at the rate of \$2/gal. It is the intent of the parties that this contract shall not be severable.” Oil rates for suppliers (such as R) at the time of the contract was \$1.90/gal. R’s cost to install the heating system was \$4250. S paid R the \$5000 agreed upon.
- During the heating season the price of oil (for suppliers) increased from \$1.90 to \$2.90/gal. During November and December S used 100 gals of oil. When R invoiced S at the end of December, he complained that S’s inefficient use of the heating system and refusal to wear a sweater in his home was causing S to use twice the amount of oil that he should use, and that therefore he was stopping future deliveries. S refused to pay the invoice for the 100 galleons used to date and found another supplier who supplied an additional 100 gal. of oil through the end of the season at the rate of \$3/gal.
- R sues for the \$200 due for the 100 gals of oil delivered.
S sues for the return of the \$5000 paid for the heating system and \$100 premium paid for last 100 galleons of oil
- Who wins? How much? Why?

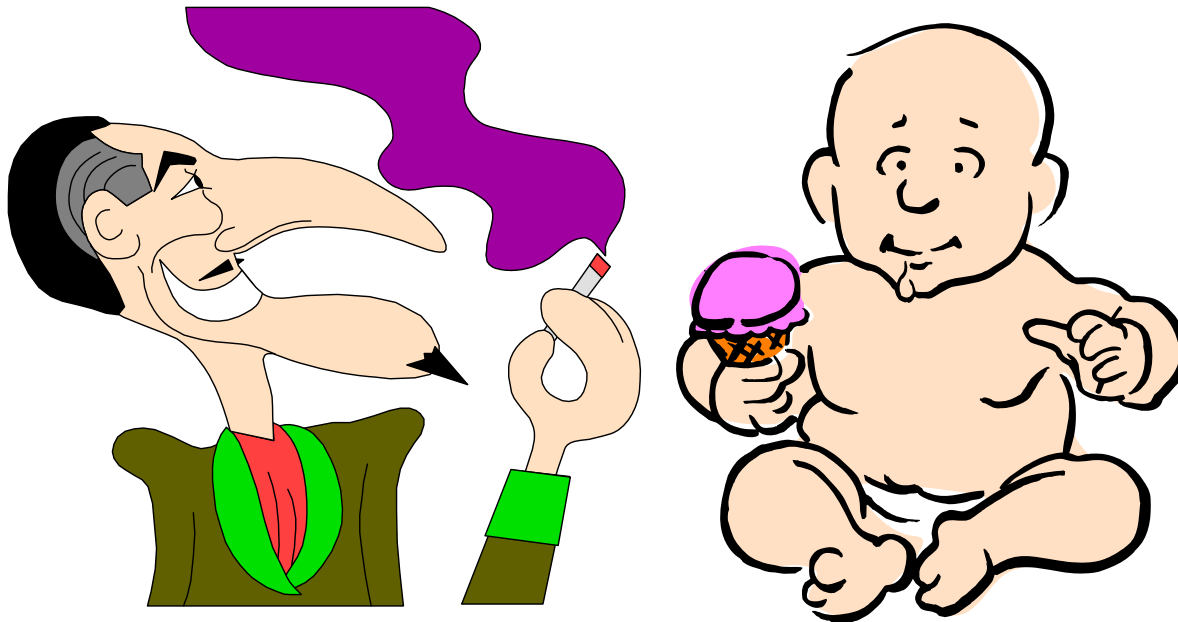
DEFINITION OF THE TERM
"CONTRACT"

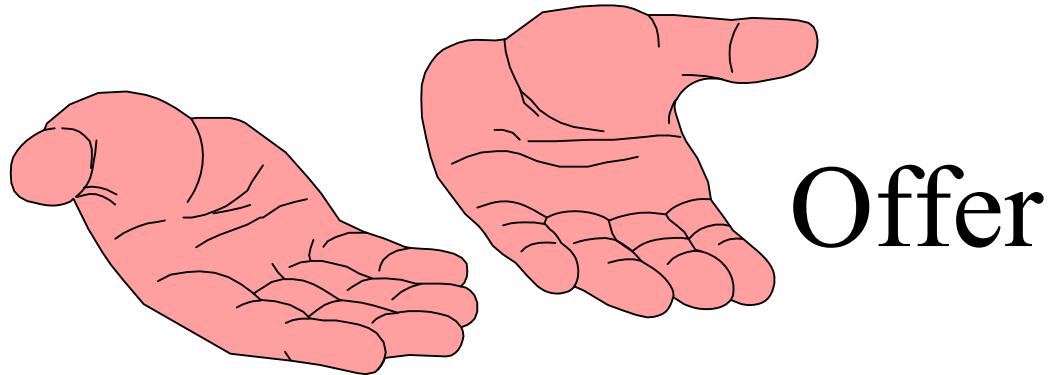
A CONTRACT IS ...

AN AGREEMENT, BETWEEN TWO OR MORE COMPETENT PARTIES,
REACHED UPON OFFER AND ACCEPTANCE AND
A MUTUAL TRUE "MEETING OF THE MINDS" OF ALL PARTIES THERETO,
RELATING TO A COMPETENT SUBJECT MATTER,
REQUIRING LEGAL CONSIDERATION AND MUTUALITY OF OBLIGATION,
AND SET OUT SUCH THAT ITS TERMS ARE ASCERTAINABLE
AND NOT OVERLY VAGUE OR UNCERTAIN,
THAT CREATES, MODIFIES, OR DESTROYS A LEGAL RELATIONSHIP

Competent Parties

- Protected Status: Infancy, Mental Impairment, Intoxication,
- Duress, Fraud, Undue Influence, Overreaching
- Avoidance v. Ratification - until a reasonable time after majority
- Legal Recognition: Corporations, Married Women, Convicts, Spendthrifts
- Municipal Corporations & Public Agencies -- acting outside procedure

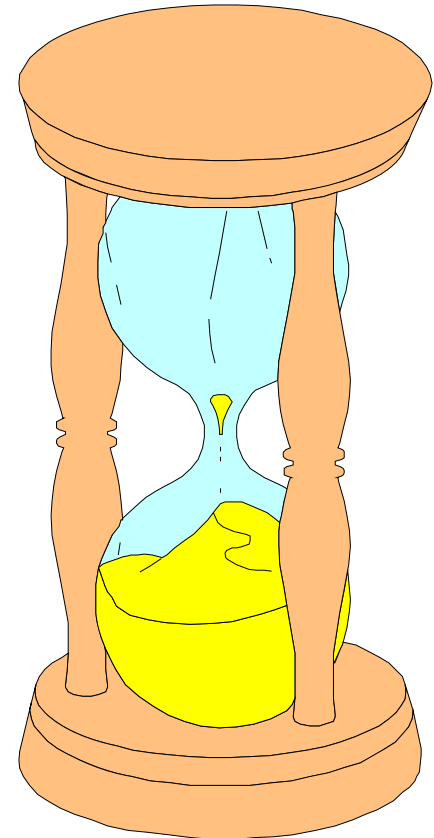




- "An act on the part of one entity giving another the power to obligate the first"
- distinguish from Quotation, Request for Offer, ...
 - perceived intent .. by reasonable man [with actual knowledge]
- duration - reasonable time - bananas v. scrap metal
 - ends automatically upon
 - death
 - revocation - but see mailbox rule
 - rejection
 - counter offer - but see UCC 2-207
 - sale of non-fungible subject matter to another
 - destruction of non-fungible subject matter
 - intervening illegality

Offer

- duration - continued...
 - suspended during intervening mental incapacity of the offeror
 - UCC firm offer 2-205 - 3 months maximum
 - Options - Binding contract to keep offer open



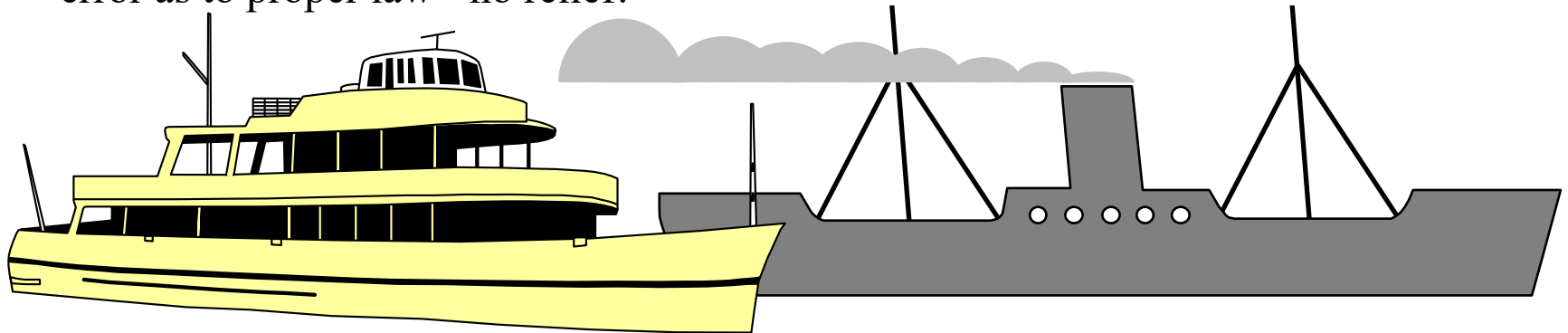


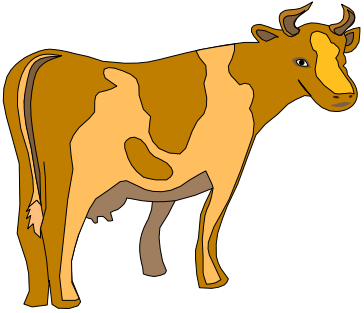
Acceptance

- The Mirror Rule: Acceptance without modification of Offer
- Cf. UCC 2-207 - the non-conforming acceptance
 - distinguish from conditional acceptance = counter-offer
 - new terms become part of contract unless
 - offer specifically does not permit
 - new terms substantially change offer
 - new terms rejected within reasonable time
 - in which case valid contract formed without new terms
- When accepted: Notice by authorized means to agent of offeror
 - The Mailbox Rule: USPS is agent of offeror
 - UNLESS offer specifies otherwise
 - Authorized means: same as offer unless offer specifies otherwise
 - Cf. UCC 2-206(1) any reasonable means -- nb FAX
- "The sound of silence is 'NO'" - except if there exists a duty to reply

"Meeting of the Minds"

- Judicial fiction
- mutual mistake as to the facts - neither sees latent ambiguity
- Case law: Raffles v. Wichelhaus the PEERLESS case
- latent ambiguity v. patent ambiguity -- parol evidence accepted
- mutual mistake as to the facts - both should see patent ambiguity
- clerical errors: real intent of parties as they signed
- unilateral mistake - no relief -- unless known of by other party
 - compare quasi-contract or estoppel
- error as to proper law - no relief!





"Meeting of the Minds"

- Qualities of the Subject Matter and Conscious Uncertainty
- In *Sherwood v. Walker*, a cow of good breeding stock, Rose of Aberlone, was believed to be sterile and the owner contracted to sell her at a price far under that which she would have brought if fertile. Before she was delivered it was discovered that she was with calf and thereby worth about ten times the sales price

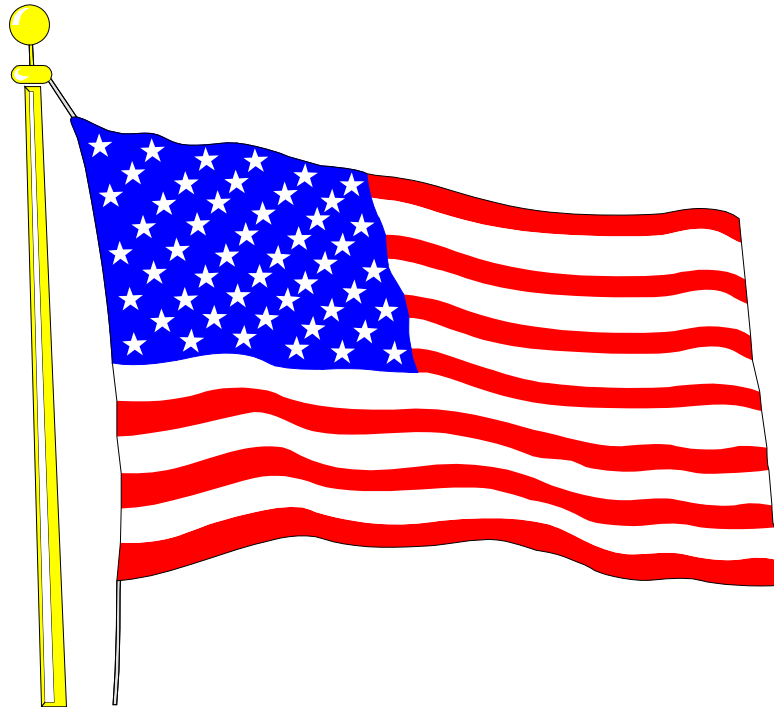


"Meeting of the Minds"

- In Wood v. Boynton the plaintiff found a small pretty stone and sold it for one dollar to the defendant after two conversations in which the parties expressed their ignorance of the nature of the stone and guessed it to be a topaz. It turned out to be an uncut diamond worth from \$700 to \$1,000.

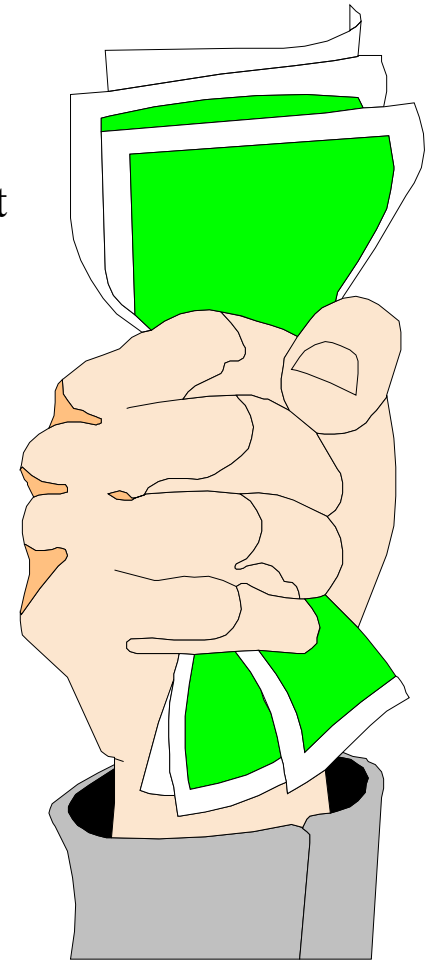
Competent Subject Matter

- neither formation nor performance may be criminal, tortious or ...
- against public policy -- contrary to best interests of citizenry
- severance of non-essential "improper" terms from "reformed" contract



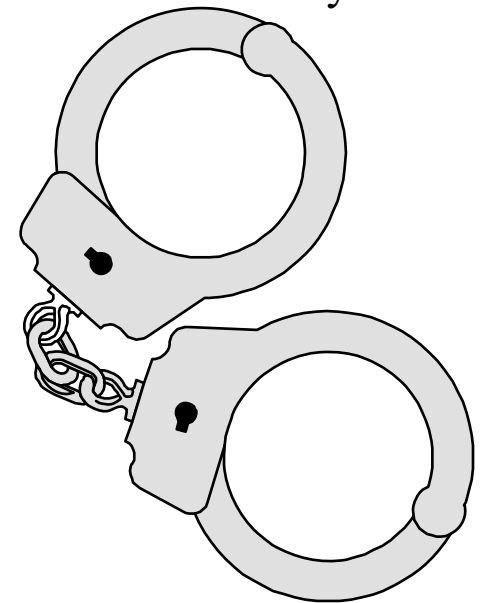
Consideration

- relate to advantage given up rather than to benefit gained
- party must have right to give up to be consideration
 - Case law: Foakes v. Beer: part payment of undisputed debt
- past consideration - will not convert promise to contract
- moral consideration - no duty to reward good Samaritan



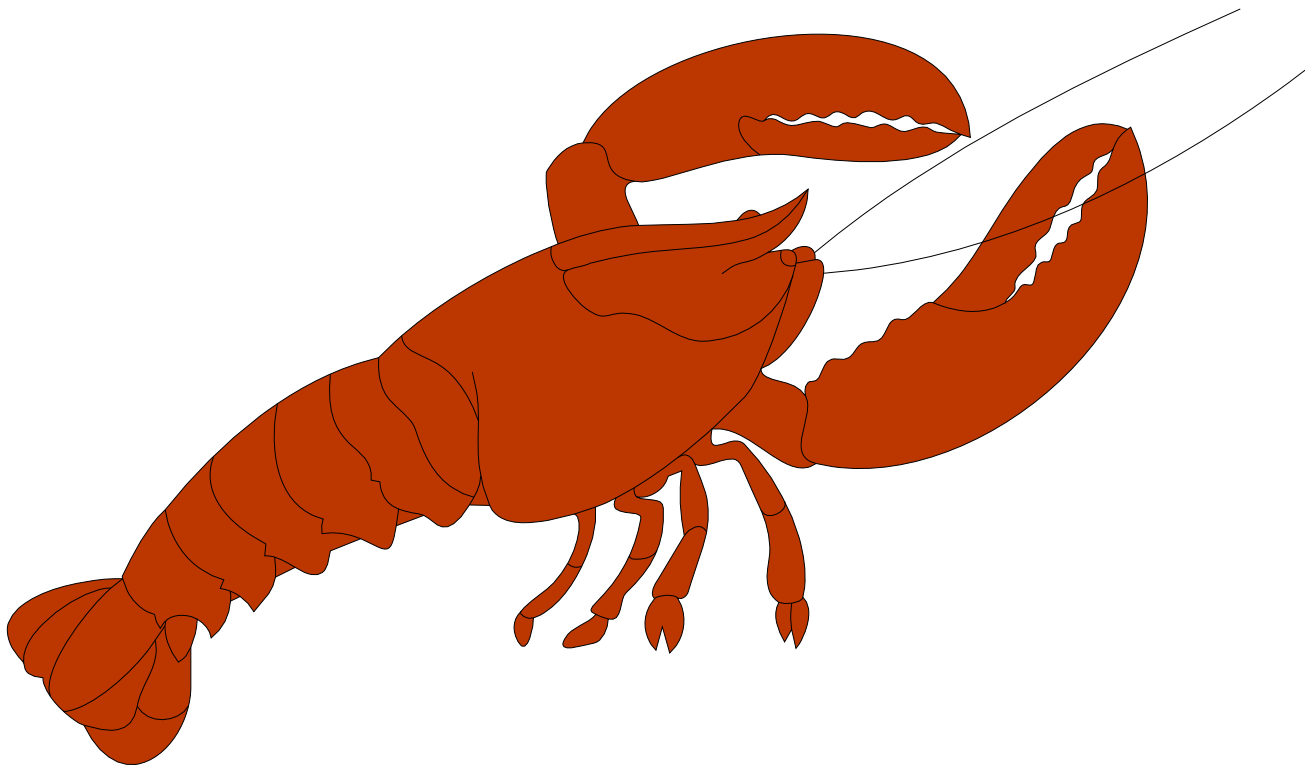
Mutuality of Obligation

- both parties must be bound or neither is ...
- obligation is to give up some legal right
- "requirements" and "output" contracts valid
 - e.g. Govt right to Cancel for Convenience valid as Govt
 - may not then contract for same services from another
- "conditional" contracts valid unless "condition" totally impossible or entirely within promisor's control
- right to cancel or withdraw valid if in any way restricted
- mutuality may be added by Court
 - e.g. "best efforts" implied for "output" contracts



Definite Terms

- subject matter, quantity, price required
- other "reasonable" terms may be added by Court
 - "market price" acceptable under UCC 2-305



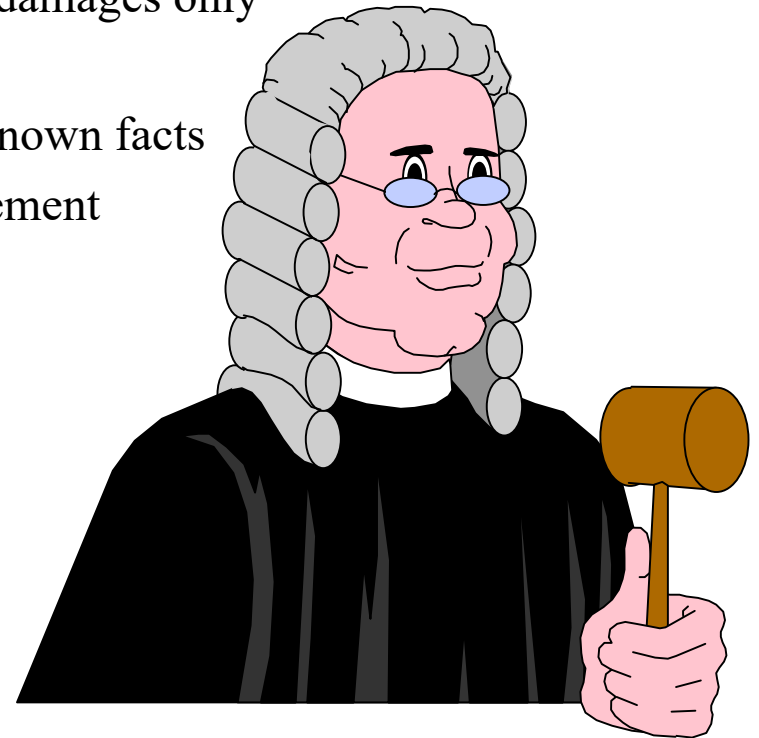
Legal Relationship

- an obligation to be bound, enforceable by the Court



JUDICIAL ENFORCEMENT OF CONTRACTS

- Fraud and Material Misrepresentation
- degree of culpability v. possible remedy
 - intentional - cancellation & compensatory & punitive damages
 - negligent - cancellation & compensatory damages only
 - innocent - cancellation only
 - misstatement of fact v. non-disclosure of known facts
 - need to demonstrate reliance upon misstatement



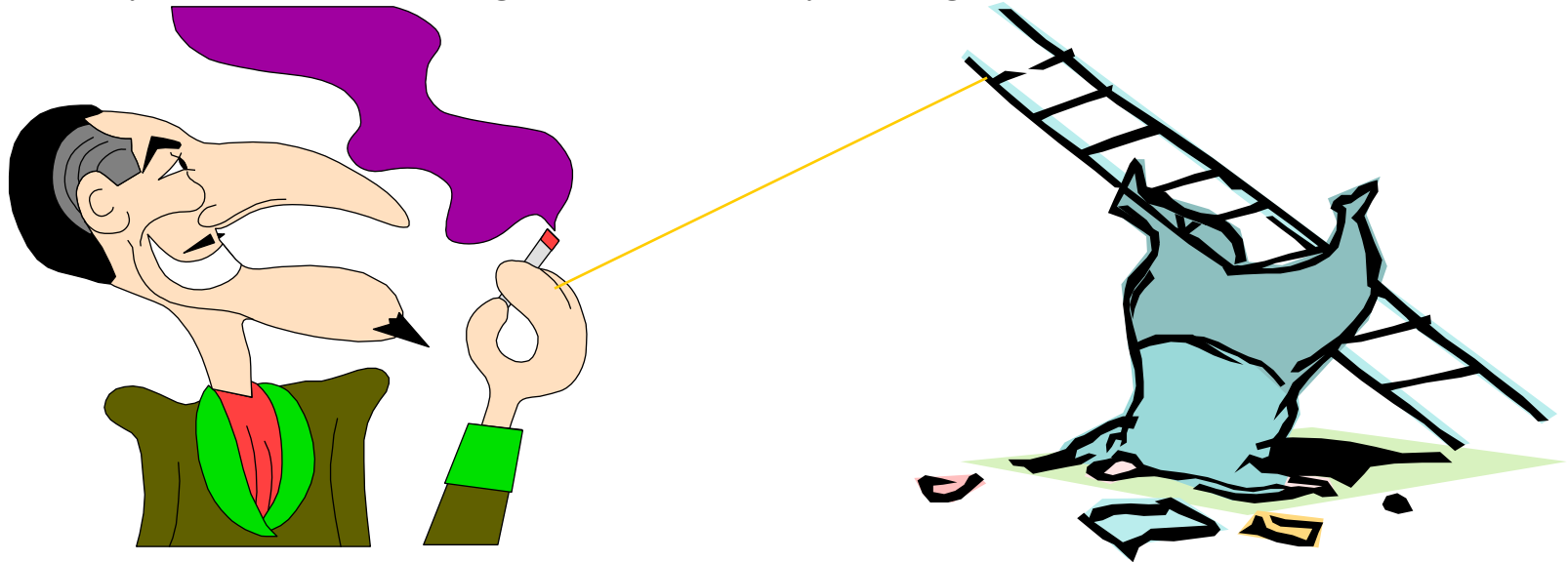
Promissory Estoppel

- a bare promise - unsupported by consideration \implies no K
- + reliance on promise + knowledge of reliance
- = estoppel = preclusion from denying promise = K
- equitable remedy - quasi-contract at best



Helping the Other Party Fail

- Judicial repugnance to forfeitures
- Hard deadlines .. Liquidated damages .. “Penalties” .. Notice requirements
- “although proof may be difficult or impossible, the court fully understands how easy it may be for a party “help” the other party to fail”
- cf. NAFTA and other Civil Law jurisdictions
- remedy – excessive damages denied → any damages denied → sanctions



Statute of Frauds

- STATUTORY requirement to evidence existence to Court
- Must be EVIDENCED in writing - signed by party to be charged
- Concerning specific types of contracts only: MY LEGS
 - Marriage - in contemplation of - payment for act of
 - Years - if LAST act of K to be completed > 1 year from signing
 - Land - ownership or RIGHT to occupy, use or trespass upon
 - Executorship - obligating the estate of deceased
 - Goods - if value of goods \geq \$500 [statutory see State law]
 - Suretyship - undertaking to guarantee obligation of other



Verbal or Written Contract?

ESIGN Act: A Well-Established Law Enabling Business Transformation Today

A guide to electronic signatures in the United States for corporate counsels and compliance officers

On June 30, 2000, President Bill Clinton signed the *Electronic Signatures in Global and National Commerce Act* (ESIGN Act) into law without a pen. Instead, he used an *electronic signature*. This ground-breaking law addresses *e-signatures* as well as electronic records, both of which are commonly used in commerce today. An *e-signature* was granted the same status as a written signature under the terms of this legislation; however, it is important to note that simply placing a symbol on a document does not, in and of itself, create an enforceable contract. Those who are concerned about the question of legality must be well informed about the various requirements associated with the use of e-signatures. For most, the first and foremost question may be, "Are e-signatures legal?"

According to the ESIGN Act, an e-signature is defined as "an electronic sound, symbol, process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record and be legally bound." The key takeaway for purposes of contract enforcement is that the electronic sound, symbol, or process must be both associated with a contract or other document and adopted by the signatory, by some act, with the intent to be bound.

https://acrobat.adobe.com/content/dam/doc-cloud/en/pdfs/Adobe_E-Sign_Act_WhitePaper_ue.pdf

See also ENR: [Will Google Voice Open the Door Again to Trustworthy Verbal Contracts?](http://www.enr.com/blogs/19-the-next-generation/post/15427-will-google-voice-open-the-door-again-to-trustworthy-verbal-contracts)

<http://www.enr.com/blogs/19-the-next-generation/post/15427-will-google-voice-open-the-door-again-to-trustworthy-verbal-contracts>

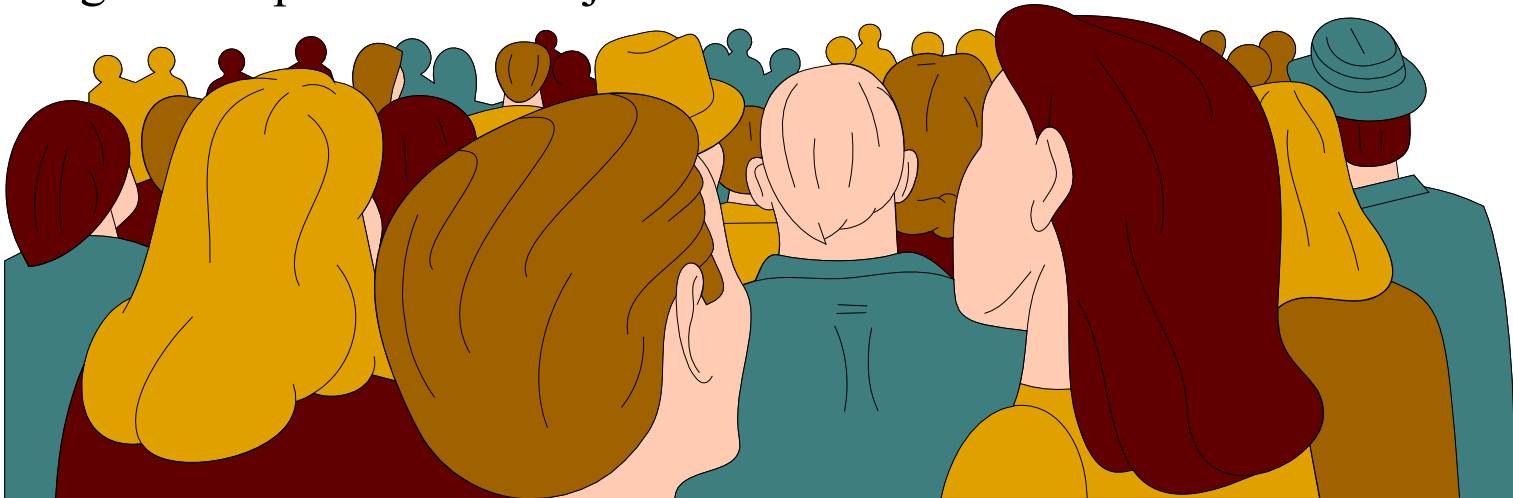
CONDITIONS OF THE CONTRACT

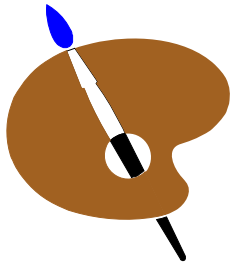
- A Condition is ...
 - A future and uncertain event upon the happening of which is made to depend the existence of an obligation, or that which subordinates the existence of an obligation under a contract to a specified future event.



TYPES OF CONDITIONS

- Potestative v. Casual v. Mixed
- Express v. Implied
 - Implied in fact: from the conduct of the parties
 - Implied in law: from a consensus of the community
- Precedent v. Subsequent
- Concurrent
- Single v. Copulative v. Disjunctive





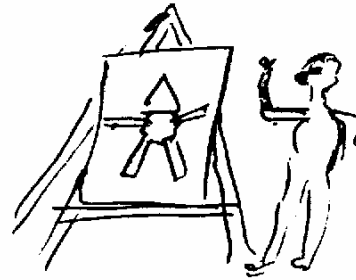
IMPLIED INTERPRETATION OF CONDITIONS

- Personal Taste - assumed DUTY of good faith - personal liability

PERSONAL
TASTE



ARTWORK



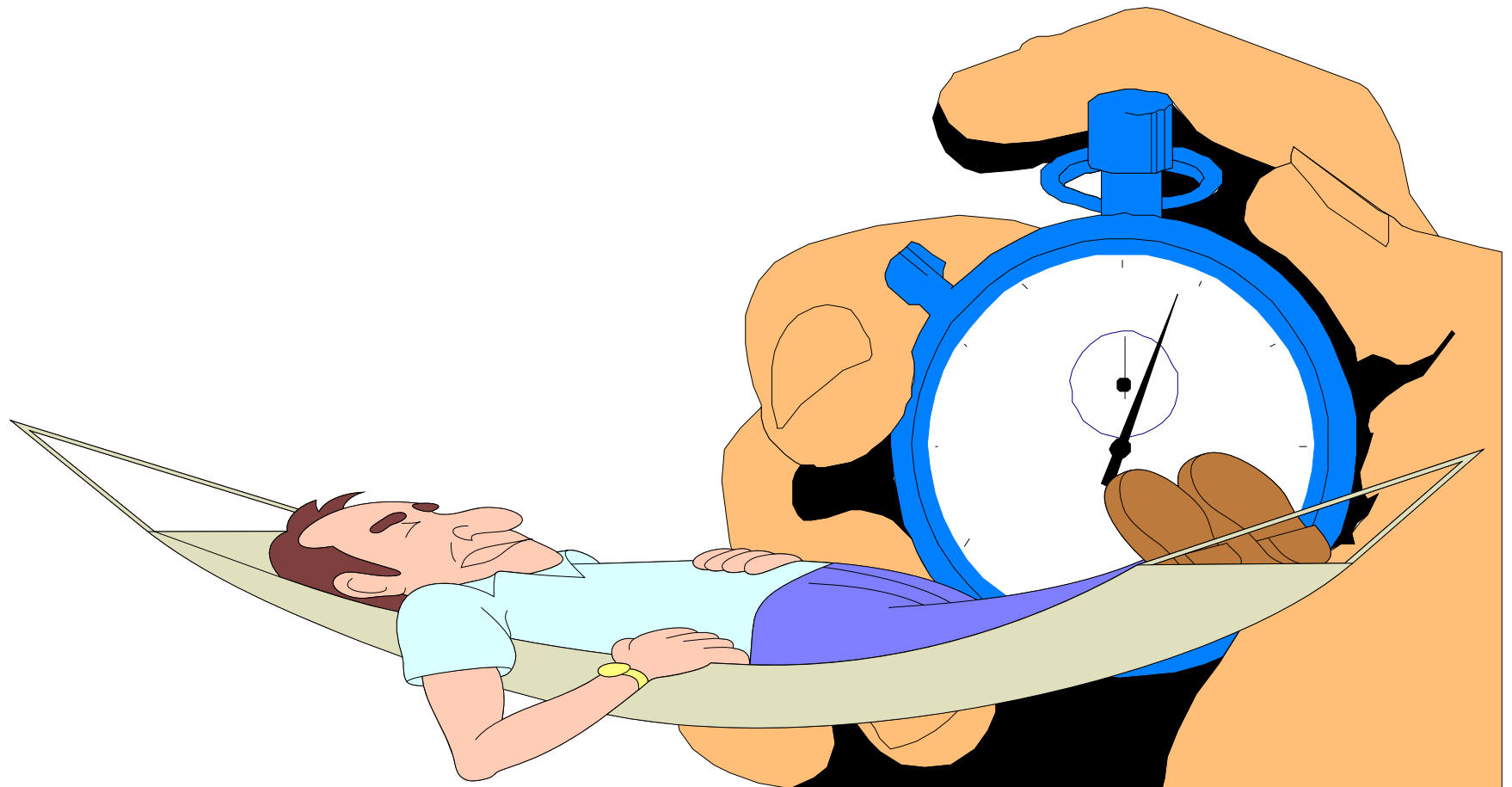
.VS.



BROOM-CLEAN

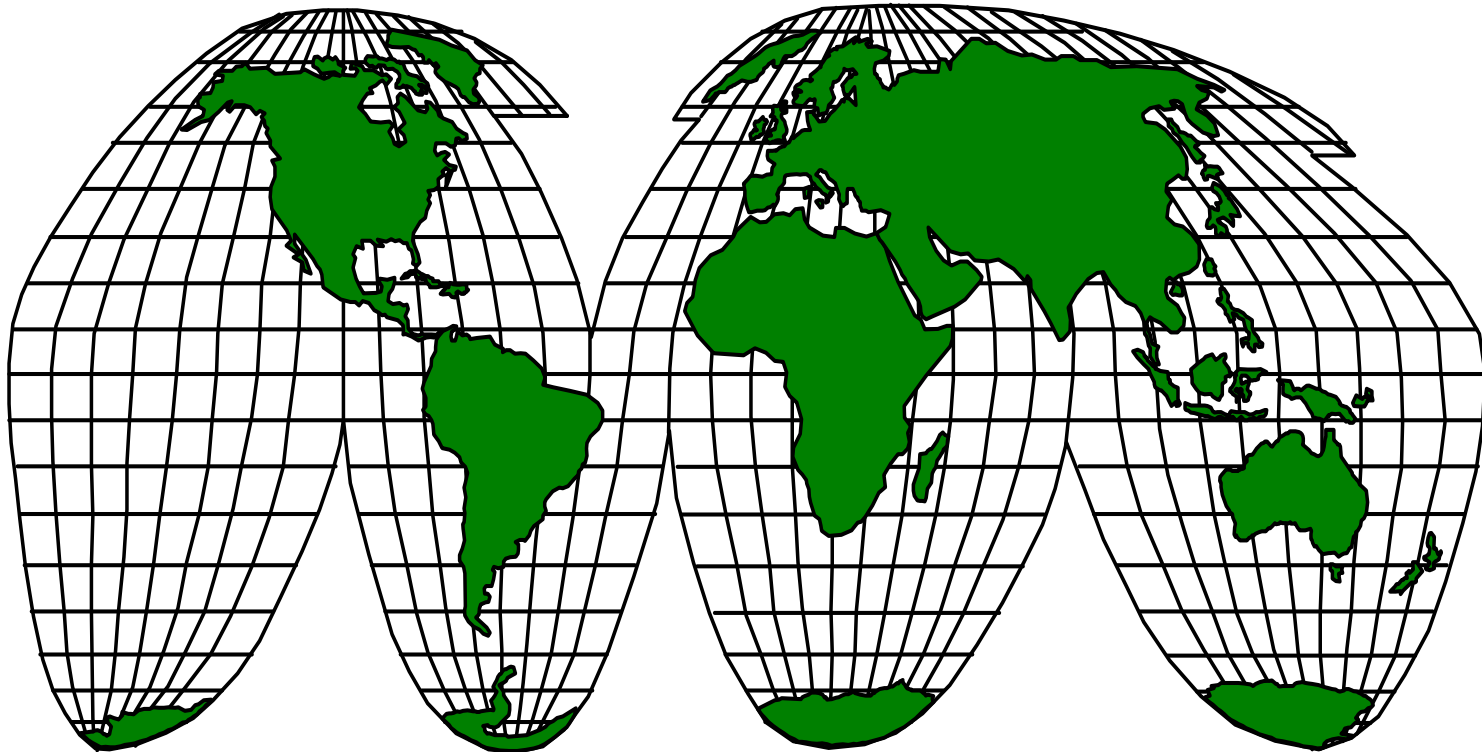
IMPLIED INTERPRETATION OF CONDITIONS

- Time of Performance - "Time Is Of The Essence"



IMPLIED INTERPRETATION OF CONDITIONS

- Place of Performance - as per K - or location where K signed



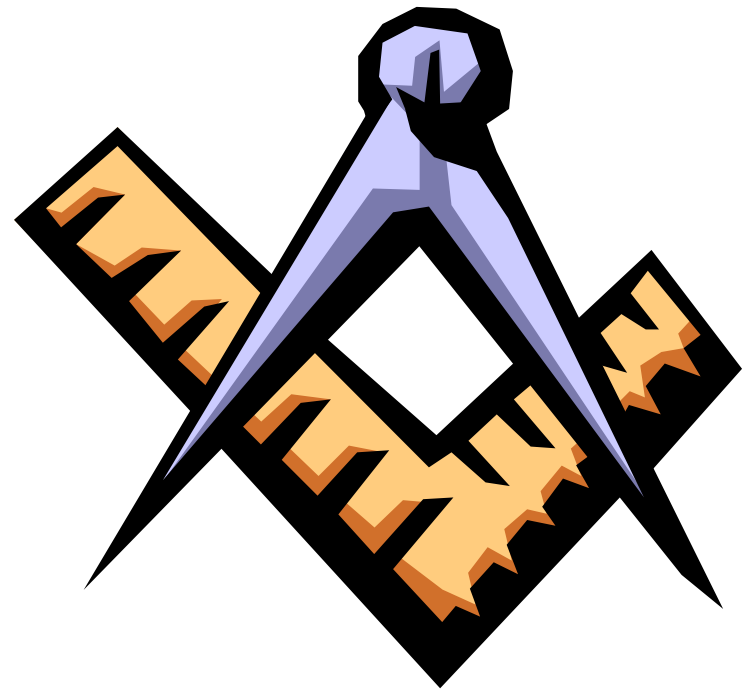
IMPLIED INTERPRETATION OF CONDITIONS

- Amount of Compensation - as per K - or "reasonable"



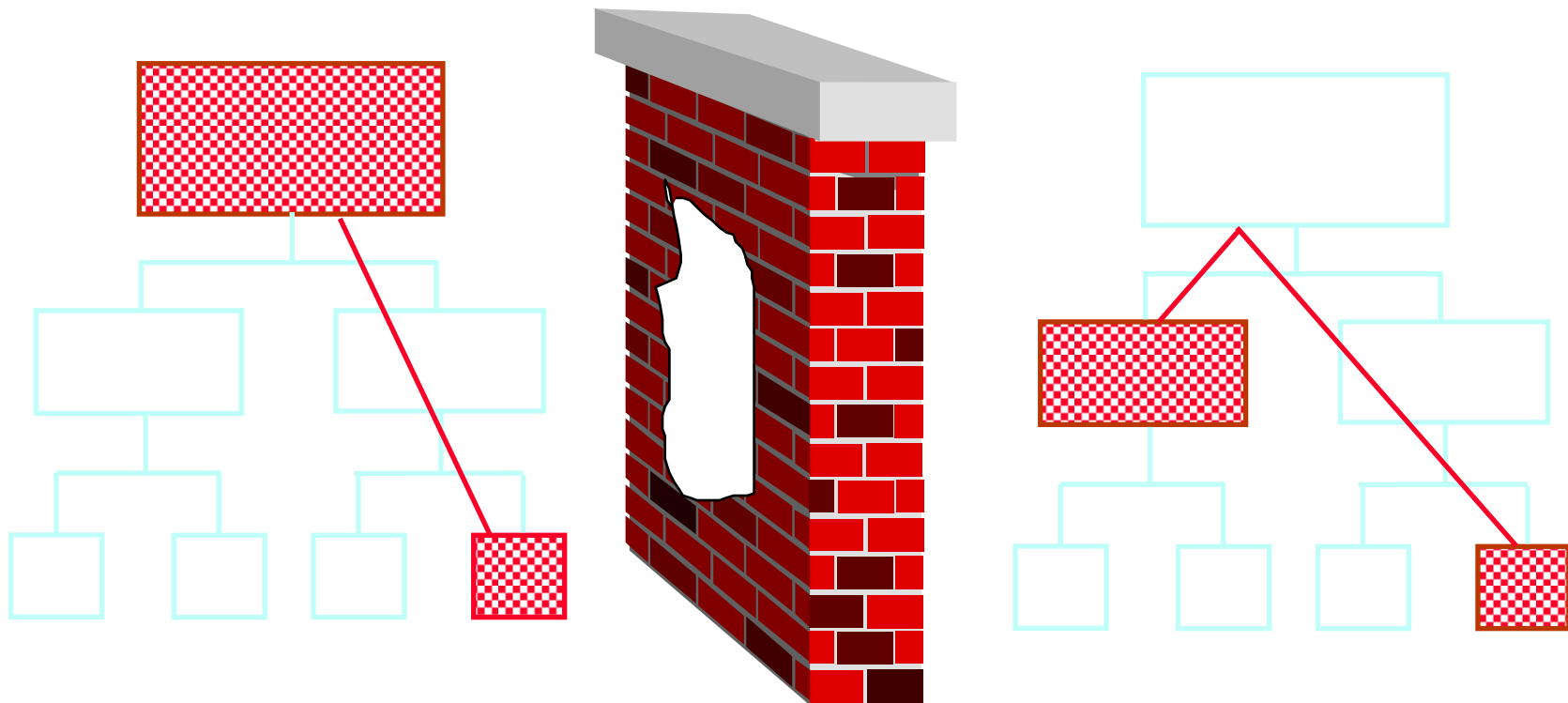
IMPLIED INTERPRETATION OF CONDITIONS

- Waiver & Estoppel - reliance upon waiver estops revocation



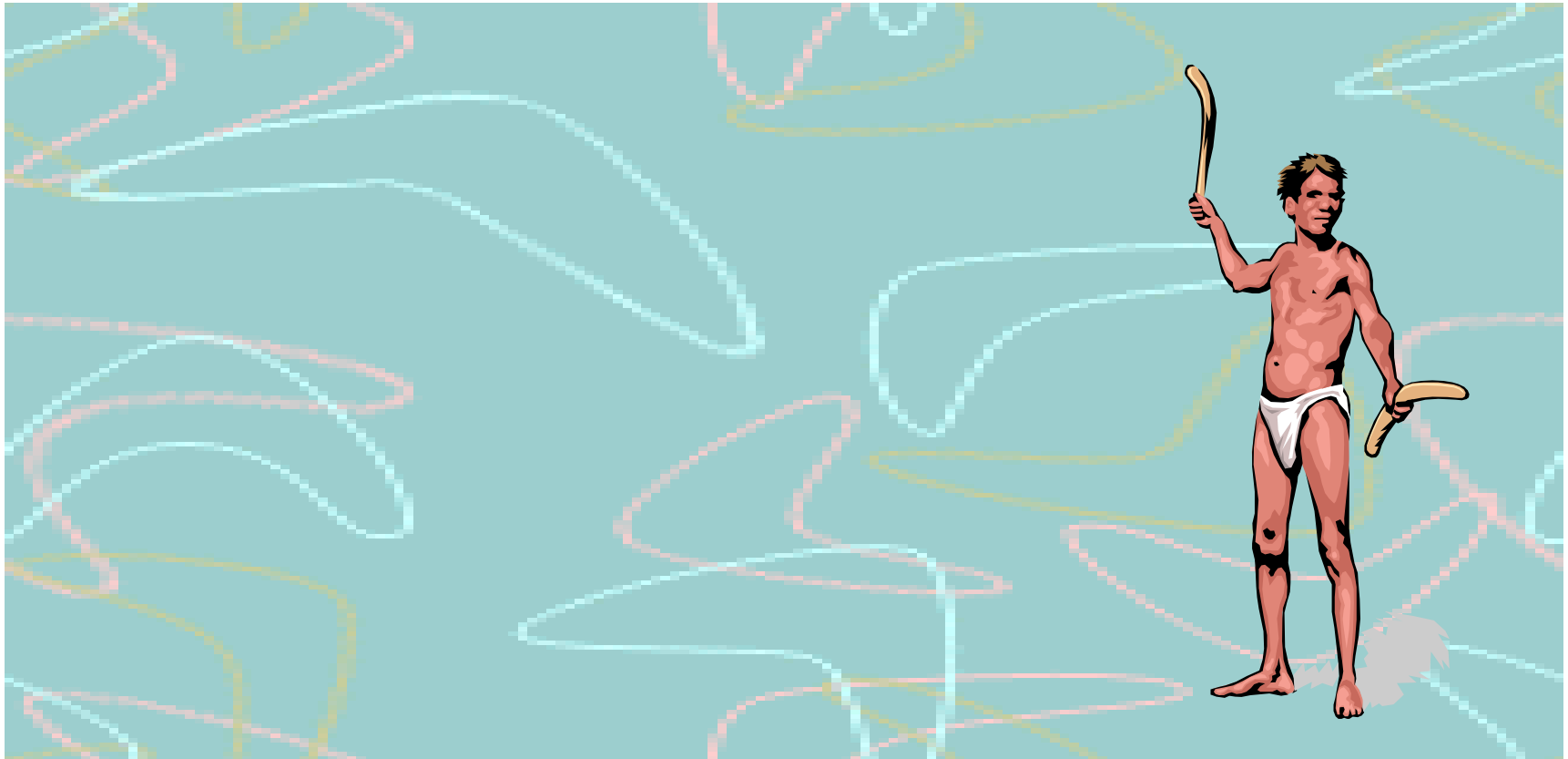
IMPLIED INTERPRETATION OF CONDITIONS

- Third Party Beneficiaries: Creditor v. Donee v. Incidental
 - Restatement of Contracts 2nd: Intended v. Incidental



IMPLIED INTERPRETATION OF CONDITIONS

- Assignment of Rights v. Delegation of Duties



RULES OF CONSTRUCTION OF CONTRACT LANGUAGE

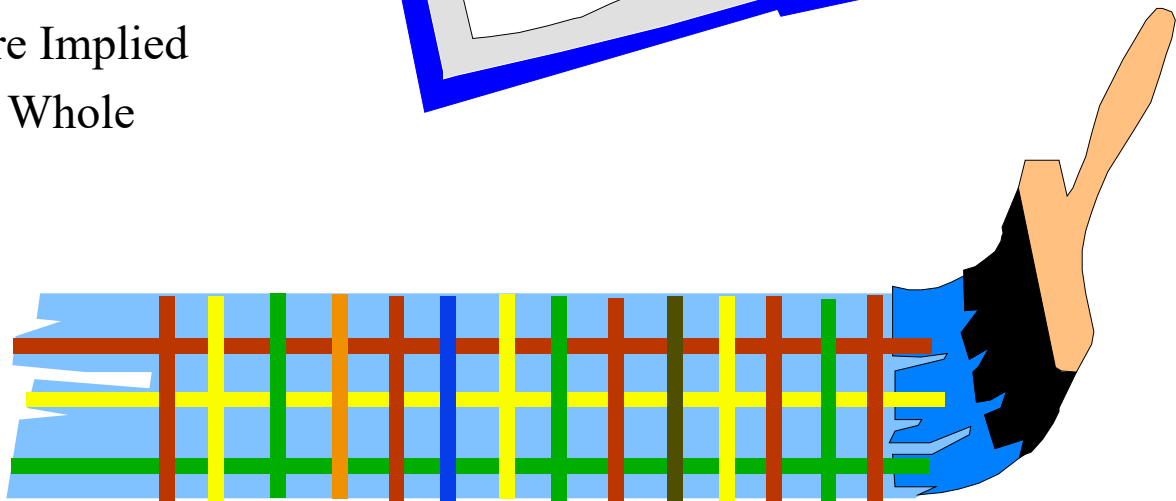
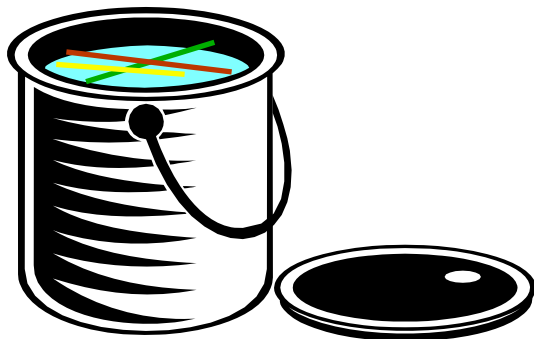
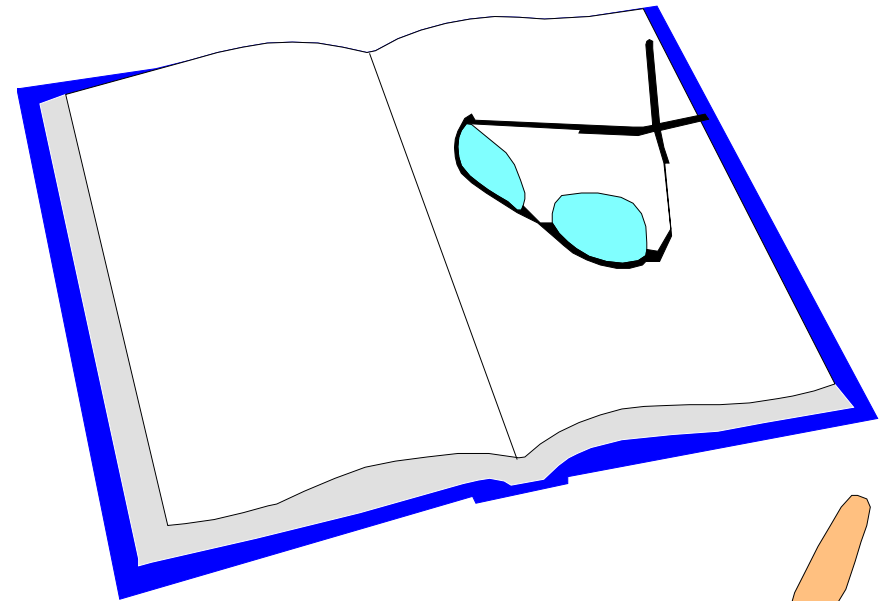


“‘When *I* use a word,’ Humpty Dumpty said, in rather a scornful tone, ‘it means just what I choose it to mean – neither more nor less.’
‘The question is,’ said Alice, ‘whether you *can* make words mean so many different things.’
‘The question is,’ said Humpty Dumpty, ‘which is to be master – that’s all.’”

Lewis Carrol, Through the Looking Glass, Chapter VI
as quoted in Cases and Materials on Contracts, 2nd Ed., Farnsworth,
Young and Jones, 1972.

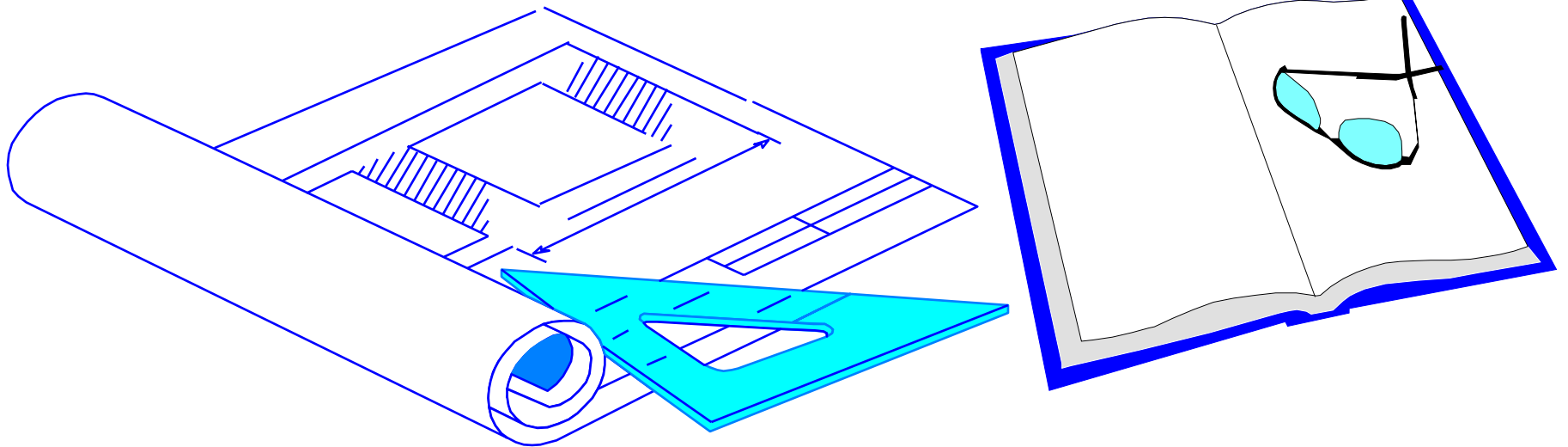
RULES OF CONSTRUCTION OF CONTRACT LANGUAGE

- Plain Meaning v.
 - Technical Terms
 - Trade Terminology
 - Prior Dealings
 - Absurd Results
- Harsh or Unreasonable Results
- Intent v. Parol Evidence Rule
- Unspecified Terms are Implied
- Contract is Read as a Whole



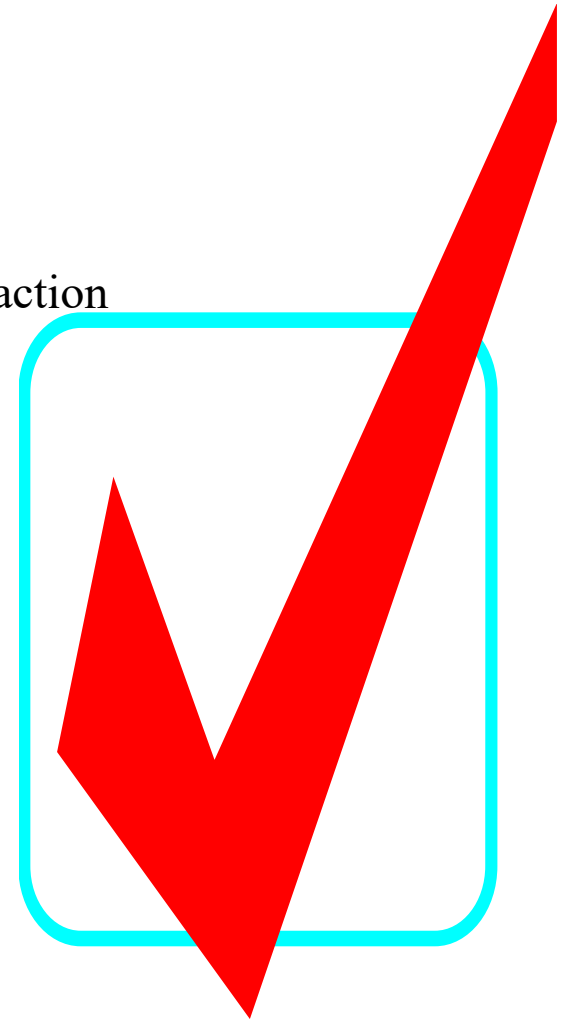
RULES OF CONSTRUCTION OF CONTRACT LANGUAGE

- General Terms v. Special Terms
- Specifications v. Drawings
- Printed Forms v. Typed Insertions v. Handwritten Notes
- Partial Performance and Severable Contracts
- Construed Against the Draftsman
- Conflict of Laws: Procedural v. Substantive



DISCHARGE OR BREACH OF CONTRACTUAL OBLIGATIONS

- Discharge may be by:
 - Performance
 - Tender
 - Condition Subsequent
 - Impossibility
 - Commercial Frustration
 - Recission
 - Novation
 - Cancellation
 - Accord & Satisfaction
 - Account Stated
 - Lapse
 - Judgment
- Substantial Performance
- Partial Performance
- Timely Performance v. Time is of the Essence
- Evaluation of Performance v. Good Faith Requirement



Breach may be excused by:

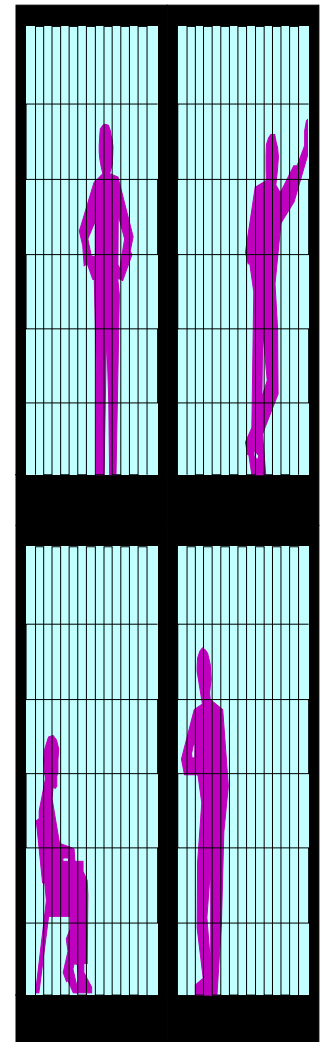
- Prevention
- Anticipatory Breach
- Breach of Other Party
- Substantial Performance
- Divisibility
- Waiver
- Estoppel



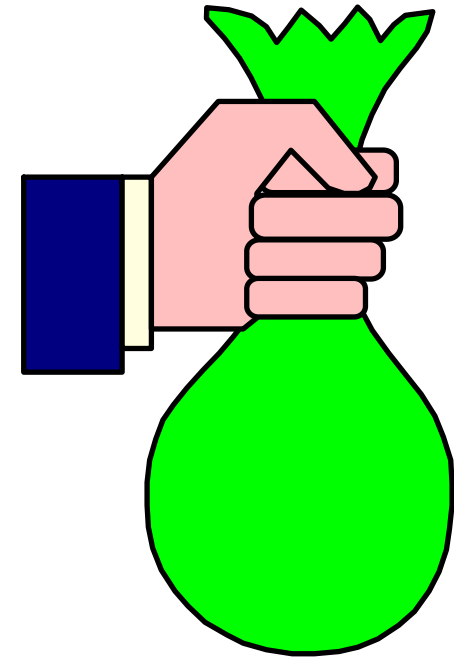
Judicial Preference Against “Excuses”

REMEDIES FOR BREACH OF CONTRACT

- Specific Performance
 - for services
 - substitutable - specific performance rarely available
 - personal or unique - to perform -- not to perform elsewhere
 - for goods
 - fungible commodities - specific performance rarely available
 - irreplaceable or unique - specific performance is available
 - for land or contracts involving use of land
 - almost always unique - almost always available
 - forcible "taking" more likely than forcible "giving"



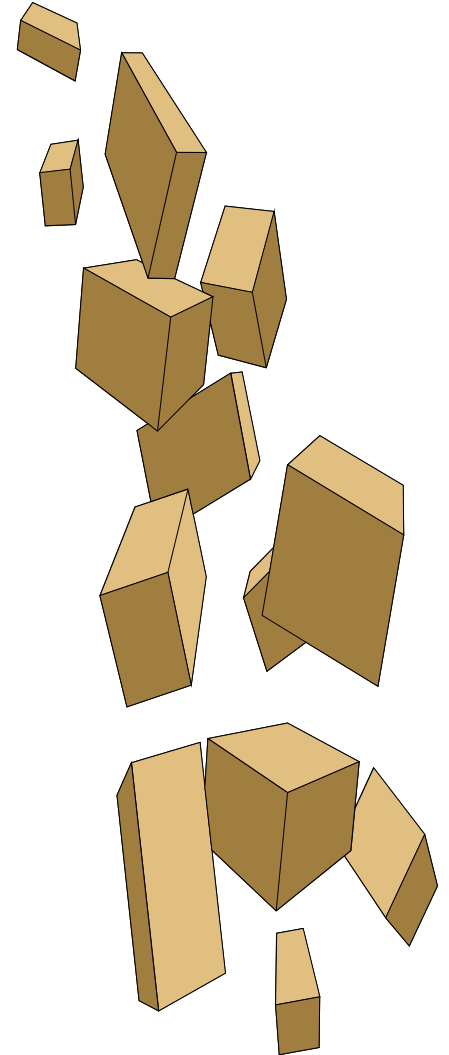
Damages:



- Compensatory - including benefit of the bargain
- Incidental - costs incurred attempting to minimize damage
- Consequential - foreseeability
- Nominal - to prove a point - "quiet title" - determine law
- Punitive - not permitted for breach of contract in U.S.
 - Civil Law countries do permit punitive damages as agreed in K
 - Common Law permits punitive damage for "outrageous" actions
- Stipulated = Liquidated - must prove not punitive
 - will be difficult or impossible to determine actual damage
 - stipulated amount bears reasonable relationship to anticipated damage to be caused by breach

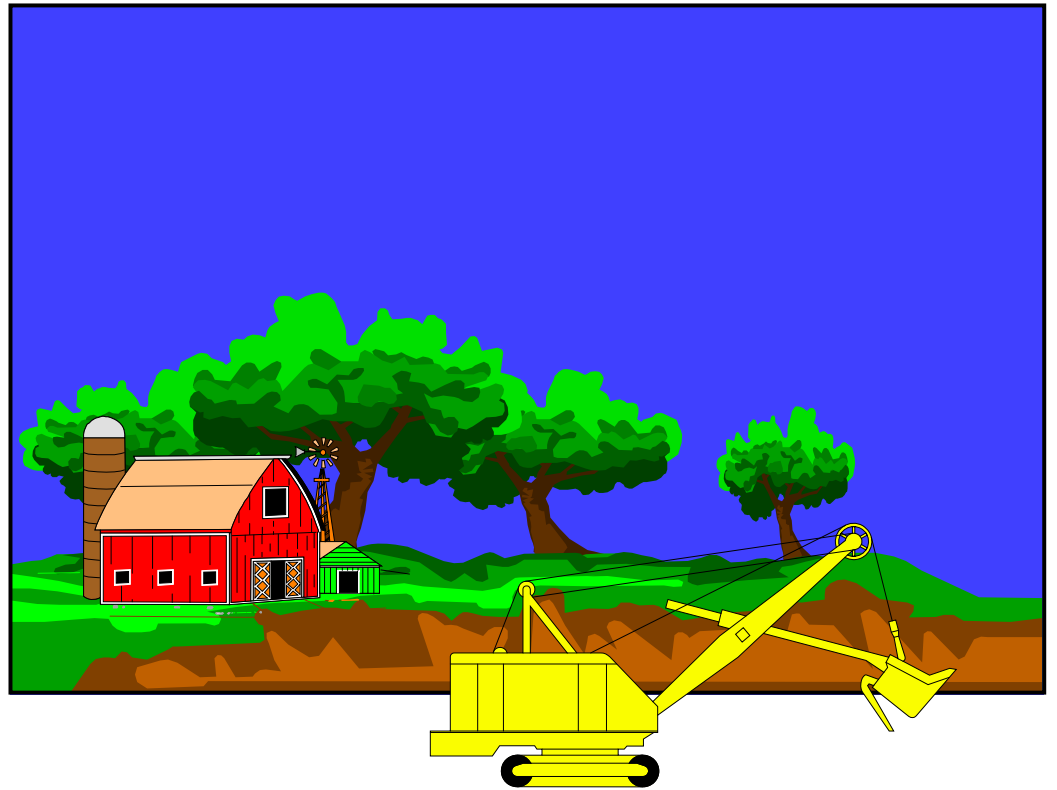
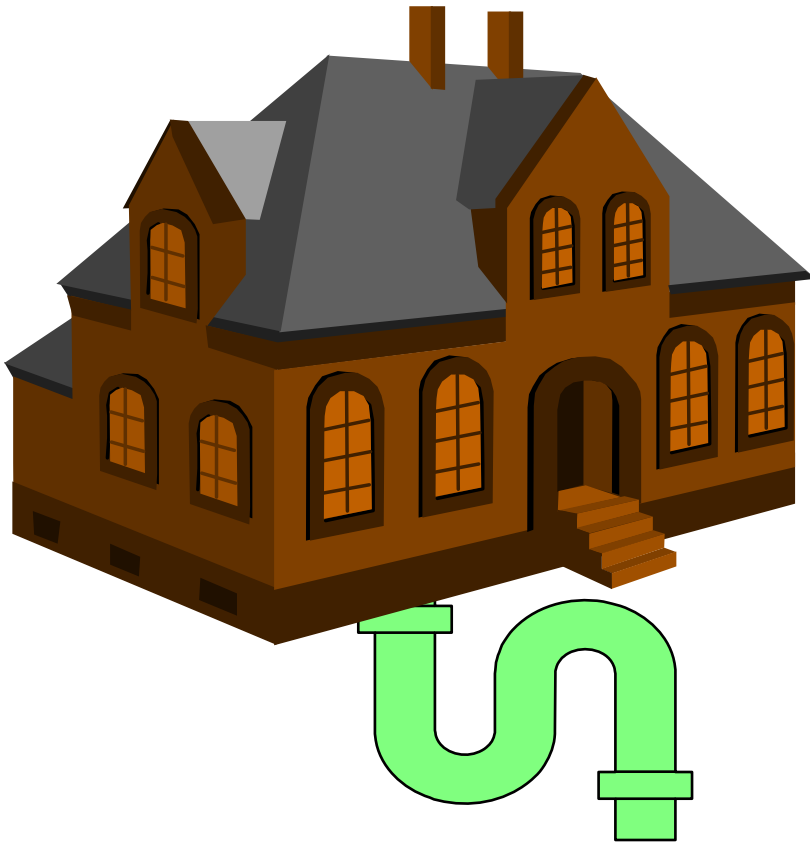
Special Rules for Goods:

- Remedies of Seller for Breach by Buyer
 - -- withhold goods -- stop goods -- resell plus damages
 - -- damages w/o resale -- action for price -- cancellation
- Remedies of Buyer for Breach by Seller
 - -- cover -- damages -- specific performance
 - -- reject -- accept knowing -- accept not knowing



Limitations on Recovery

- Special Rules for Realty: Economic Waste Rule
- Mitigation - Required - Reasonable attempt sufficient

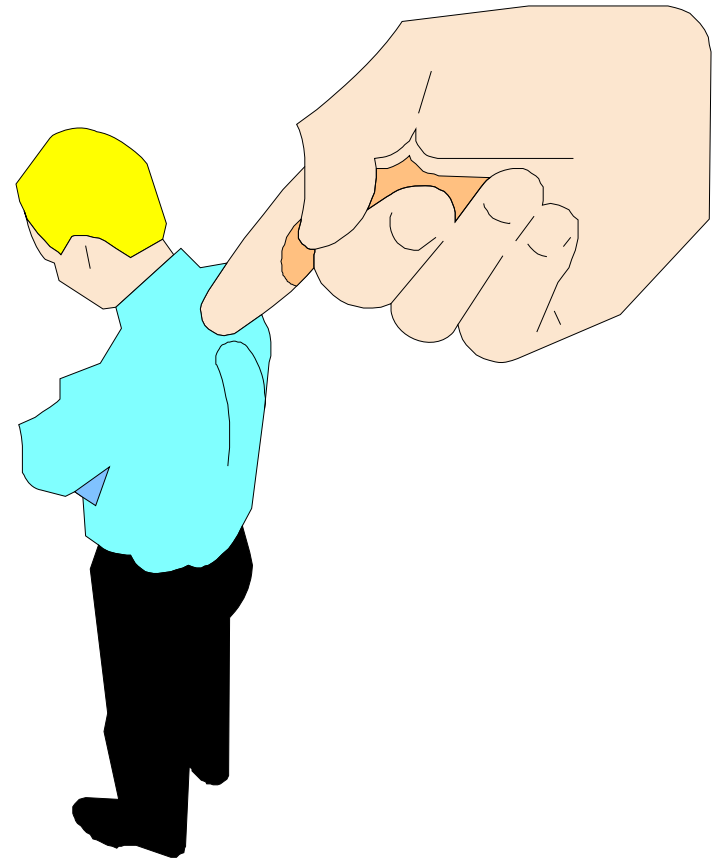


OUTLINE FOR SESSIONS ON TORTS

Non-Contractual Civil
Obligations

A Tort is ...

- a breach of duty with such duty imposed by society rather than by contract.



DEFINITION

- Acts v. Omissions
 - breach caused by affirmative action
 - duty to not commit prohibited act - prohibited by society
 - duty to perform act in reasonable manner (or higher standard)
 - acquired upon commencement of act
 - breach caused by lack of affirmative action
 - duty to perform act - imposed by society
 - no duty to perform act; but once started, reasonable effort

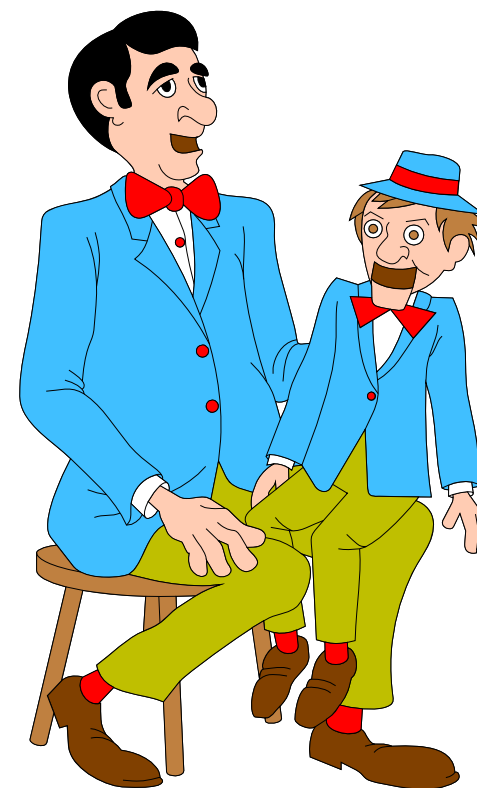
DEFINITION

- Degree of Responsibility v. Burden of Duty and Breach Thereof
 - Traditional - Intentional v. Negligence v. Casual Conduct
 - Intentional - no need to show damage - punitive damage remedy
 - Negligence - must prove damages - compensatory damages only
 - Casual - must prove special duty & damages - compensatory only
 - Modern - Ability to Control Act v. Ability to Control Loss
 - New Societal Duties to Consumers & Constituents
 - The "Deep Pocket" Theory
 - The General Insurer or Spread the Loss Theory
- Legal Duty v. Moral Duty
 - cf. Strict Liability - Allocation of Loss
- Doctrine of Rescue, of the Volunteer



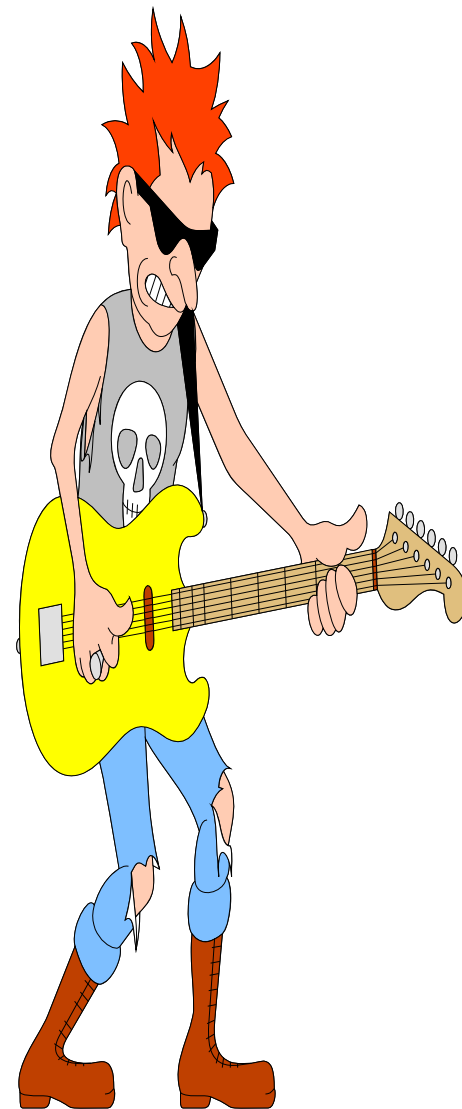
GENERAL CONSIDERATIONS

- Vicarious Liability - Imputed Liability
"...the general common law notion that one who is in a position to exercise some general control over the situation must exercise it or bear the loss..." Law of Torts, Prosser, p 459



GENERAL CONSIDERATIONS

- Respondeat Superior
 - Employer ◀ Employee
 - scope of employment v. private actions of employee
 - intentional torts v. actions on behalf of the employer
 - Employee v. Independent Contractor
 - scope of control over actions
 - Employee v. Agent - not subject to control by employer
 - actions within apparent authority of agent



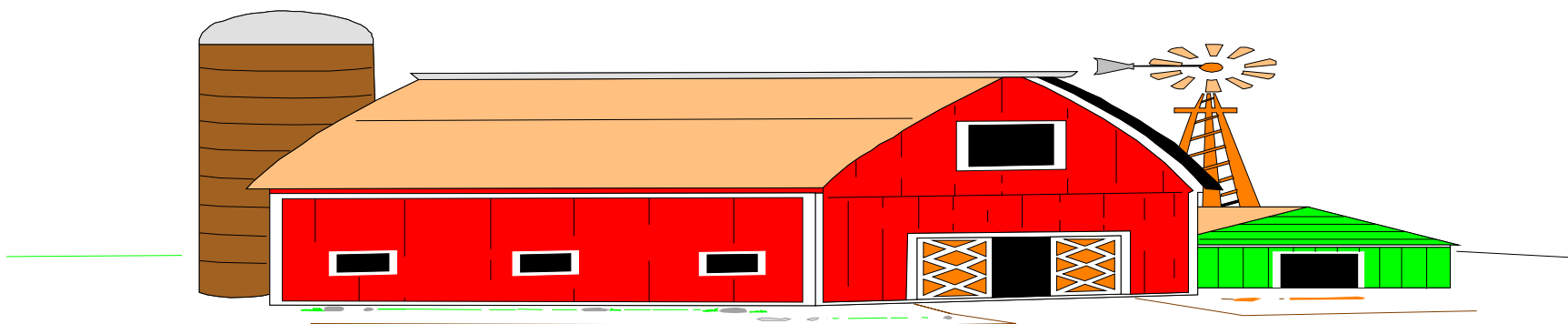
GENERAL CONSIDERATIONS

- Liability for Independent Acts of Other Parties
 - Partners and Joint Venturers
 - scope of partnership -- enhancement of partnership
 - Independent Contractors
 - Non-delegable duties and inherently dangerous activities



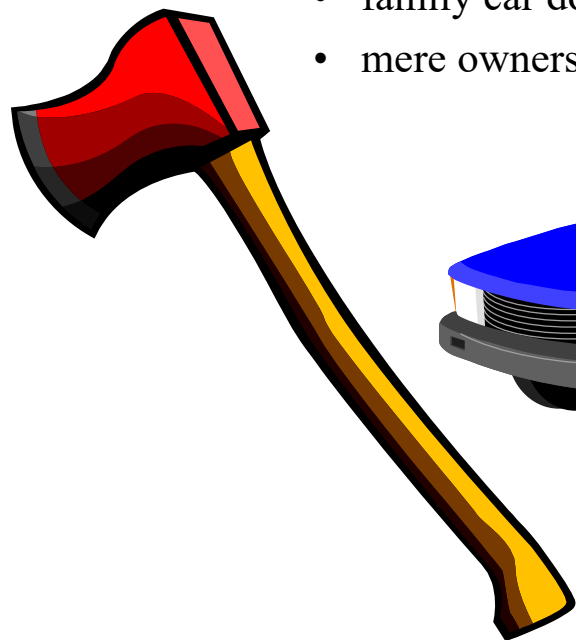
GENERAL CONSIDERATIONS

- Liability based upon Ownership of Real Property
 - duty to business visitors, social visitors, trespassers
 - doctrine of attractive nuisance
 - duty of lateral and subjacent support
 - special notes to geotechnical engineers
 - riparian duties to inhibit waste, pollution of ground waters
 - additional duties to adjoining property
 - special duties of landlords relating to common areas
 - special rules for leased areas open to public usage



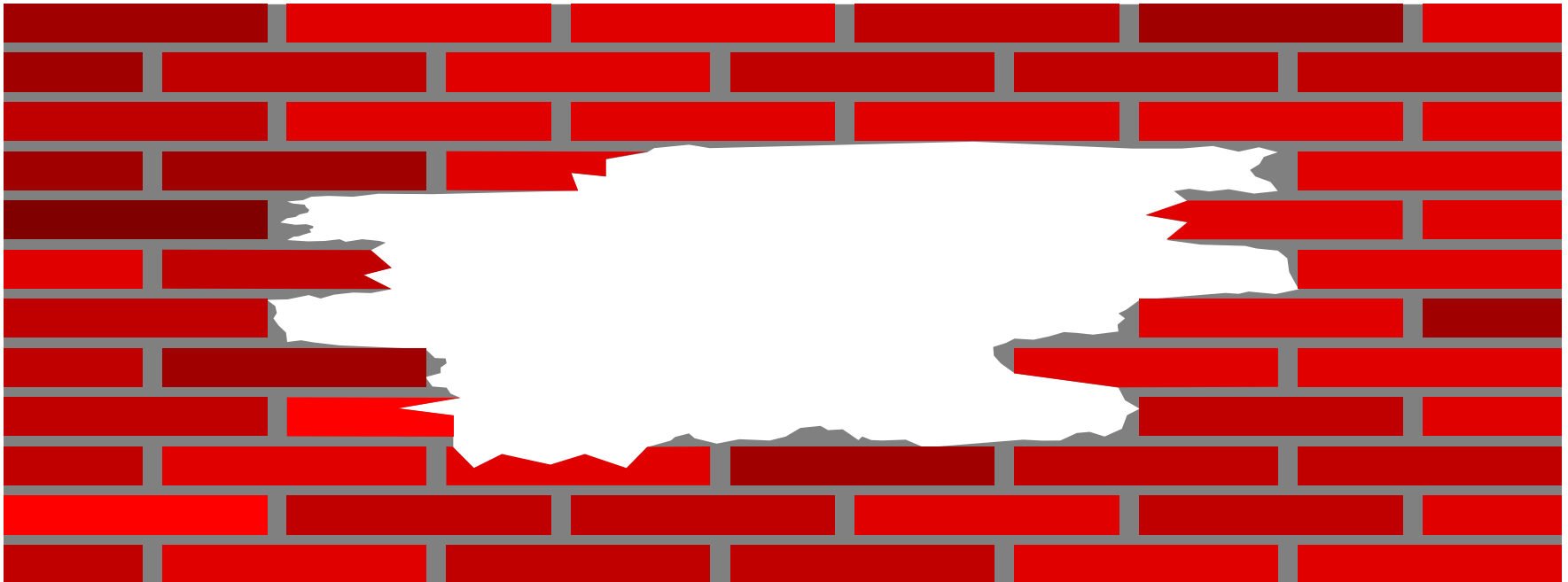
GENERAL CONSIDERATIONS

- Liability based upon Ownership of Personal Property
 - primitive law - liability for injuries caused by inanimates
 - common law ... evolving ... action of pendulum
 - general rule of no liability
 - family car doctrine .. but no family gun doctrine
 - mere ownership of car -- the "dangerous instrumentality"



GENERAL CONSIDERATIONS

- Statutory Expansion of Common Law Duties
- Contractual Expansion of Common Law Duties
 - and the erosion of the concept of privity
 - the "intended beneficiary" is everyman



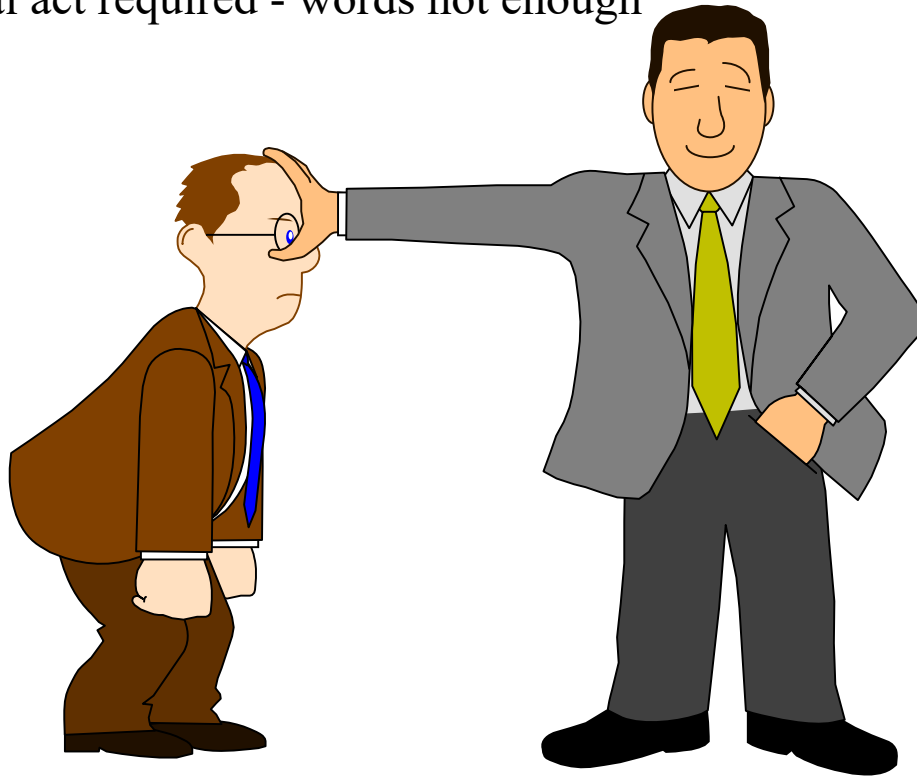
INTENTIONAL TORTS

- **Battery** - Unauthorized Contact
 - intent - causation - contact
 - to the person - to zone of the person



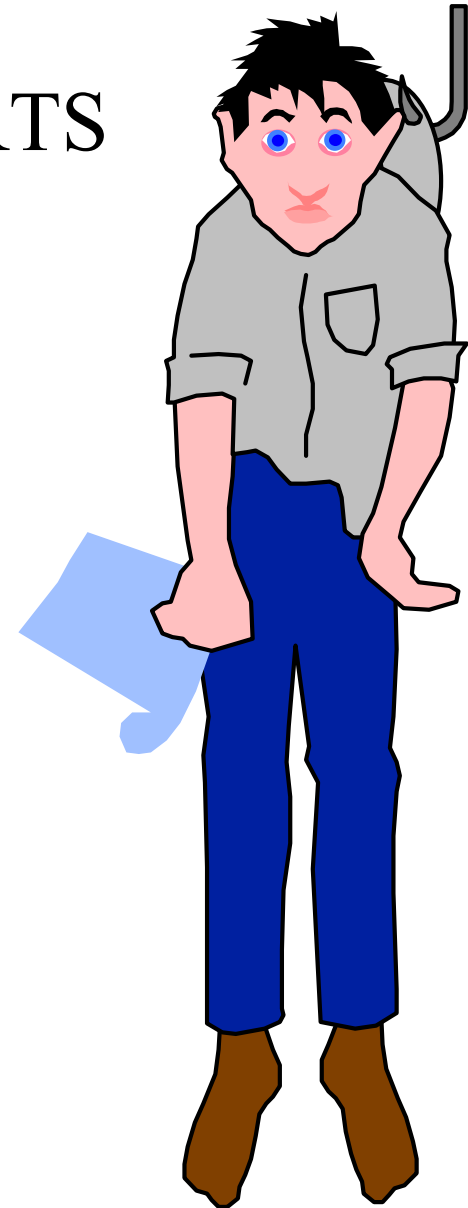
INTENTIONAL TORTS

- **Assault** - Threat of Immediate Unauthorized Contact
 - intent - causation - apprehension
 - physical act required - words not enough



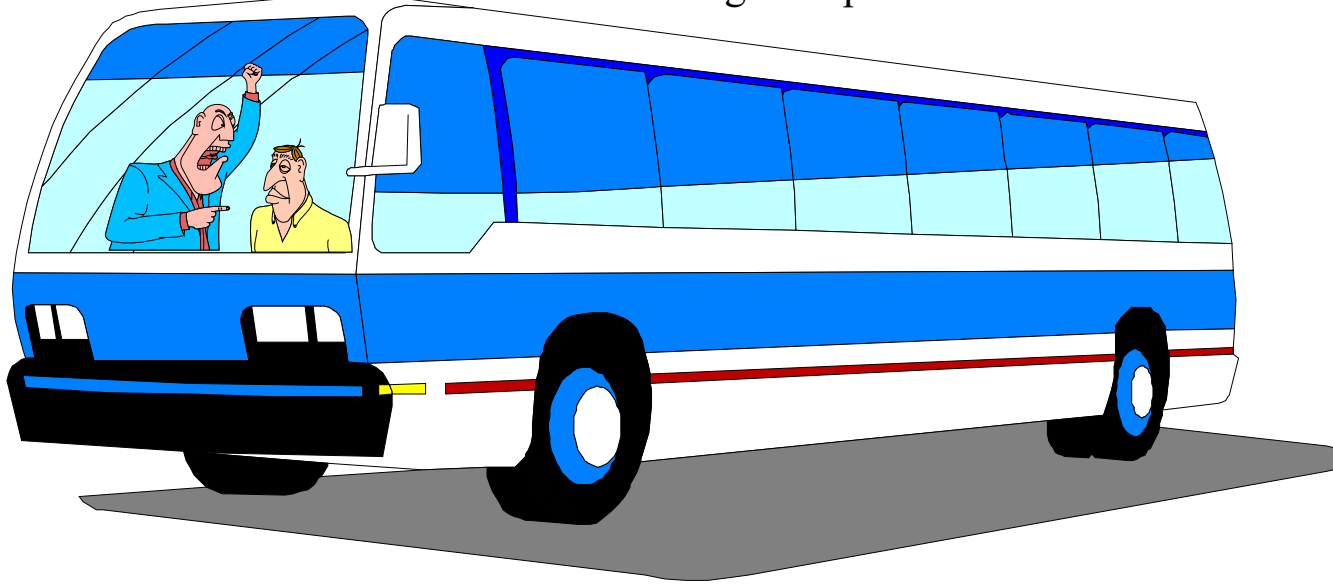
INTENTIONAL TORTS

- **False Imprisonment** - Bounded Area
 - intent - causation - known restraint of movement



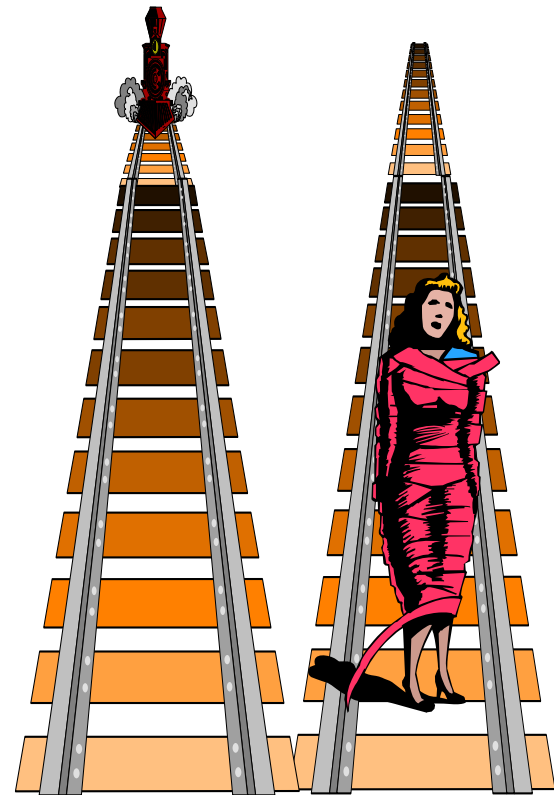
INTENTIONAL TORTS

- Emotional Distress - Child of Assault
 - intent - causation - mental anguish - PLUS some physical manifestation, however slight (proof of damage)
 - higher duty of common carriers & public utilities
 - but not of private concerns dealing with public



INTENTIONAL TORTS

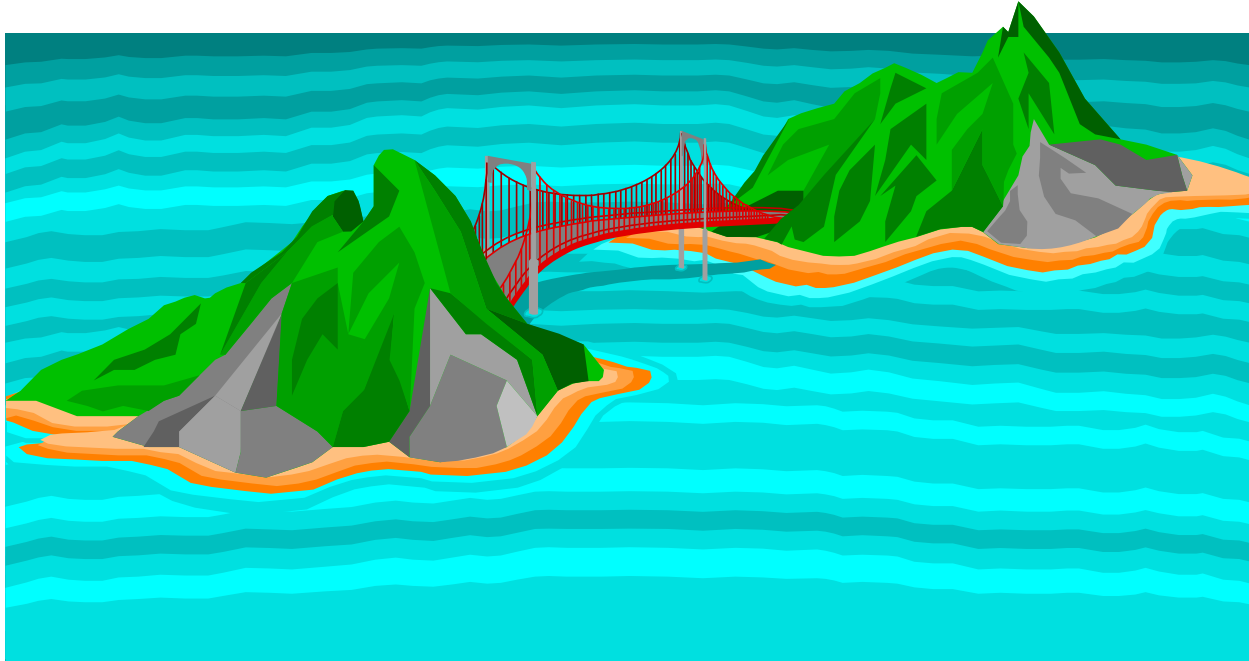
- Intentional Infliction of Emotional Distress - new tort
 - intent to cause distress approaching mental disturbance
 - by willful, extreme and outrageous conduct



INTENTIONAL TORTS

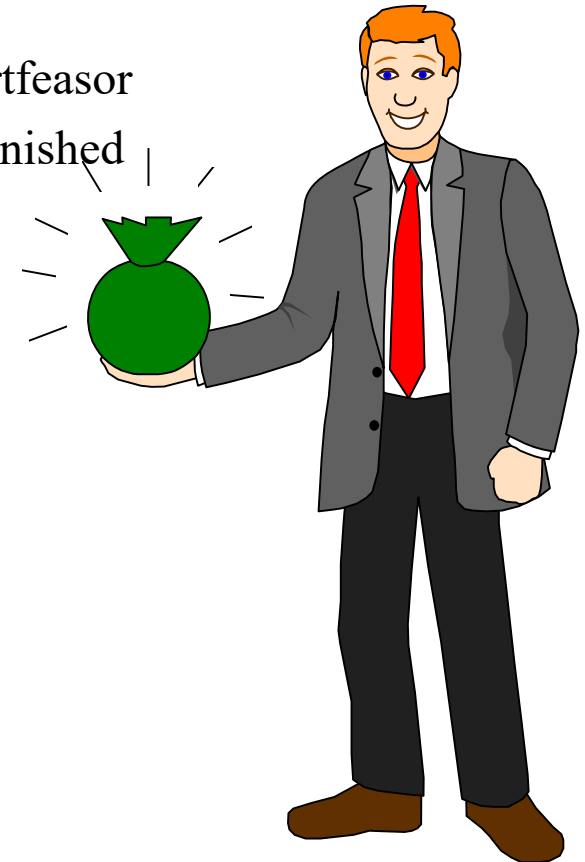
- Trespass to Land

- Trespass - forcible, direct, immediate injury = INTENT
- Trespass on the Case - wrongful conduct = NEGLIGENCE
- Nuisance: interference with the use of or enjoyment of land



INTENTIONAL TORTS

- **Conversion** - Act to Permanently Deprive True Owner of Possession
 - intent (to possess or control) - possession
 - choice of remedy - possession or forced sale to tortfeasor
 - no wrongful act required - innocent conversion punished
 - cf. NY Courts only require return upon demand



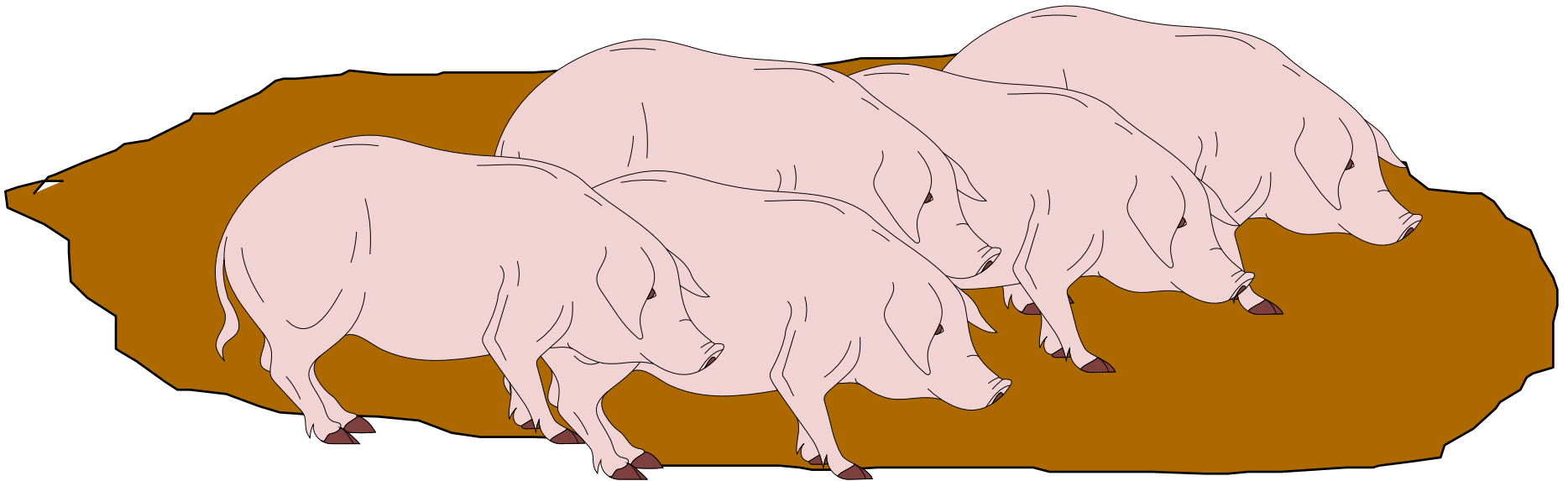
INTENTIONAL TORTS

- **Trespass to Chattels** - Intentional Interference to Property
 - to damage or destroy goods of another
 - to make use of goods of another without permission
 - to move goods of another
 - no protection from intermeddlers
 - cf. trespass to land



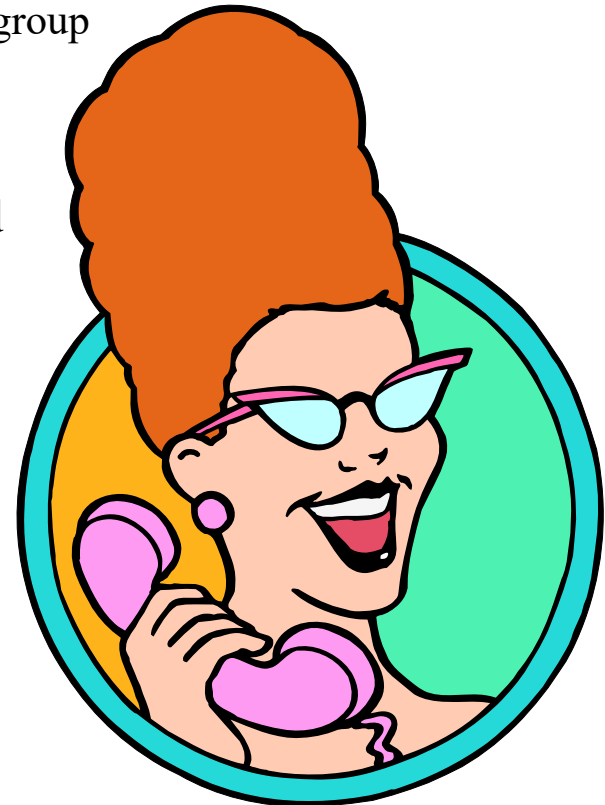
INTENTIONAL TORTS

- **Nuisance** - Private v. Public - Civil Wrong v. Criminal Offense
 - private - infringement upon rights of property owner
 - public - infringement upon common rights of the public



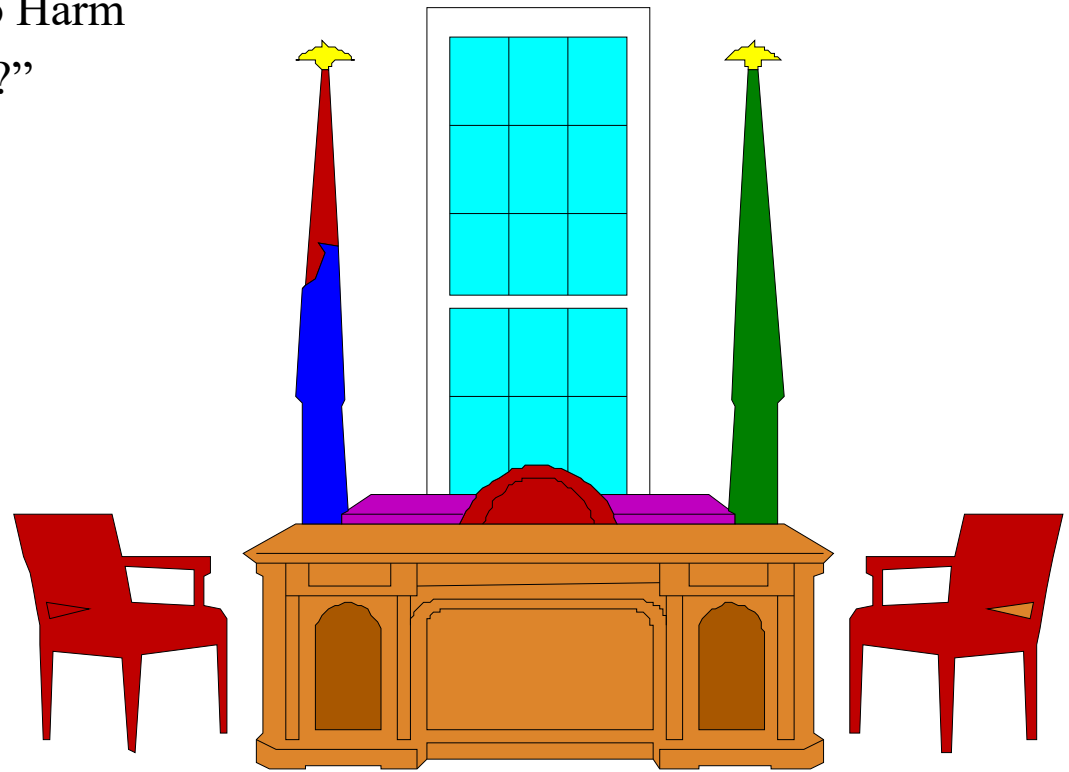
INTENTIONAL TORTS

- **Defamation** - Publication of Untrue Allegations
 - Defamatory Language - Of or Concerning - Causing Injury
 - comments on member of small group v. of a large group
 - normal meaning of words v. innuendo
 - Publication --- 1st time --- 2nd time --- 10th time
 - Libel = written word --- Slander = spoken word
 - Differing historical bases
 - Actual damage presumed for libel
 - Proof of actual damage required for innuendo
 - Proof of actual damage required for slander
 - Actual damage presumed for per se slander

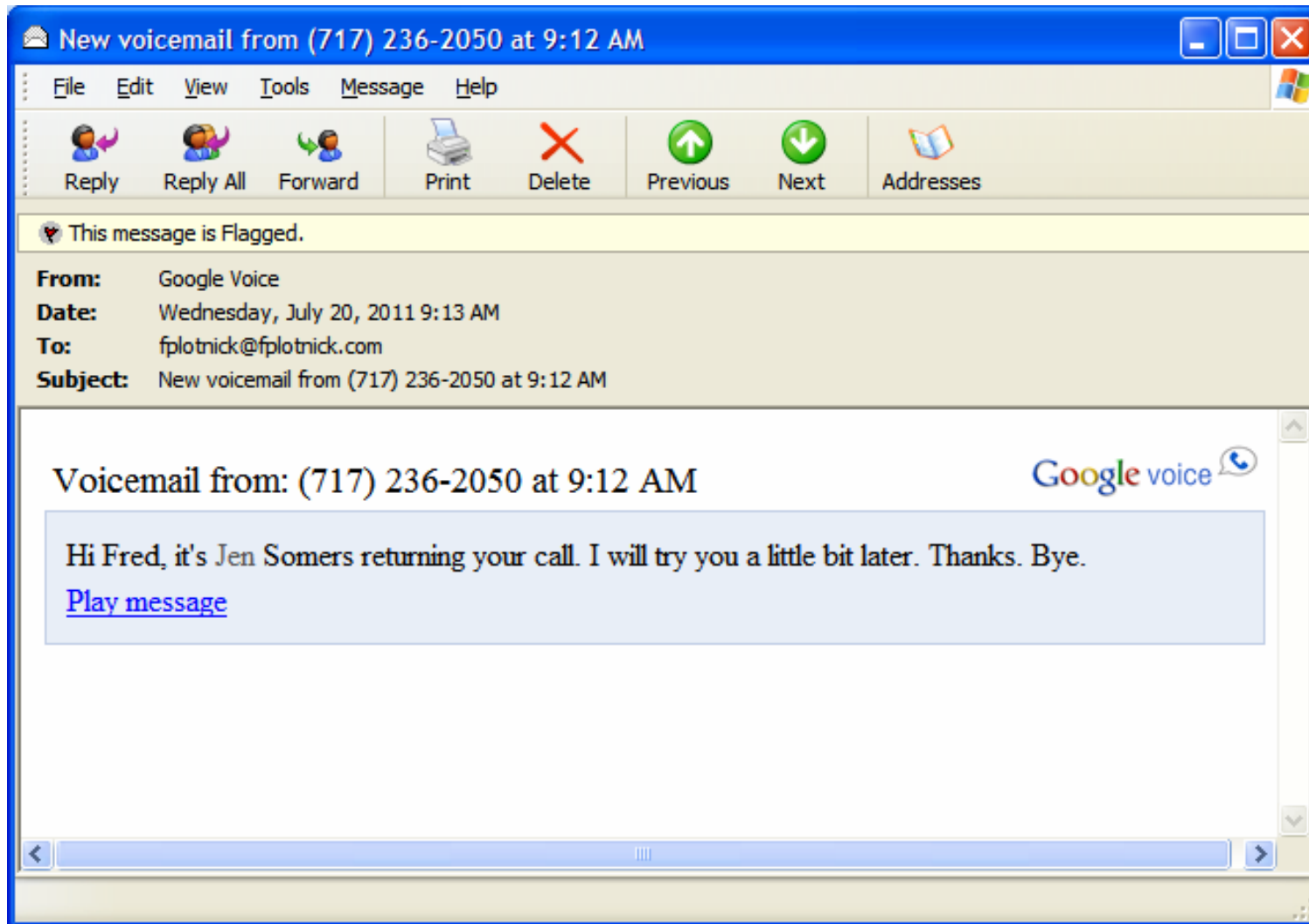


INTENTIONAL TORTS

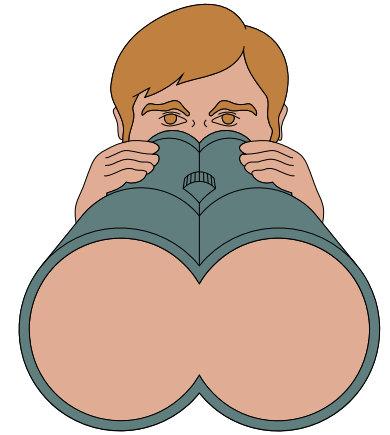
- **Defamation** - Private v. Public Figures
 - Intent to Act v. Intent to Harm
 - Who is a “public figure?”



INTENTIONAL TORTS



INTENTIONAL TORTS



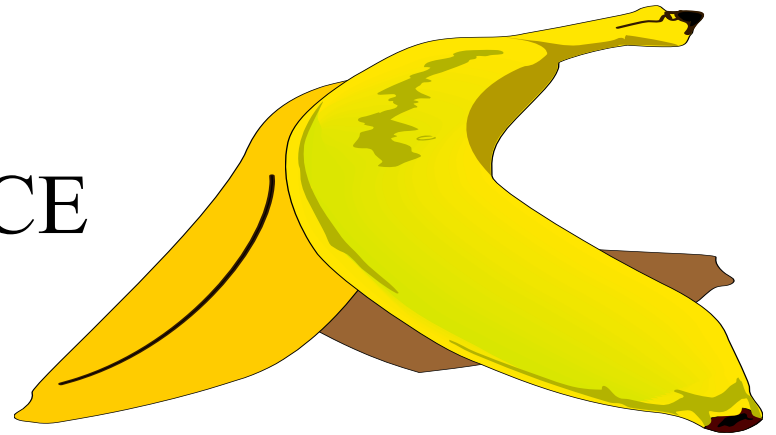
- **Right to Privacy Torts** - “Children of Defamation”
- **Appropriation** - use of name or picture for commercial purpose
 - impersonation denoting affiliation, authority or approval
- **Publication Presenting Injured Party in a False Light**
 - usually less than defamation
 - objectionable to the ordinary man under the circumstances
- **Intrusion Upon Personal Affairs or Seclusion**
 - gaining information which is not available to the public
 - physical search, telescopes, wiretapping, excessive phone calls
- **Public Disclosure of Private Facts**
 - facts NOT available in the public record - eg debts v. lawsuit

INTENTIONAL TORTS

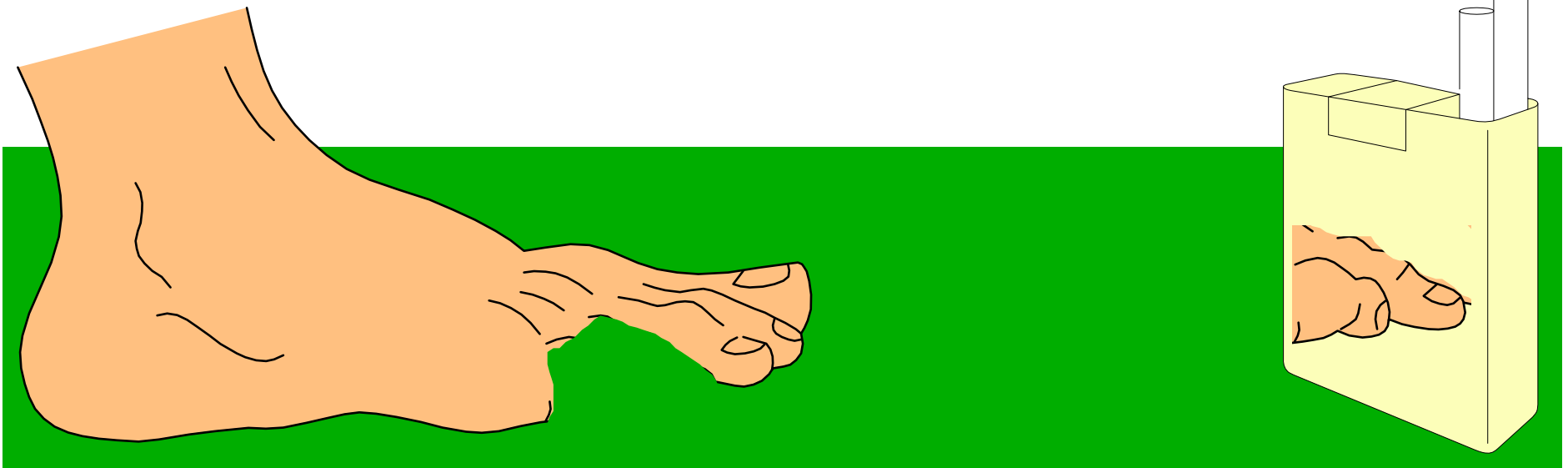
- Intentional Interference with Economic Relations
- Injurious Falsehood
- Interference with Contractual Relations
- Interference with Prospective Advantage



NEGLIGENCE

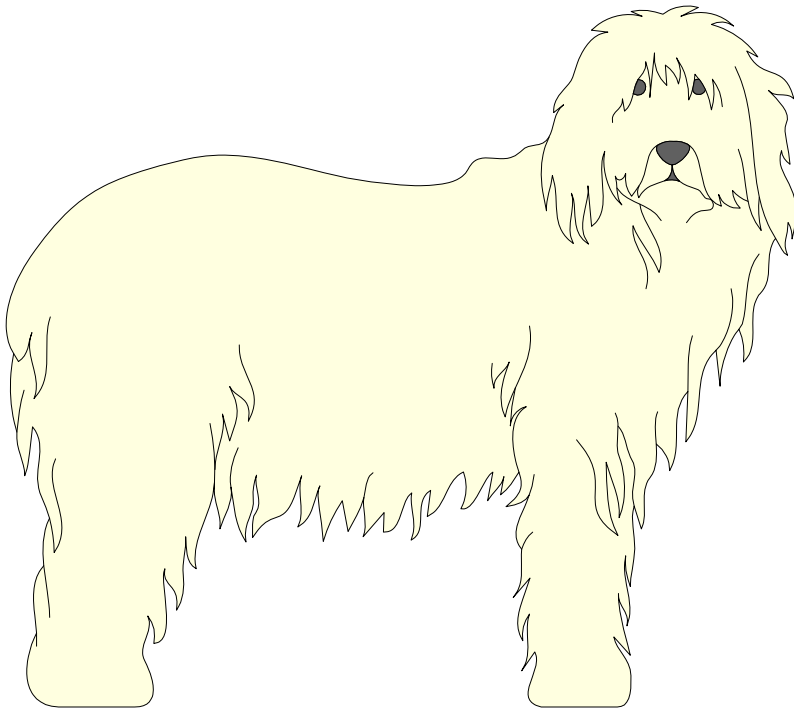


- Duty, Breach, Proximate Cause, Damages
 - Duty - by common law, statute, contract, prior conduct
 - Breach - reasonable man standard - professional man standard
 - Proof - need to show duty and breach - or duty and control
 - *Res Ipsa Loquitur*



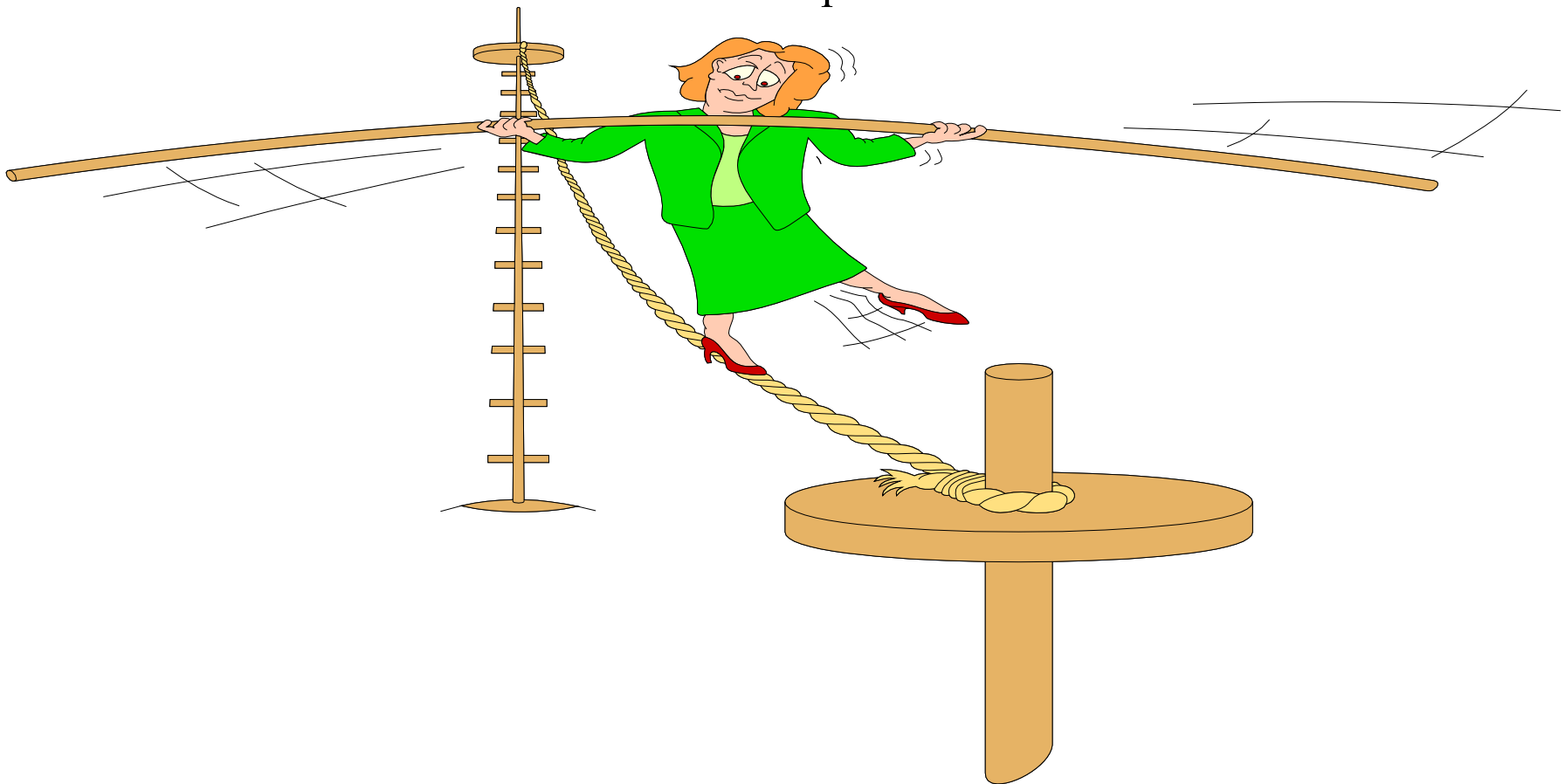
NEGLIGENCE

- Foreseeability
 - Proximate Cause - Palsgraf v. Long Island RR, 1928, NY
- Intervening Cause - prevents prior actor from curing his act



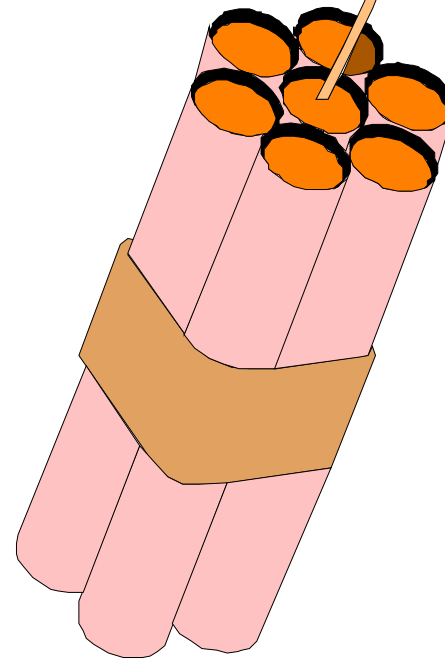
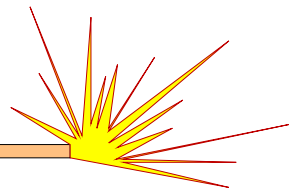
NEGLIGENCE

- Dilemma for the Owner or A/E Representative on Site



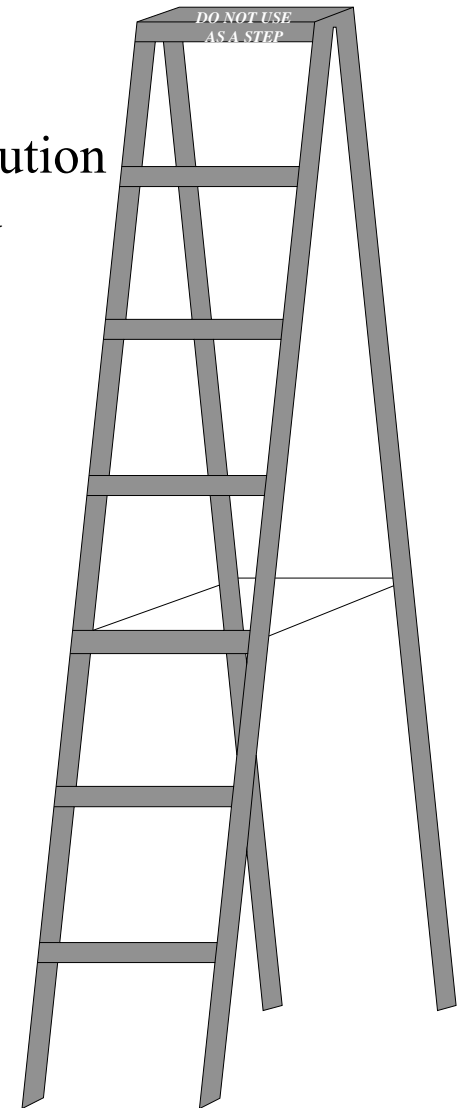
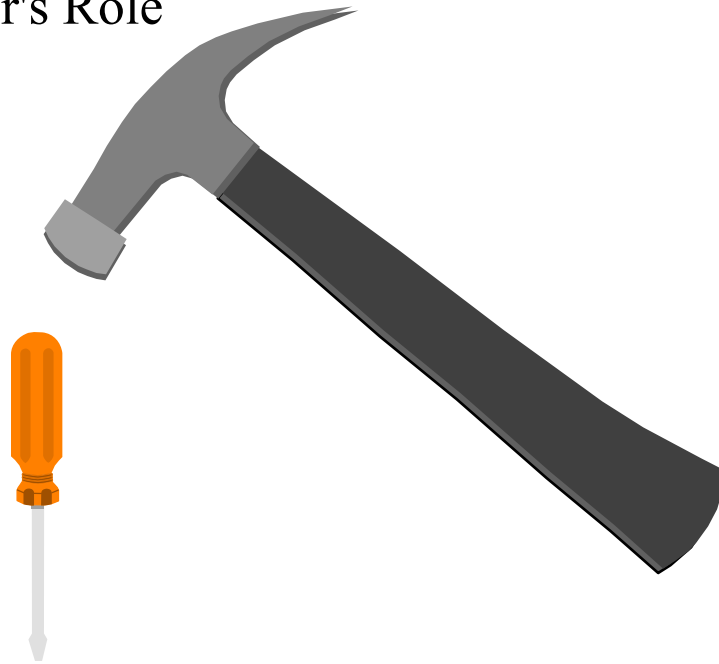
STRICT LIABILITY

- Absolute Duty, Breach, Causation, Damages
- Owner & Occupiers of Land
- Animals and Ultra-Hazardous Activities
- Abnormal or "Non-natural" Activities
- Statutory Extensions



PRODUCTS LIABILITY

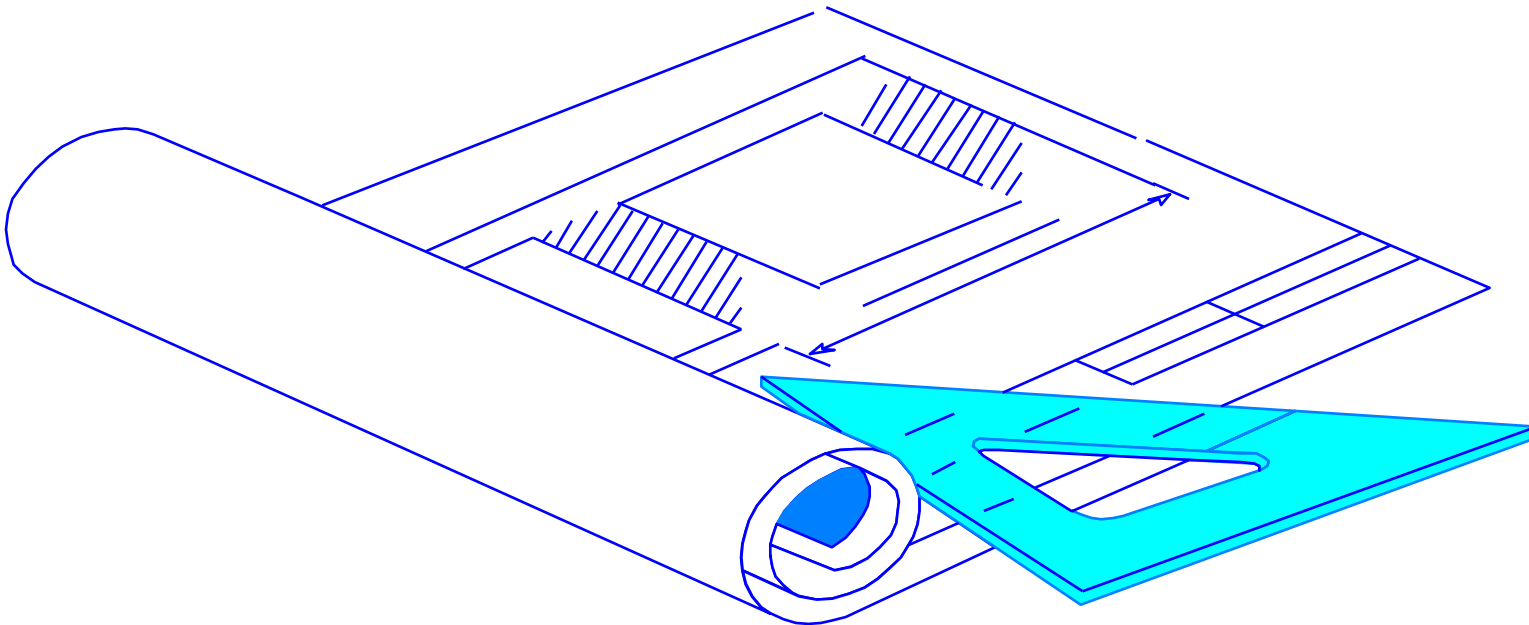
- Use, Existence of Defect, Distribution - Chain of Distribution
- Negligence, Strict Liability, Breach of Implied Warranty
- Due Care v. Abnormal Usage v. Warnings
- The Engineer's Role



"SERVICES" LIABILITY

for the 1990's ?

- Public Misunderstanding of Engineer's Ability to Design
- Ability to "Spread the Loss" v. "Luck of the Draw"
- What Public Policy May Call For ...



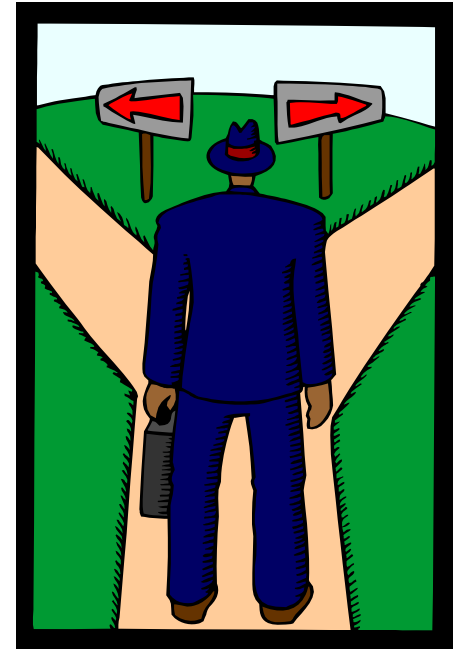
MISREPRESENTATION

- v. Intentional Torts, Negligence, Defamation
- Deceit - Common Law v. Equity - requirement of intent



TORT v. CONTRACT REMEDIES

- Nonfeasance v. Misfeasance
- Duty to accept contract
- Misrepresentation
- Promise made without intent to perform
- Misfeasance of contract v. negligence of gratuitous act
- Election - procedural, monetary considerations
- Election - by court - property v. personal injury
- Third Parties Beneficiaries - Nonfeasance v. Misfeasance
- Goods v. Services - Product Liability v. Negligence
- Evolution to Quasi-contract - Merging of Law & Chancery



TORT v. CONTRACT REMEDIES



- ? “liability in an indeterminate amount for an indeterminate time to an indeterminate class” ?

See Ultramares Corporation v. Touche, 174 N.E. 441 (1932)

- **The Economic Loss Rule**

Limiting liability to “foreseeable” or to “practical” – for products, services, professional services?

- See Casa Clara Condominium Ass’n v. Charley Toppino and Sons, 620 So. 2d 1244 (Fla. 1993)

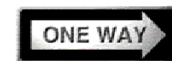
“Defective concrete which caused no other injury was deemed solely an economic loss that is not recoverable in tort ...[and] ...that contract principles were a more adequate remedy than tort principles. This ambiguity blurred the line between the economic loss rule in products liability cases and in contract cases.”

See <http://www.smithcurrie.com/commonsensecontractlaw/economic-loss-rule-Florida>

- See Bilt-Rite Construction, Inc. v. The Architectural Studio, 866 A.2d 270 (2005)

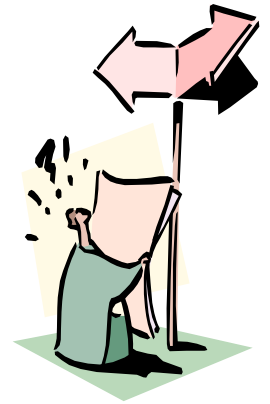
“[T]o apply the economic loss doctrine ...would be nonsensical: it would allow a party to pursue an action only to hold that, once the elements of the cause of action are shown, the party is unable to recover for its losses. Thus, we hold that the economic loss rule does not apply to claims of negligent misrepresentation....”

See http://www.martindale.com/personal-injury-law/article_Marshall-Dennehey-Warner-Coleman-Goggin_615198.htm



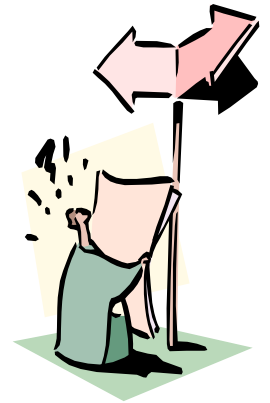
TORT v. CONTRACT REMEDIES

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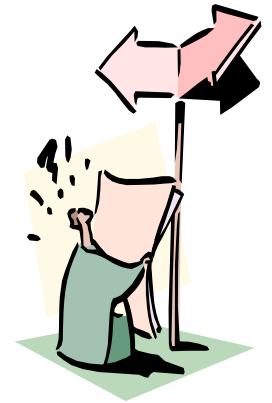
TORT v. CONTRACT REMEDIES

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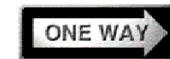
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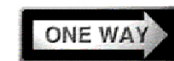
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See Ultramares Corporation v. Touche, 174 N.E. 441 (1932)

- The Economic Loss Rule

Limiting liability to “foreseeable” or to “practical” – for products, services, professional services?

- See Casa Clara Condominium Ass’n v. Charley Toppino and Sons, 620 So. 2d 1244 (Fla. 1993)

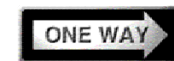
“Defective concrete which caused no other injury was deemed solely an economic loss that is not recoverable in tort ...[and] ...that contract principles were a more adequate remedy than tort principles. This ambiguity blurred the line between the economic loss rule in products liability cases and in contract cases.”

See <http://www.smithcurrie.com/commonsensecontractlaw/economic-loss-rule-Florida>

- See Bilt-Rite Construction, Inc. v. The Architectural Studio, 866 A.2d 270 (2005)

“[T]o apply the economic loss doctrine ...would be nonsensical: it would allow a party to pursue an action only to hold that, once the elements of the cause of action are shown, the party is unable to recover for its losses. Thus, we hold that the economic loss rule does not apply to claims of negligent misrepresentation....”

See http://www.martindale.com/personal-injury-law/article_Marshall-Dennehey-Warner-Coleman-Goggin_615198.htm



1993 to 2013 Case Law re the Economic Loss Rule in Florida


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 **The Next Generation**

Fredric L. Plotnick, Ph.D., Esq., P.E., is an authority on CPM planning and scheduling and on legal aspects of engineering and construction. Dr. Plotnick, the co-author of two textbooks on CPM scheduling, has also created the [Construction CPM Conference](#), with its third annual meeting set for January 27-30 in New Orleans. The Next Generation blog discusses CPM scheduling, engineering law and other aspects of project management.

[Fla. Supreme Court Reverses Course on Economic Loss: A Must-Read for Designers](#)

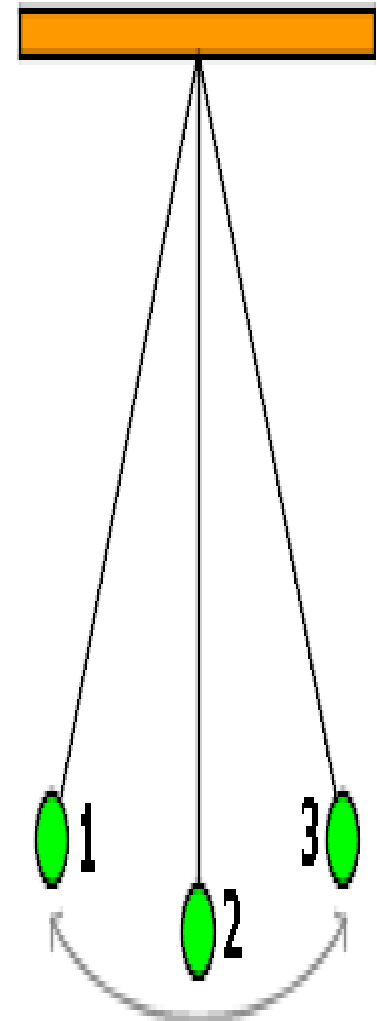
Posted by [fplotnick](#) at 3/26/2013 4:09 PM CDT

Rarely will a practitioner live through a full swing of the pendulum of the expansion and retraction of a judicial doctrine. Read how the latest decision of the Florida Supreme Court again changes the legal landscape.

[Add blog to WatchList](#)

Recent Entries

- [Fla. Supreme Court Reverses Course on Economic Loss: A Must-Read for Designers](#)



1993 to 2013 Case Law re the Economic Loss Rule in Florida

I was never quite happy with that decision by the Florida Supreme Court to restrict this choice, the Economic Loss Doctrine. So as I recently read the case *Tiara Condominium Association, Inc., vs. Marsh & McLennan Companies, Inc.*, SC10-022, decided only a little over two weeks ago, I experienced a feeling of *deja vu* all over again (sic).

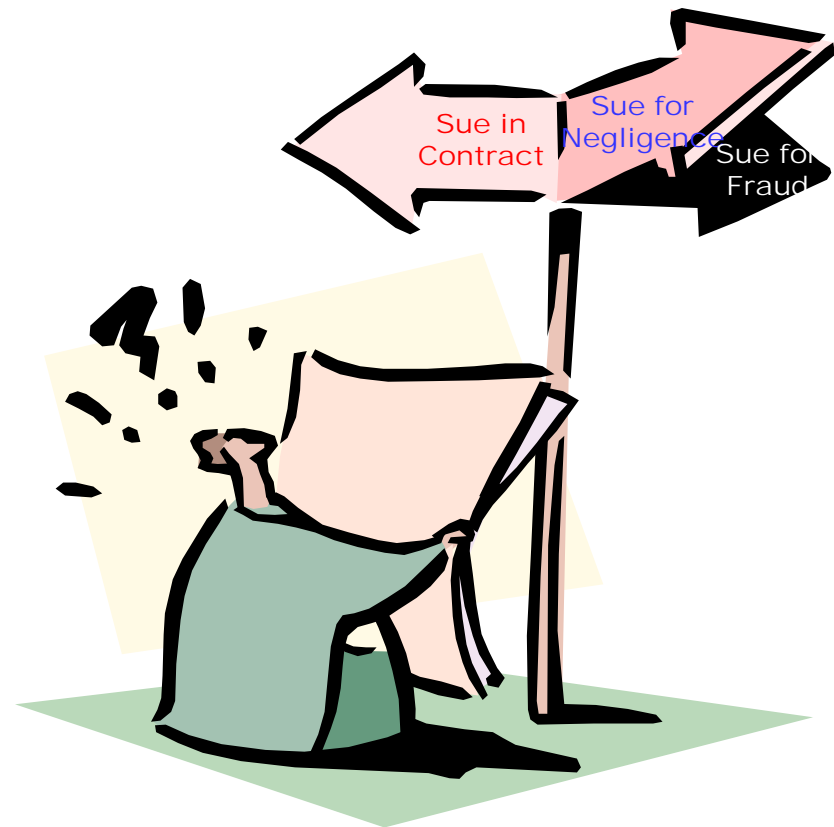
The Supreme Court of Florida, as of March 7th, 2013, now states

“For some time ... this Court has been concerned with what it perceived as an over-expansion of the economic loss rule. ... Having reviewed the origin and original purpose of the economic loss rule, and what has been described as the unprincipled extension of the rule, we now take this final step and hold that the economic loss rule applies only in the products liability context. We thus recede from our prior rulings to the extent that they have applied the economic loss rule to cases other than products liability. The Court will depart from precedent. Stare decisis will also yield when an established rule has proven unacceptable or unworkable in practice. ... Our experience with the economic loss rule over time, which led to the creation of the exceptions to the rule, now demonstrates that expansion of the rule beyond its origins was unwise and unworkable in practice. Thus, today we return the economic loss rule to its origin in products liability.”

Rarely will a practitioner live through a full swing of the pendulum of the expansion and retraction of a judicial doctrine.

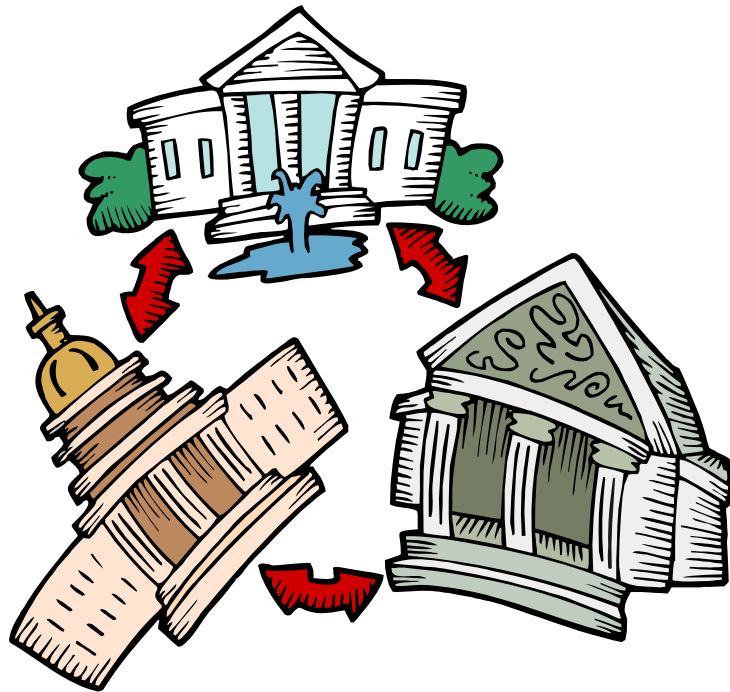
Perhaps I am getting old. And so I will need to look up my old lecture notes written in WordStar on a DOS computer, and reintegrate into my course.

The case is MUST reading for all design professionals and for those who rely on their opinions and judgment. You may access the decision text via <http://www.floridasupremecourt.org/decisions/2013/sc10-1022.pdf>.



PREVENTION AND CARE

- Bench Law v. Statutory Law: Expanding v. Limiting Liability
- Contractual Protection v. Public Policy
- Limitation of Scope v. Affirmative Duties of Principal
- Insurance



On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

A. General Considerations

1. Specifications v. Drawings

Savings Clauses:

"Anything shown on the Drawings but not mentioned in the Specifications, or mentioned in the Specifications but not shown on the Drawings, shall be deemed to have been mentioned and/or shown in both."

"In the event that a conflict is found between the Drawings and Specifications, then"

a. simple rule of preference

b. simple rule of preference, not to conflict with general character of the work

c. conflict shall be resolved by the Engineer in such manner as to not conflict with the general character of the work

2. Cost considerations of broad based savings clauses

3. Enforceability of broad based savings clauses

a. judicial repugnance to exculpatory language

b. extra-contractual questions of deliberate misrepresentation or fraud

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

B. Types of Specification

1. General v. Specific

2. Performance v. Prescription: Responsibility v. Control

a. advantages and disadvantages of each

b. mixtures and limitations thereon:

see *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1919), and *MacKnight Flintic Stone Company v. Mayor, Alderman and Commonalty of the City of New York* 160 N.Y. 73, 54 N.E. 661, (1899).

Note both warranty and negligence theories for finding against provider of prescription portions of specifications inadequate to support performance portions.

3. Open v. Closed

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

C. Organization

1. Contract Documents:

- a. Bidding Documents: Invitation to Bid, Instructions to Bidders, Proposal Form:
Offer to be made by Contractor
- b. General and Special Conditions: Conditions of Work, and specific duties or obligations which must be performed by the General Contractor only (not subcontracted.)
- c. Technical Provisions or Specifications; and Drawings

2. Work Breakdown Structure

- a. All work presumed to be subcontracted unless specifically prohibited ... wording should apply to both G.C. and subs.
- b. Divide Specification into Sections

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

2. Work Breakdown Structure

a. All work presumed to be subcontracted unless specifically prohibited ... wording should apply to both G.C. and subs.

b. Divide Specification into Sections

1. by party to perform work – deal with specific scopes of work, not by craft

DEFINITION: "Specifications should be divided into 'Sections'; each section should cover the work of one subcontractor, but never the work of two subcontractors."

CSI Specification Methods Committee: Rolf Retz, *The Construction Specifier*, Sept. 1961.

PROBLEM: Owner should not presume G.C. 's method of dividing work among subcontractors. Such decisions are based upon factors of unit responsibility, coordination among subcontractors, union craft regulations, and cost considerations.

2. by physical system – examples: MASTERSPEC

PROBLEM: Contractors must divide the scope of work prior to requesting subcontractor bids. Failure to properly delineate such scope division may cause subcontractors to raise their quotations to compensate for the uncertainty of their scope of work.

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

3. Organization within each Section

a. General: "What is the product, material, component, system, and its accessories?"

1. Work Included - general scope

2. Related Work - from other Sections

3. Description / Design - parameters, performance, design

4. Quality Assurance - criteria for evaluation

5. Submittals - shop dwgs, tests, samples

6. Product Delivery, Storage, Handling - acceptable standards

7. Site Conditions - to be maintained by contractor

8. Alternatives - criteria for possible substitutions

9. Guarantee / Warranty - requirements, start dates

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

3. Organization within each Section

b. Products: "How is the product incorporated into" the project?"

1. Material Properties - incl Brand Names, if applicable
2. Mixes - proportions and procedures for mixing, if applic.
3. Fabrication and Manufacture - criteria

c. Execution: "What is the relationship between the product, and rest of project?"

1. Inspection
2. Preparation
3. Installation / Application
4. Field Quality Control
5. Adjustments and Cleaning
6. Schedules - presenting data in tabular format including location, products, components, systems, finishes, etc.

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

D. Language

1. Use of the imperative: a. "The contractor shall" b. "The owner will "

"Shall. when used in the 2d or 3d person, is expressive of some authority or compulsion on the speaker's part. as in thou shalt not kill. conventional rules call for shall in the 1st person to express mere futurity; for will in the 1st person with its primary force of volition or willingness •... , for will in the 2d and 3d person to express mere futurity “
from Webster's New Collegiate Dictionary, 1961

"WILL" v. An auxiliary verb commonly having the mandatory sense of "shall" or "must." Tennessee Cent. R. Co. v. Morgan, 132 Tenn. 1, 175 S.W. 1148, 1153. State v. Summers, Mo.App. • 281 S. W. 123, 124. It is a word of certainty, while the word "may" is one of speculation and uncertainty. Carson v. Turrish, 140 Minn. 445, 168 N.W. 349, 352, L.R.A.1918F, 154.

"SHALL" As used in statutes, contracts, or the like, this word is generally imperative or mandatory. McDunn v. Roundy, 191 Iowa, 976, 181 N.W. 453, 454; Bay State St. Ry. Co. v. C of Woburn, 232 Mass. 201, 122 N.E. 268;

from Black's Law Dictionary, Revised 4th Ed., 1968

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

D. Language

c. whichever is used, be consistent

d.. do not use word "must"

e. reduction in words to convey specific instruction

Grammatical Mood: note number of words required

Standard: 18 – The **Contractor shall** apply two coats of paint to the generator
which **will** be supplied **by the Owner**

Indicative: 14 – Two coats of paint shall be applied to generator to be supplied by Owner.

Imperative: 10 – Apply two coats of paint to generator supplied by Owner.

include expression "The Contractor shall" once in the agreement; do not repeat

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

D. Language

2. Carefully follow rules of grammar. Avoid rules of prose.

- a. Avoid use of pronouns -- repeat names of parties', of things
- b. Carefully choose a word, then repeat –
ignore rule of composition to use slightly different words to avoid repetition
- c. Instructions should not be repeated in various sections. If required in two or more sections, instructions should be placed in General Requirements Section.
- d. Tabular listing preferred to aid in understanding – requirement to define "grades," etc.

3. Words - avoid ambiguous words

4. Parallel Construction: "Heating, Ventilating, and Air Conditioning" is preferred to "Heating, Ventilation, and Air Conditioning"

5. Commas: A, B, and C v. A, Band C

- a. Paint all pumps, motors, and control panels on the 5th floor.

= All pumps and motors, on all floors, to be painted. = Only control panels on 5th floor to be painted.

- b. Paint all pumps, motors and control panels on the 5th floor.

= Only equipment on the 5th floor to be painted.

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

E. Definitions

1. Avoid or define all words with multiple definitions.
2. Standard abbreviations should be utilized wherever possible, but should also be defined under general conditions.
3. Tolerances must be specified for any action, item, or word which is subject to interpretation.
 - a. e.g. "Broom Clean" - to whose standard?
- if to Resident Engineer's Satisfaction, potential problems related to bona fide review
 - b. e.g. "Exactly 5 inches" plus or minus reasonable tolerance

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

F. Style

1. Direct Contractor to perform work to specified standards.

- Avoid use of "To the Architect's satisfaction." – when is this clause to be used?

2. Tolerances and Testing:

"A specification should not specify anything which cannot be enforced. Otherwise the contractor who furnishes a cheap product has the advantage, realizing that the product cannot be properly tested; the contractor who wishes to conform to the intent of the specifications is penalized." Ayres, p.107

3. Each subsection, article, and paragraph should relate to one subject only.

4. Numbers should be both spelled out in words and numerals

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

F. Style

5. Avoiding Missed Items

a. **RESIDUAL CLAUSES:** Order of installation of materials from least expensive to most expensive. Most expensive material is left as residual (e.g. "all pipe not otherwise specified to be stainless steel") thus protecting Owner (and Architect or Engineer.)

DISADVANTAGE: Contractor may suspect that some of most expensive items are "hidden" and add contingency; courts may consider "hidden" items misrepresented; may consider such a clause as attempt to protect against avoidable negligence of Architect.

b. **SCOPE OF WORK CLAUSES:** Contractor to install any and all additional items required to complete scope of project.

DISADVANTAGE: Contractor may suspect that some of most expensive items are "hidden" and add contingency; courts may consider "hidden" items misrepresented; may consider such a clause as attempt to protect against avoidable negligence of Architect.

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

F. Style

6. Other Characteristics

Be Complementary – ensure that all items are covered – minimize overlap of information

Be Clear – use simple language and proper punctuation

Be Concise – use the least number of words require to convey meaning

Be Consistent – use the same style and terminology throughout – how to with a team effort?

Be Correct – all information should be double checked - 2 party review

Be Current – do not specify obsolete materials or methods

Be Organized – ease of use of spec will promote such use

Be Precise – do not use term "or approved equal" w/o definition

Be Specific – do not include specs for items not included in project

Be Fair – increased contingencies increase price – risk challenge of award to “favored” contractor

Be Objective – the contract must protect the Owner, but permit the Contractor to perform the work

Be Realistic – do not specify that which will not be enforced

Be Practical – differentiate construction method from construction detail; ensure constructability;
note access of Owner supplied equipment

On Writing of a Specification

OUTLINE FOR SESSION ON WRITING ENFORCEABLE SPECIFICATIONS

F. Checklists

1. Refer to detail of CSI or Masterformat Work Breakdown Structure
2. Membership in, and publications of, CSI
3. Specialty texts in Specification Writing
4. Experience

CONTRACTS FOR CONSTRUCTION PROJECTS

- 29.1 Preliminary Matters Relating to Contract Documents
- 29.2 Application to Construction Industry
- 29.3 Contracts for Engineering and Architectural Services
- 29.4 Components of a Construction Contract
- 29.5 Types of Contracts for Construction
 - 29.5.1 Stipulated Sum Contract
 - 29.5.2 Unit-Price Contract
 - 29.5.3 Cost-Plus-Percentage Contract
 - 29.5.4 Cost-Plus-Fixed-Fee Contract
 - 29.5.5 Guaranteed Maximum Price Contract
 - 29.5.6 Design–Build Contracts
 - 29.5.7 Design–Build–Operate Contracts
 - 29.5.8 Subdivision into Several Contracts
- 29.6 Preparing Enforceable Contract Documents
- 29.7 Standard Form Contracts of the Industry

CONTRACTS FOR CONSTRUCTION PROJECTS

Insert on AIA

Insert on Consensus Docs

CONTRACTS FOR CONSTRUCTION PROJECTS

DRAWINGS

30.1 Introduction

30.2 Preparing Enforceable Drawings

30.3 Use of Design Drawings

30.4 Tabulation of Drawings

30.5 Preservation of Contract Drawings

30.6 Sources of Trouble

30.7 Development of Details

30.8 Revisions

30.9 Notes

30.10 Sealing of Electronic CAD Drawings

30.11 Building Information Modeling

31 SPECIFICATIONS

32 SPECIFICATIONS FOR WORKMANSHIP

33 SPECIFICATIONS FOR MATERIALS

CONTRACTS FOR CONSTRUCTION PROJECTS

GENERAL CONDITIONS

34.1 Introduction

34.2 Purpose of Written Contract Papers

34.3 Standard Contracts

34.4 Standard Contract Clauses

34.5 Contractor's Warranties

34.6 Approval of Contractor's Plans and Equipment

34.7 Defective Drawings

34.8 Approval of Contractor's Drawings

34.9 Guarantee by the Contractor

34.10 Conduct of Work

34.11 Defective Work

34.12 Relations with Other Contractors and Subcontractors

34.13 Order of Completion

34.14 Inspection of Materials

CONTRACTS FOR CONSTRUCTION PROJECTS

GENERAL CONDITIONS

34.15 Inspection of Field Operations

34.16 Duties of an Inspector

34.17 Land and Facilities

34.18 Permits and Licenses

34.19 Labor Considerations

34.20 Notices – note 2017 AIA A201

34.21 Work Done by the Owner

34.22 Lines and Grades

34.23 Underpinning

34.24 Order and Discipline

34.25 Performance

34.26 Final Inspection and Acceptance

34.27 Miscellaneous

CONTRACTS FOR CONSTRUCTION PROJECTS

CLAUSES RELATING TO FINANCE

35.1 Suspension of the Contract

35.2 Cancellation or Termination of the Contract

35.3 Transfer of Contract

35.4 Revisions

35.5 Extras in General

35.6 Extras Caused by Subsurface Conditions

35.7 Extras Caused by Additional Quantities of Work or Materials

35.8 Extras Caused by Additional Difficulty of Performance

35.9 Extras Caused by Reduction of Work

35.10 Responsibility for Extra Cost

35.11 Errors Discovered by Contractor

35.12 Exculpatory Language Relating to Claims for Extra Costs

35.13 Delays

35.14 Partial Payments

CONTRACTS FOR CONSTRUCTION PROJECTS

CLAUSES RELATING TO FINANCE

35.15 Withholding of a Portion of Partial Payment

35.16 Final Payment

35.17 Failure to Make Payments

35.18 Liquidated Damages

35.19 Damages for Defective or Incomplete Work

35.20 Special Claims for Damages Against the Contractor

35.21 Risk, Liability, and Indemnity

35.22 Power of Engineer in Settling Disputes

CONTRACTS FOR CONSTRUCTION PROJECTS

PROPOSALS

36.1 Significance of a Proposal

36.2 Purpose of Proposal Forms

36.3 Standard Proposal Forms

36.4 Special Proposal Forms

36.5 Proposal Forms for Lump-Sum Contracts

36.6 Proposal Forms for Unit-Price Contracts

36.7 Proposal Forms for Cost-Plus Contracts

36.8 Lowest Responsible Bidder

36.9 Prequalification of Bidders

36.10 Deposit for Securing Plans

36.11 Miscellaneous Items for Information to Bidders

CONTRACTS FOR CONSTRUCTION PROJECTS

PROPOSALS

36.12 Preparation of Bid on Lump-Sum Contract

36.13 Preparation of Bid on Unit-Price Contract

36.14 Preparation of Bid on Cost-Plus Contract

36.15 Improper Proposals

36.16 Alternatives

36.17 Withdrawal of Proposals

36.18 Opening of Proposals

36.19 Rejection of Proposals

36.20 Re-advertisement

36.21 Awarding the Contract

CONTRACTS FOR CONSTRUCTION PROJECTS

ADVERTISING FOR BIDS

37.1 Purpose of Advertisement

37.2 Advertising Media

37.3 Timing of Advertisement

37.4 Attracting Attention

37.5 Information to Be Given in the Text

Agency

- Agent v Employee
- Agent v Trustee
- Creation – by design – by estoppel
- General v Special
- Agent v Principal – responsibility to 3rd party
- Undisclosed Agent – Subagency
- Termination of Agency

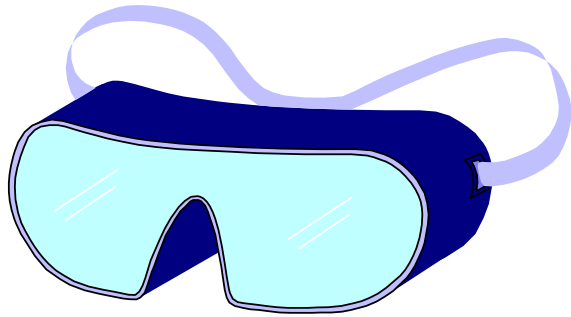
Partnership

- by Written v Oral v Implied v Implied to 3rd
- Articles of Partnership
- each Partner is Agent to Partnership
- Unlimited Liability – Contract – Tort
- Incoming – Retiring – Termination
- Limited Partnership – Subpartnership
- Joint Ventures

Corporations

- Fictitious Entity
- Formation – Defectively Formed
- Ultra-Vires Activity





Insurance

- Contract - Insurer - Insured
- Public Policy Against Gambling
- Need for Insurable Interest
- Governmental Regulation

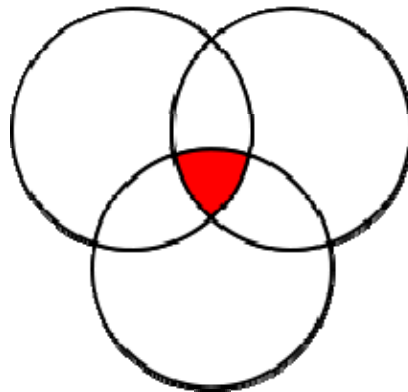


Types of Insurance

- Life
- Annuities
- Health
- Property
- Title
- Tort Liability
- Worker Compensation
- Reinsurance
- Professional Liability
- Owner's Liability
- Contractor's Liability
- Builder's All Risk

Bonds

- Tripartite Contract - Statute of Frauds
 - Principal – the Surety – the Bondsman
 - Obligor – one who is obligated to perform
 - Obligee – one to whom obligation is due



Types of Bonds

- Fidelity
- Bail
- Surety
- Contract
 - Bid
 - Performance
 - Payment
 - Maintenance



Obligor's Relations with Principal

- Duty of Full Disclosure
- Policeman or Partner?



Obligee's Relations with Principal

- Retaining Funds for Surety
- Notice of Potential Difficulty
- Improper Notice of Difficulty
- Notice of Default / Termination



Surety's Dilemma

- to fight or switch



FACTUAL PATTERN FOR EXAM QUESTION

- Engineers A and B jointly submit a bid to C to perform design on C's project.
- The agreement between A and B states that A is responsible for foundation design, while B is responsible for structural design.
- C accepts A and B's joint bid, signs a contract with A and B, the design is prepared, and the work erected. The foundations fail. C sues B.
- What rights does C have against B?
 - Why may C sue B rather than sue A?
 - What did B do wrong?
 - What defenses does B have to C?
- What rights does B have against A?



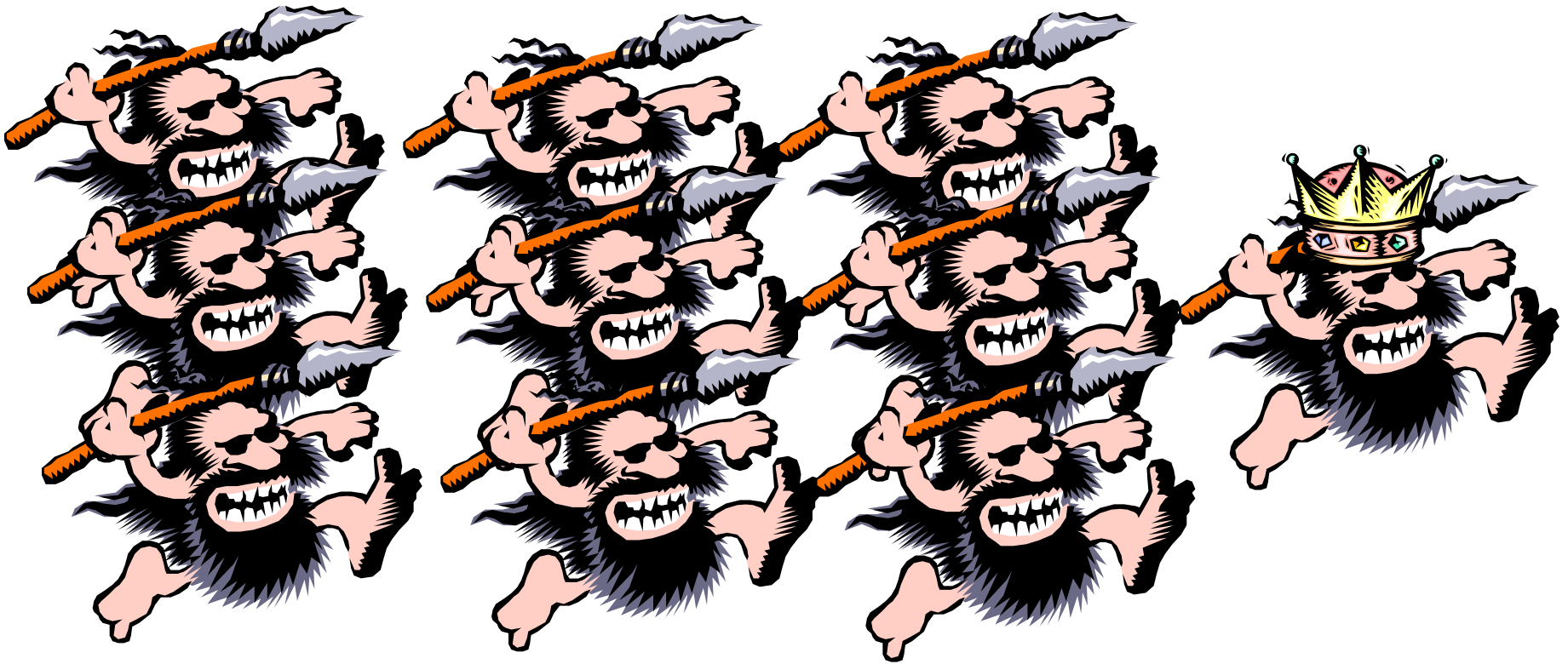
FACTUAL PATTERN FOR EXAM QUESTION

- Jones and Johnson form a partnership for the purpose of selling engineering services. Oscar Owner contacts Jones at the partnership's address and contracts with Jones for a feasibility study to determine whether Oscar should develop a shopping mall in Nowheresville, Pa. The contract states that Jones & Johnson are not to be liable for consequential damages caused by negligence.
- Jones, smelling a big engineering contract, fudges the study (including the traffic engineering study) to show excellent feasibility.
- Oscar pays for the feasibility study but contracts with another engineering firm for design.
- By the time the project is 90% complete, Jones retires and moves out of state.
- The project is completed, and the mall is a total flop due to inadequate local roads to carry the necessary traffic required to make the mall a success.
- Oscar sues Johnson for all expenses including engineering, construction, bank financing, etc., plus his anticipated profits had the project been developed in a proper location, plus punitive damages.
- Q1. What defenses would Johnson have to all or any part of the claim made? What would be the results? Why?
- Q2. Same as QUESTION 1, except that Jones negligently, rather than purposely, states in his report that the site is ideal.

OUTLINE
FOR MATERIALS ON
PROPERTY
REAL, PERSONAL, INTELLECTUAL

Ownership of Property

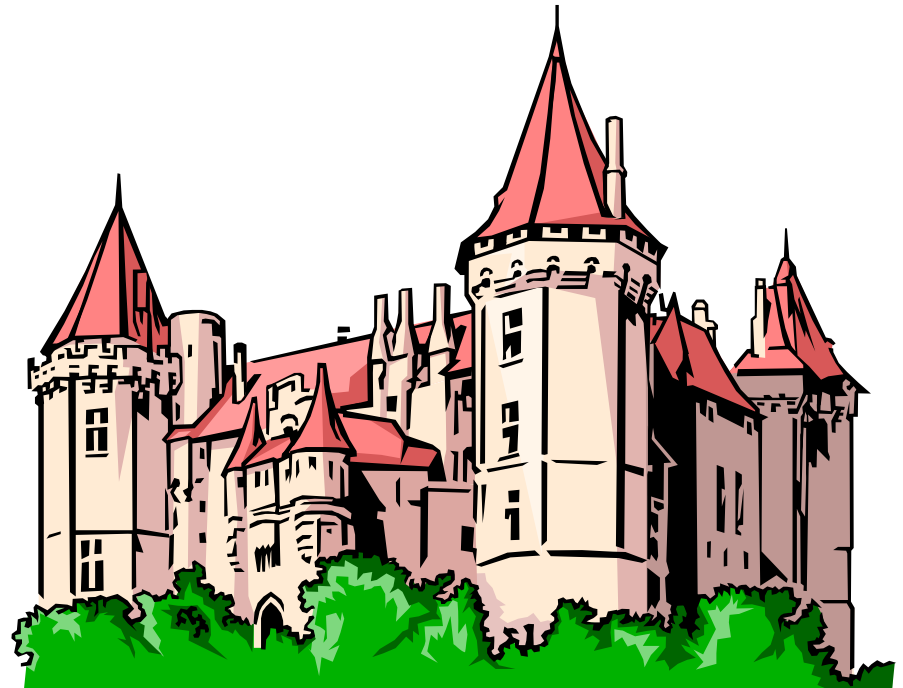
- History
 - Land owned by the sovereign - e.g. King



Ownership of Property

- History

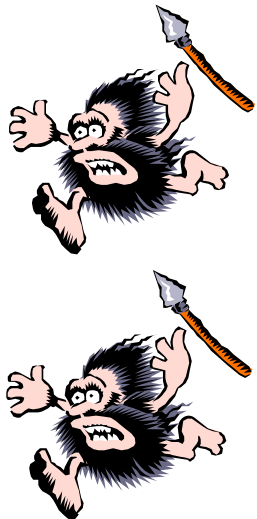
- Land owned by the sovereign - e.g. King
- Right to possess & use land granted in return for military service



Ownership of Property

- History

- Land owned by the sovereign - e.g. King
- Right to possess & use land granted in return for military service
- "Right" codified & transferable to children if they provide service

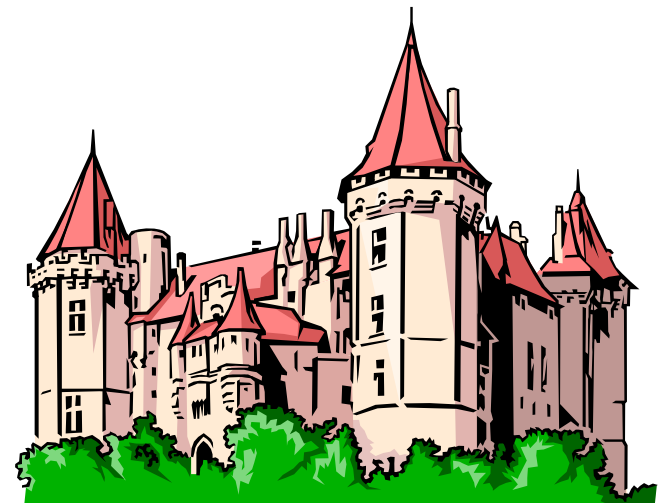


Ownership of Property



- History

- Land owned by the sovereign - e.g. King
- Right to possess & use land granted in return for military service
- "Right" codified & transferable to children if they provide service
- Military service replaced with taxes
- Sales of "right" by local lord to aid in raising taxes



Ownership of Property

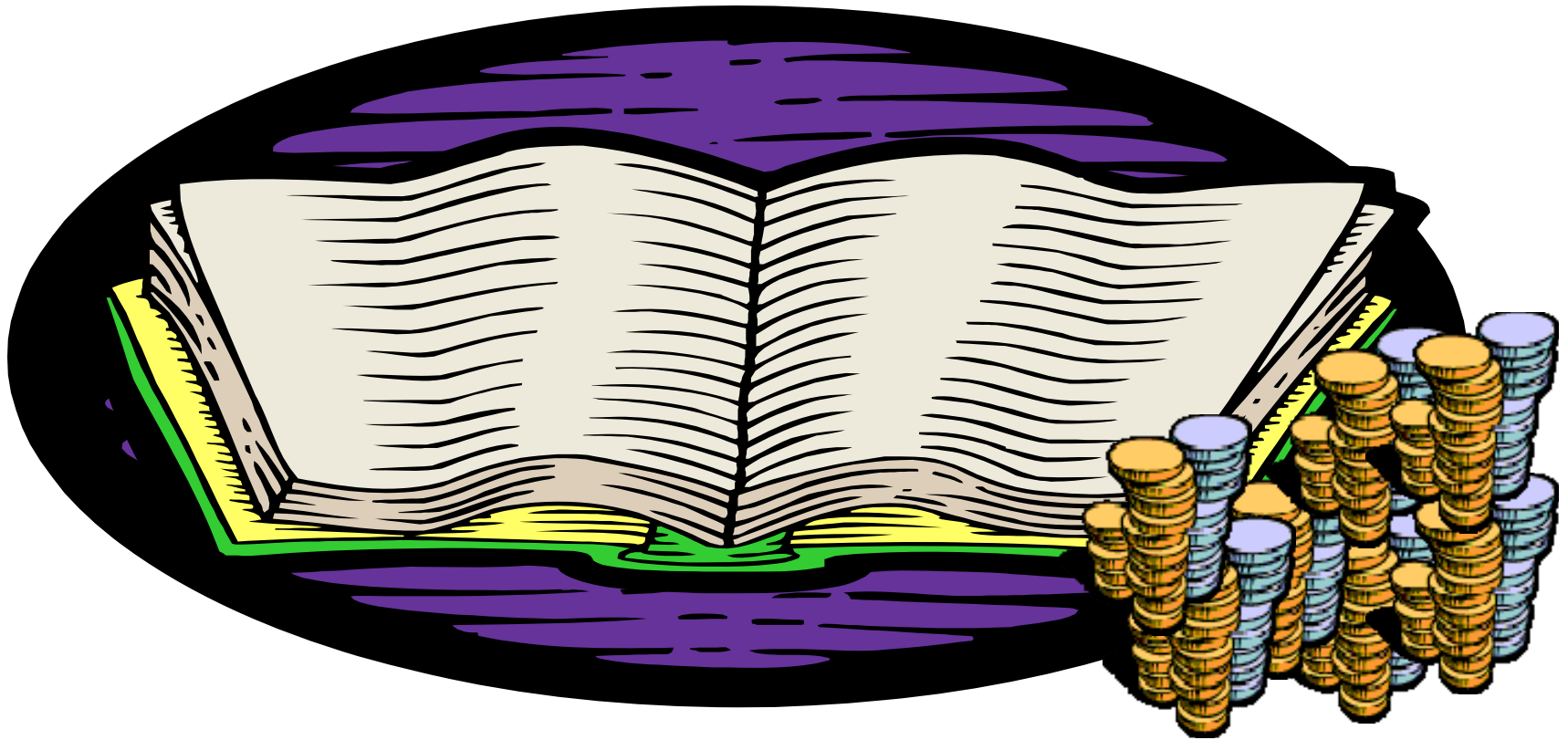
- History
 - Tax rules for transfer of land led to loopholes
 - Loopholes led to new rules ...
 - Cause for land law being so complex
 - Compare 1916 Income Tax to today's I.R.C.
- The sovereign still is ultimately owner of property and may reclaim it at any time after properly compensating current "owner"





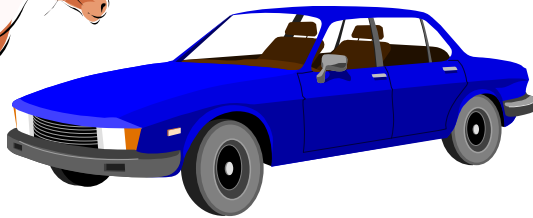
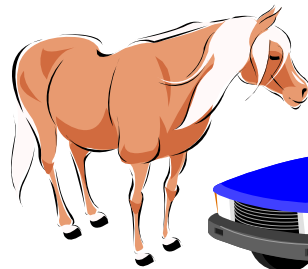
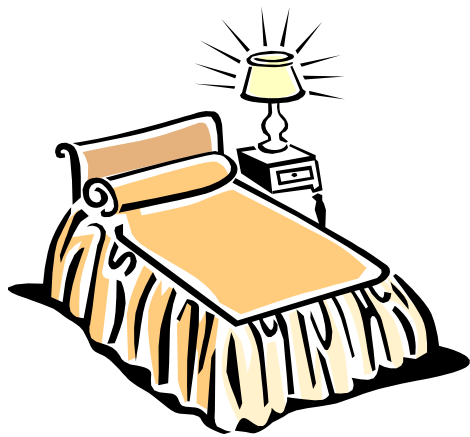
Ownership of Property

- Domesday Survey of 1086



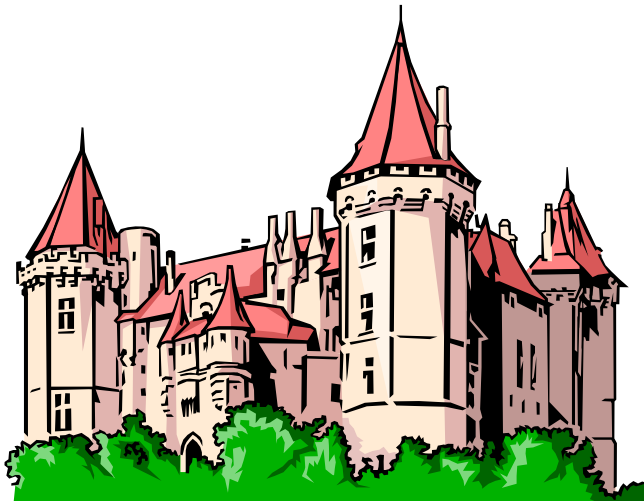
Property - Realty v. Personalty

- Personalty = personal property = movable property = chattels
- defined as any object or right not properly described as real property
 - includes rights to land, etc. not held of a freehold nature
 - e.g. rights not descendible to heirs at law



Realty

- Realty = real property including:
 - - the land
 - - all buildings, trees, and fixtures of any kind
 - - all rights and privileges "appurtenant" to the land



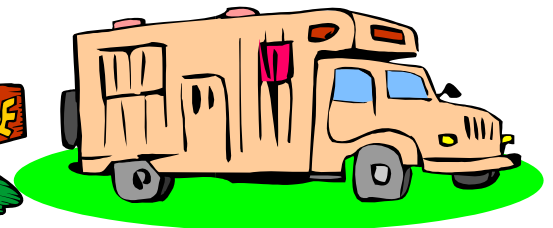
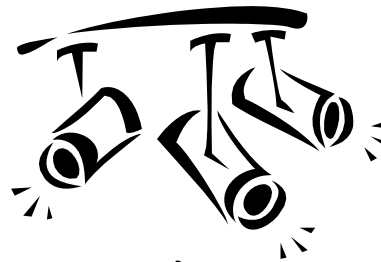
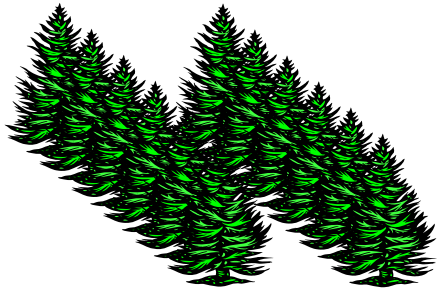
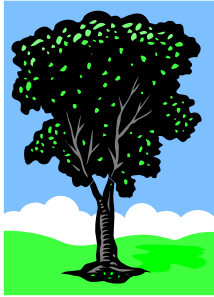
The Land

- The land - traditionally a slice from the center of the earth to infinity
 - This view still maintained in fiction, but LIMITED by the State's Police Power



Fixtures

- Natural and Artificial - Trees and Buildings



Fees - How Property is Owned

- Life Estate to John Doe
- Estate for Years to John Doe for seven years
- Fee Tail to John Doe and his bodily heirs
- Fee Simple to John Doe and his heirs



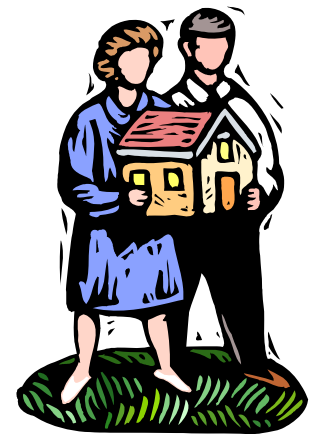
Fees - How Property is Owned

- Life Estate or Estate for Years
- Duty to Maintain – to Repair – to Pay Taxes – To Insure
- Doctrine of Waste – Ameliorative Waste
- No Exploitation of Natural Resources



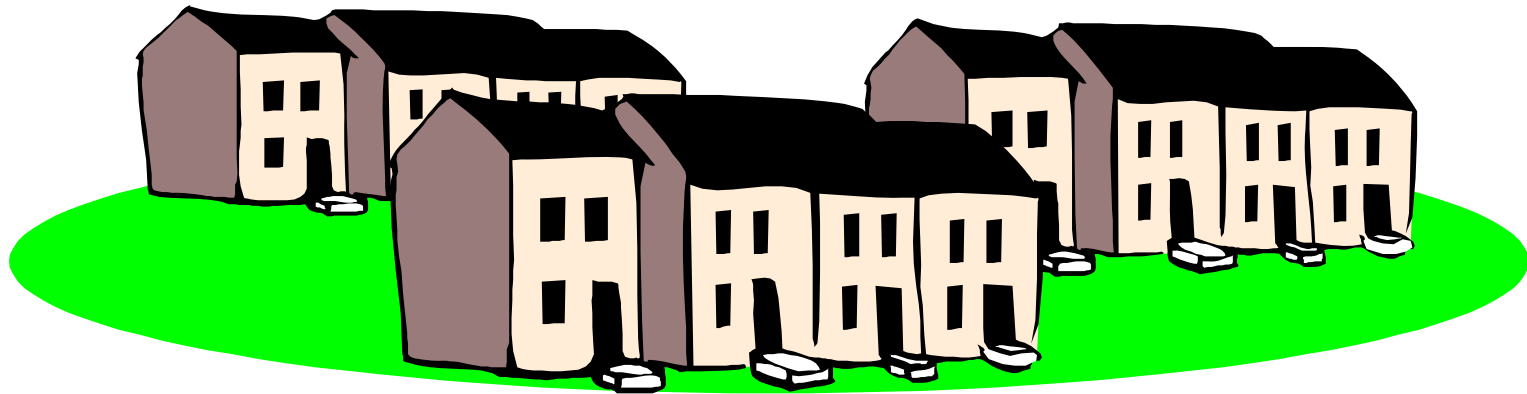
Forms of Ownership

- Sole Ownership
- Joint Ownership
 - Joint Tenancy own by the whole & by the part
 - Tenancy in Common own by the part & not by the whole
 - Tenancy by the Entireties own by the whole & not by the part



Boundaries of Ownership

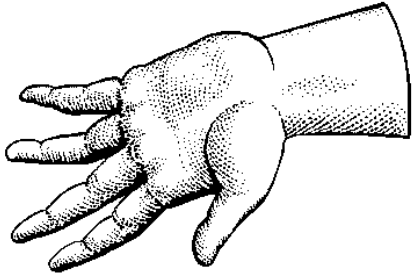
- Condominiums and Cooperatives
- Condo = Fee Simple Ownership + Easements
- Cooperative = Personal Property – Partnership or Corporate



Acquisition of Real Property

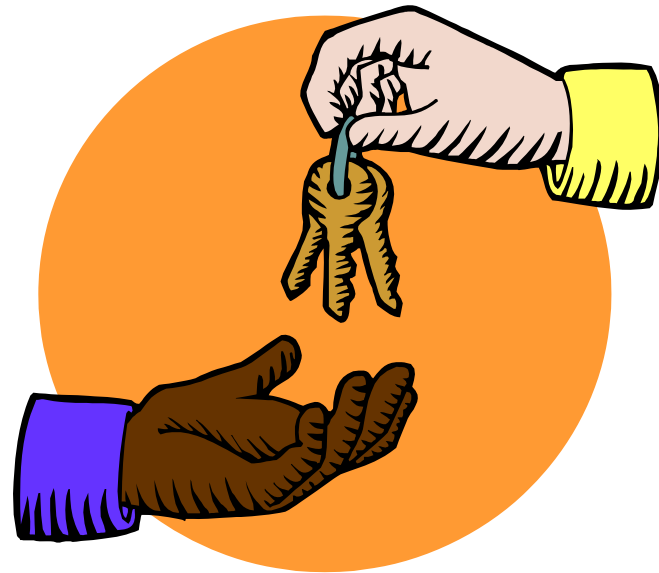
- Grant – Purchase or Inheritance or Gift
- Reversion – from Life Estate or Estate for Years
- Reservation – of a portion of formerly owned lands sold
- Adverse Possession – 90% of the law
 - Adverse – distaining permission granted
 - Open and Notorious
 - Continuous
 - by Claim of Right
 - for the stipulated period of time





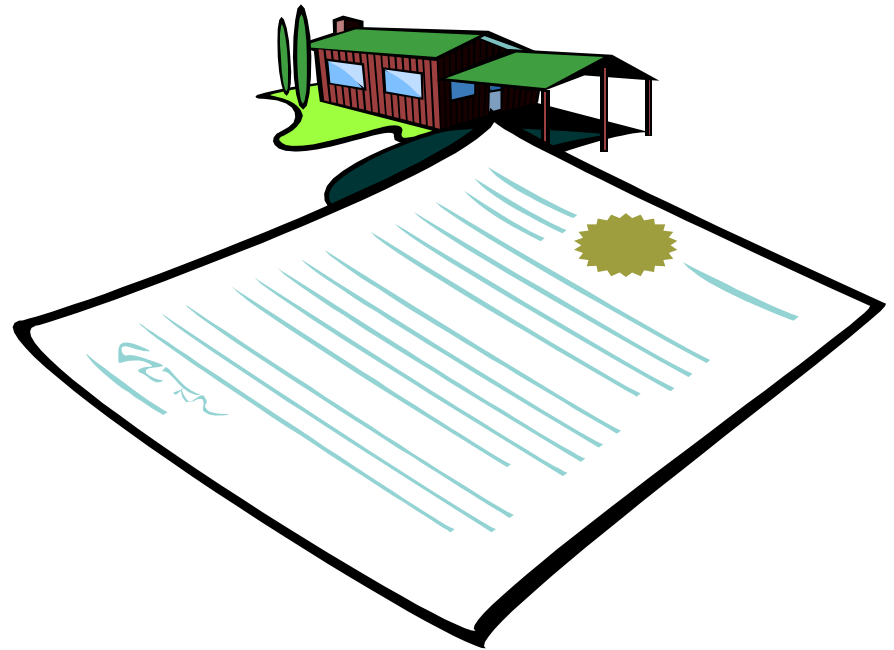
Mortgages

- History
- Title Theory
- Lien Theory



Landlord – Tenant Relationship

- **Four types of Estate**
- Estate for Years
- Periodic Tenancy
- Tenancy at Will
- Tenancy at Sufferance



Landlord – Tenant Relationship

- **Duties of Landlord**
- No Duty of Usability except by Statute or by Lease
- No Duty to Repair except by Statute or by Lease
- Duty to Disclose Latent Defect
- Duty to Maintain Common Areas
- Assumption of Repair
- Public Use



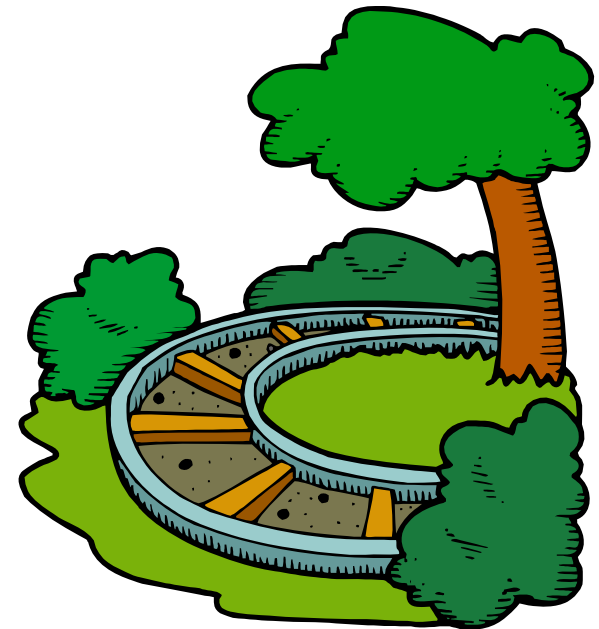
Landlord – Tenant Relationship

- **Duties of Tenant**
- To 3rd Persons
- To Landlord
 - Voluntary Waste – Permissive Waste – Ameliorative Waste
- Assignment v. Sublease v. Houseguest



Easements

- An Easement is ...
- Easement Appurtenant
- Easement in Gross



Easements

- Affirmative Easements



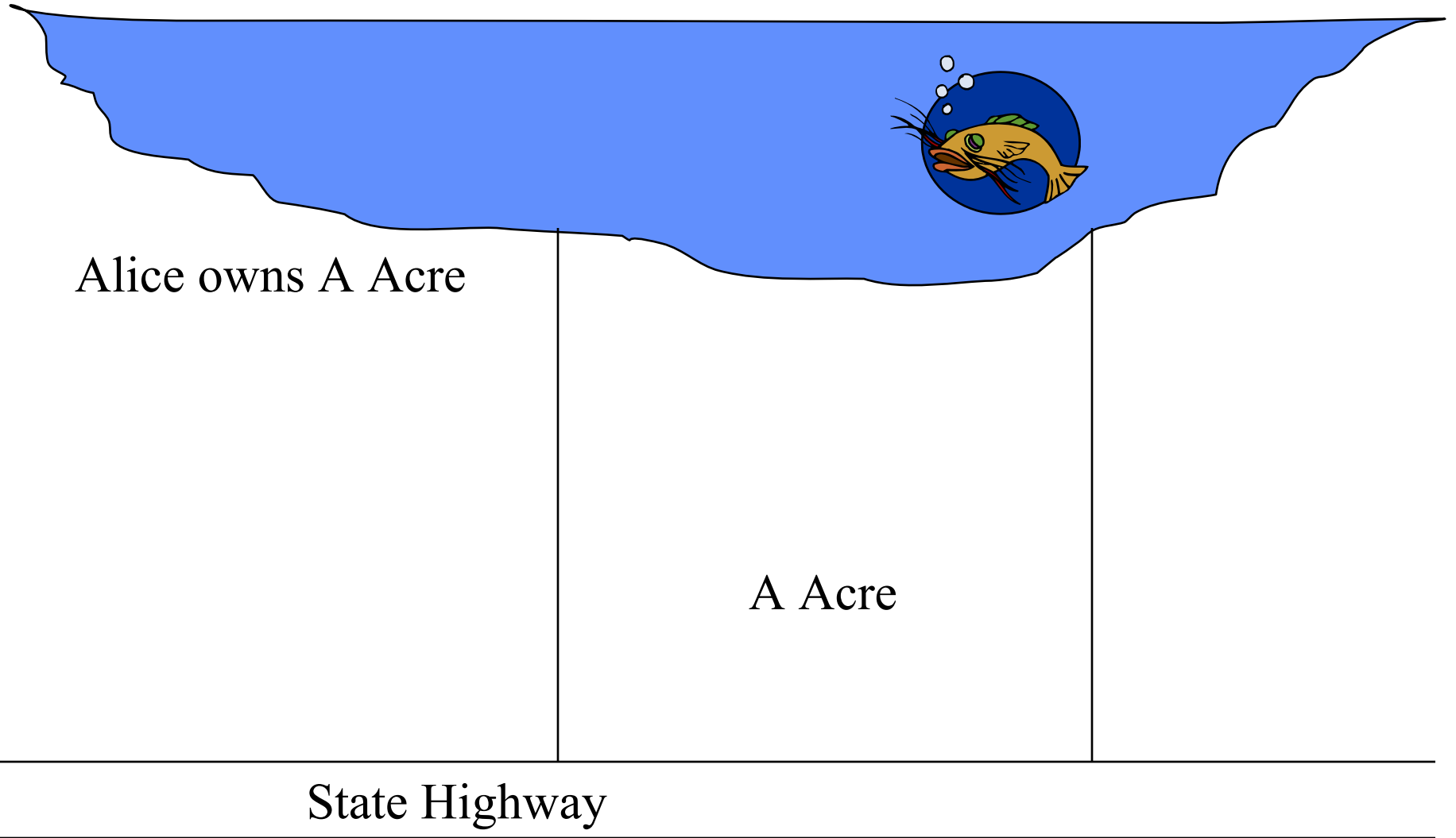
- Negative Easements



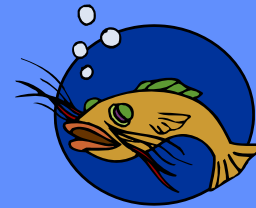
Creation of Easements

- by Grant
 - easements servient included with grant of land
 - NB the Statute of Frauds
- by Reservation including by absolute necessity
- by Implication
 - Absolute Necessity
 - Reasonable Necessity
 - Previous Use
 - Continuous Use
 - Apparent Use
 - Continuing Need v. Unreasonable Expense
- by Prescription adverse – open & notorious – continuous – claim of right
- Abandonment adverse claim not required

Problems with Easements



Problems with Easements



Alice subdivides and
sells B Acre to Bob

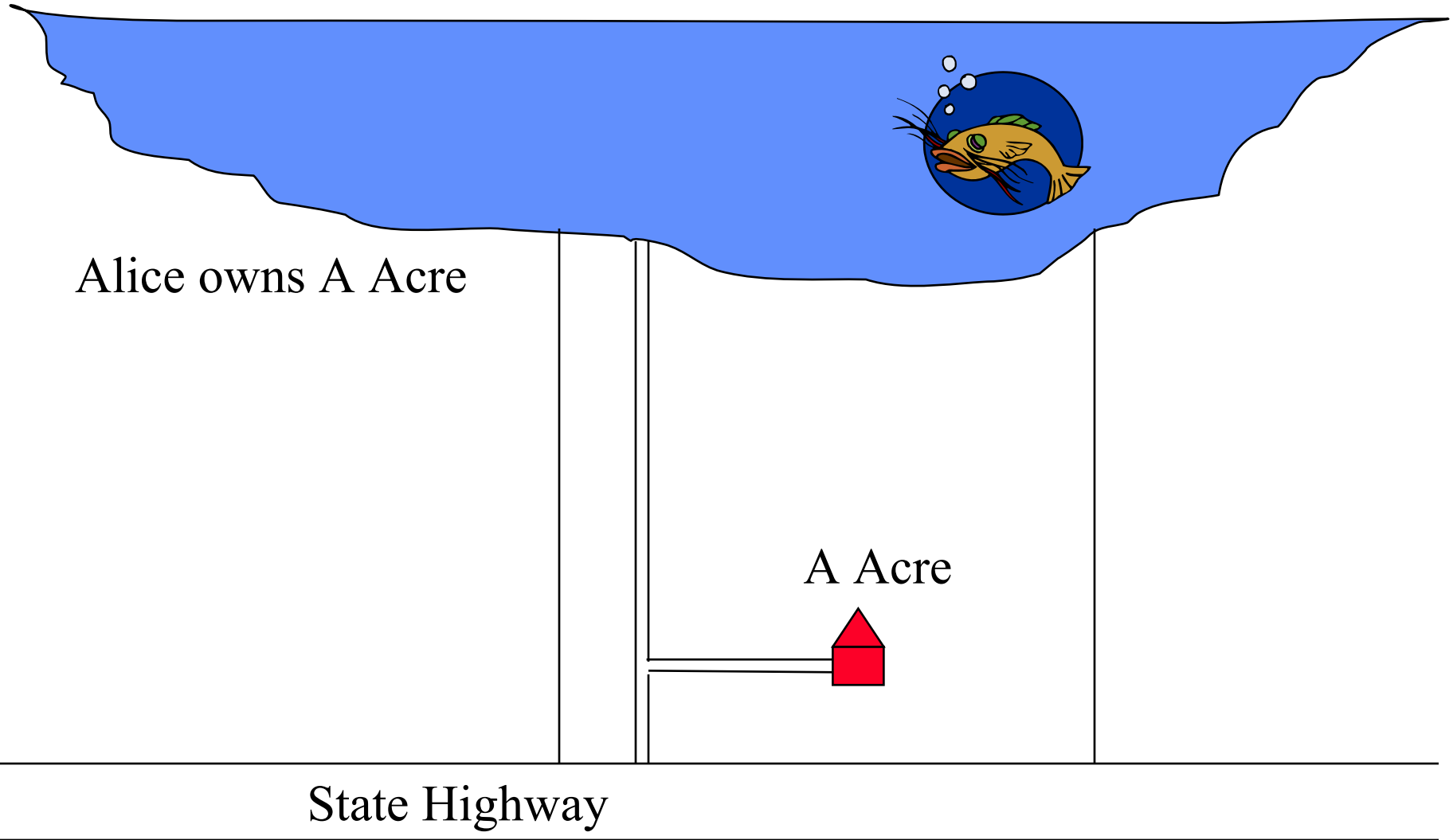
B Acre

What obligations does
“A” owe “B”?
“B” owe “A”?

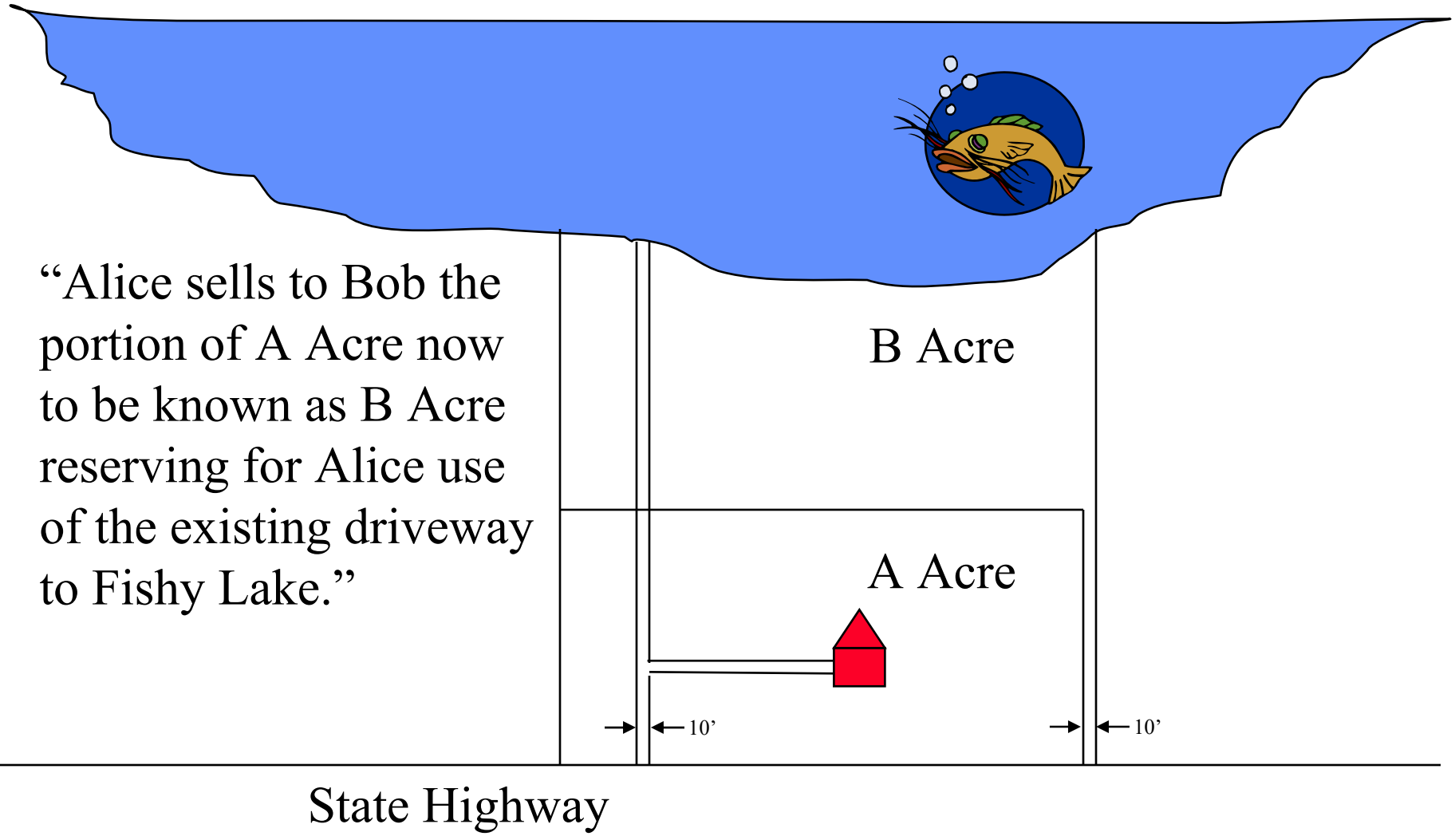
A Acre

State Highway

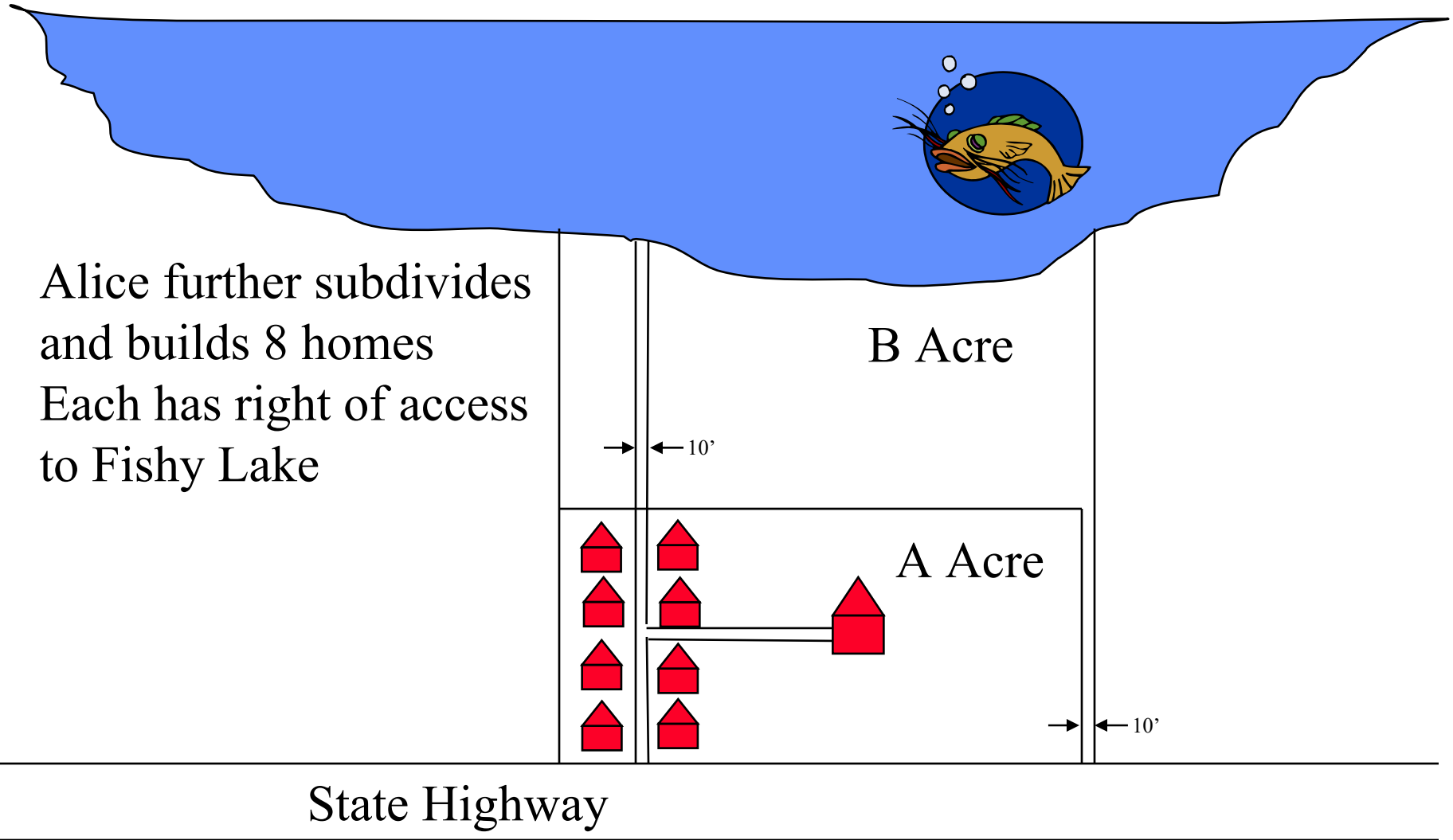
Problems with Easements



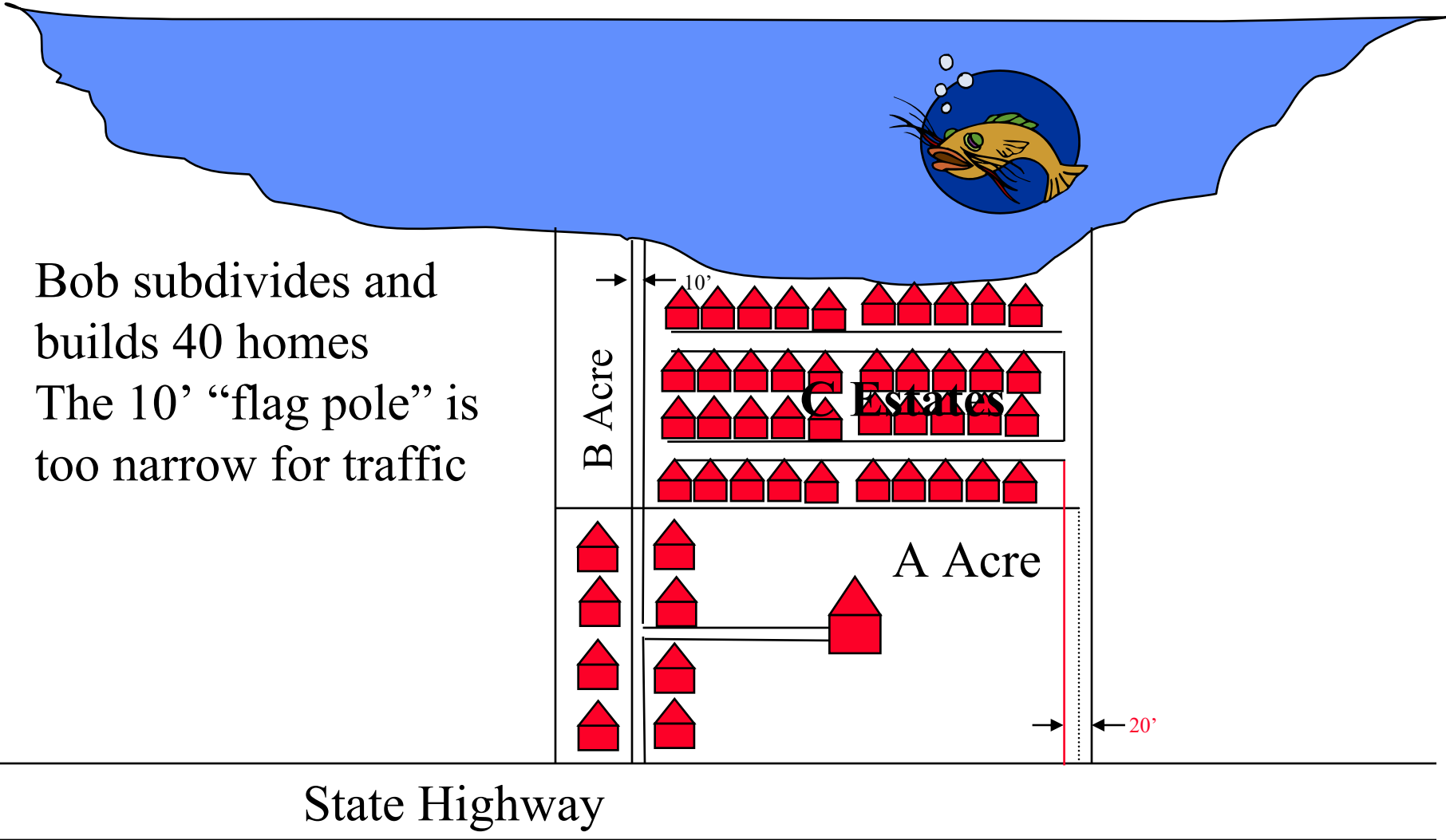
Problems with Easements



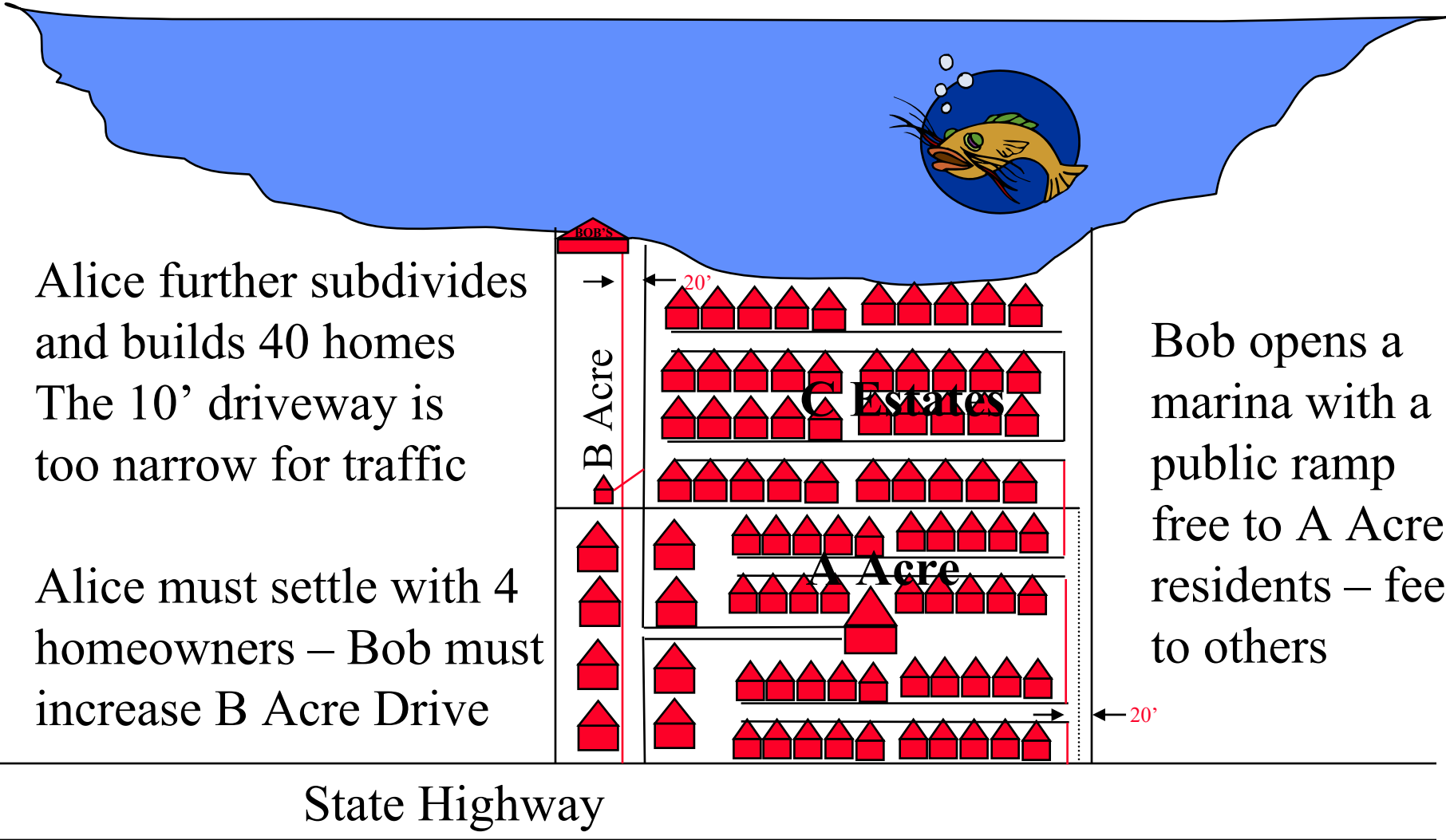
Problems with Easements



Problems with Easements



Problems with Easements



Easements – Licenses - Covenants

- License



- Profits

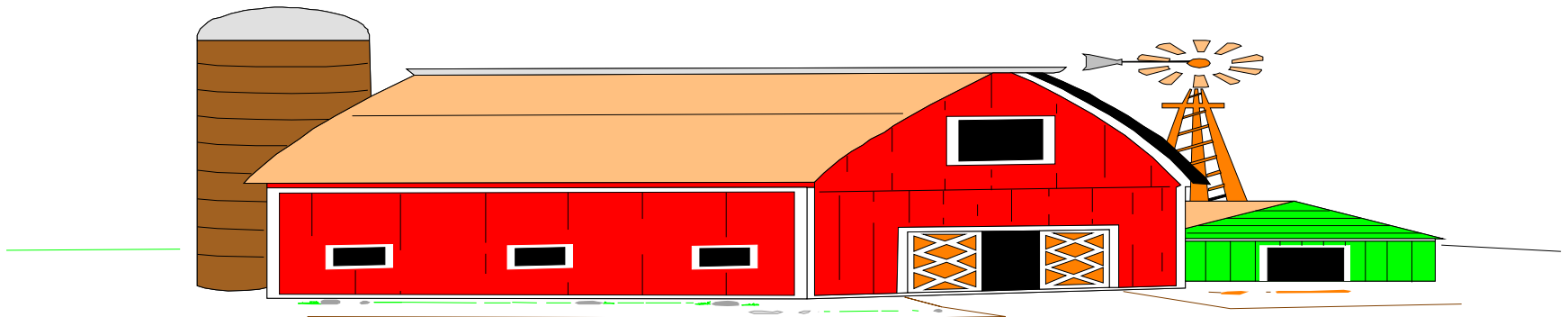


- Covenants



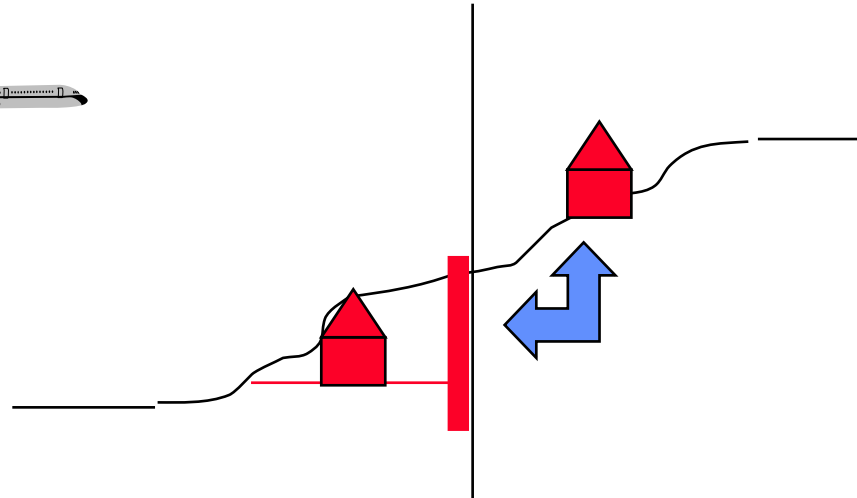
REVISIT LIABILITY WITHOUT FAULT

- Liability based upon mere Ownership of real property
 - duty to business visitors, social visitors, trespassers
 - doctrine of attractive nuisance
 - duty of lateral and subjacent support
 - special notes to geotechnical engineers
 - riparian duties to inhibit waste, pollution of ground waters
 - additional duties to adjoining property
 - special duties of landlords relating to common areas
 - special rules for leased areas open to public usage

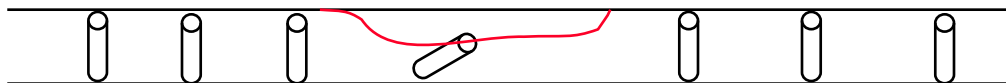
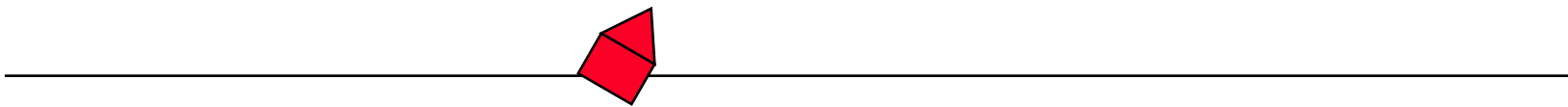


Doctrine of Support

- Lateral Support

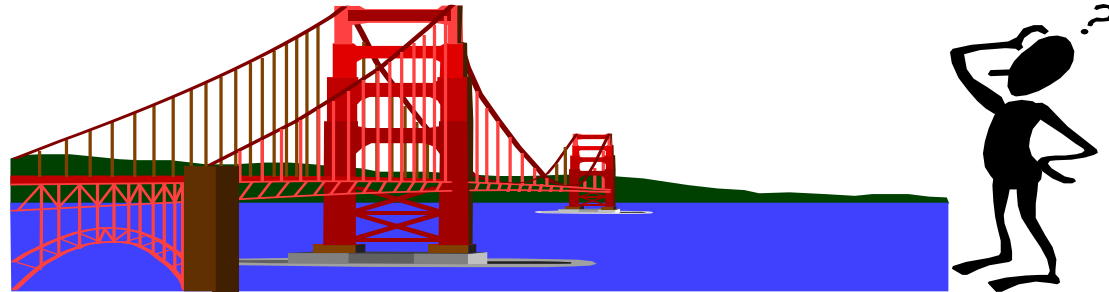


- Subjacent Support

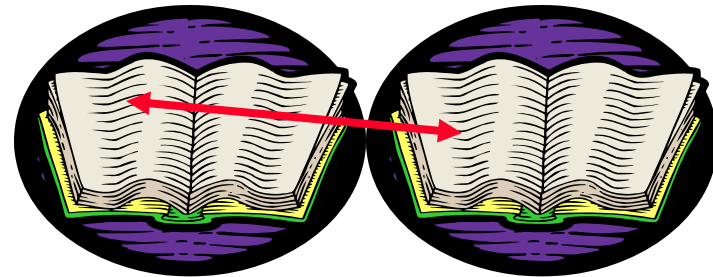


Deeds

- Warranty
- Quit Claim



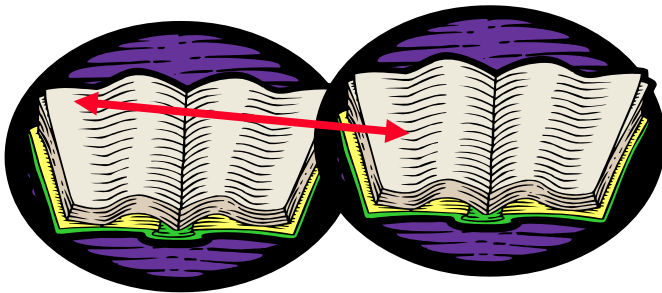
- Recordation
 - Grantor & Grantee Index
 - Tract Index
- Timeliness of Recordation
 - Pure Notice
 - Race Notice
 - Pure Race



Recordation of Deeds 2018

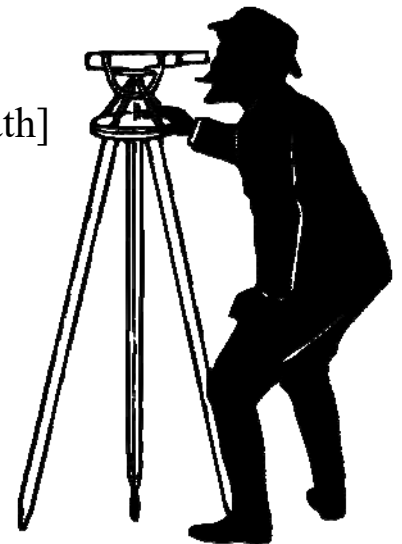


- Recordation
 - Grantor & Grantee Index 1066 – 1086 – 1688 – 2018
 - Tract Index 1908±
 - Blockchain 2018 ...
- Think of a database, but in more than one location, with hundreds, thousands, even potentially millions of copies around the world, all updated every second and unchangeable, immutable.
<https://www.bizjournals.com/bizjournals/how-to/technology/2018/07/how-blockchain-can-change-real-estate-transactions.html>
- What exactly is blockchain? In a nutshell, it's a decentralized, distributed and public ledger used to record transactions. The format is similar to Wikipedia, in which many people can write and contribute to the records of information rather than there being a single publisher. Currently, blockchain is considered one of the most secure technologies for digital asset transfer. This is because every transaction is cryptographically linked to the next one, making it nearly impossible to change the existing data. Like Wikipedia, decentralizing the information keeps a system of checks and balances in place.
<http://inbusinessphx.com/technology-innovation/will-blockchain-uplevel-the-arizona-real-estate-market#.W8dtMNQrJpQ>



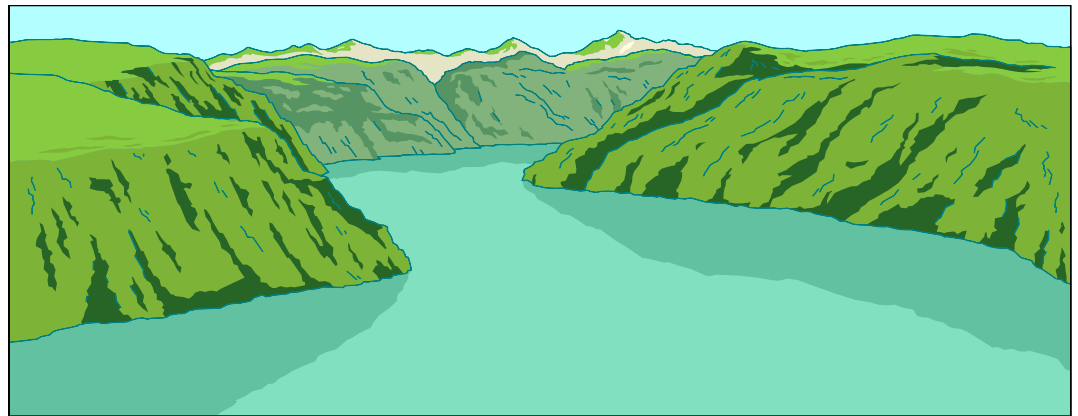
Boundary Law

- Elementary Surveying
- Precedence – Monuments – Adjoining Tracts – Courses & Distances
- Description
 - Point of Beginning – monument near the property
 - True Point of Beginning – corner of the property
 - Definite Corners – angles by degrees and direction – GPS coordinates
 - Lengths and Directions along Sides – note adjoining tracts
 - Return to True Point of Beginning
 - [Return to Point of Beginning or alternate monument by alternate path]
 - [compute area and check against prior deeds]

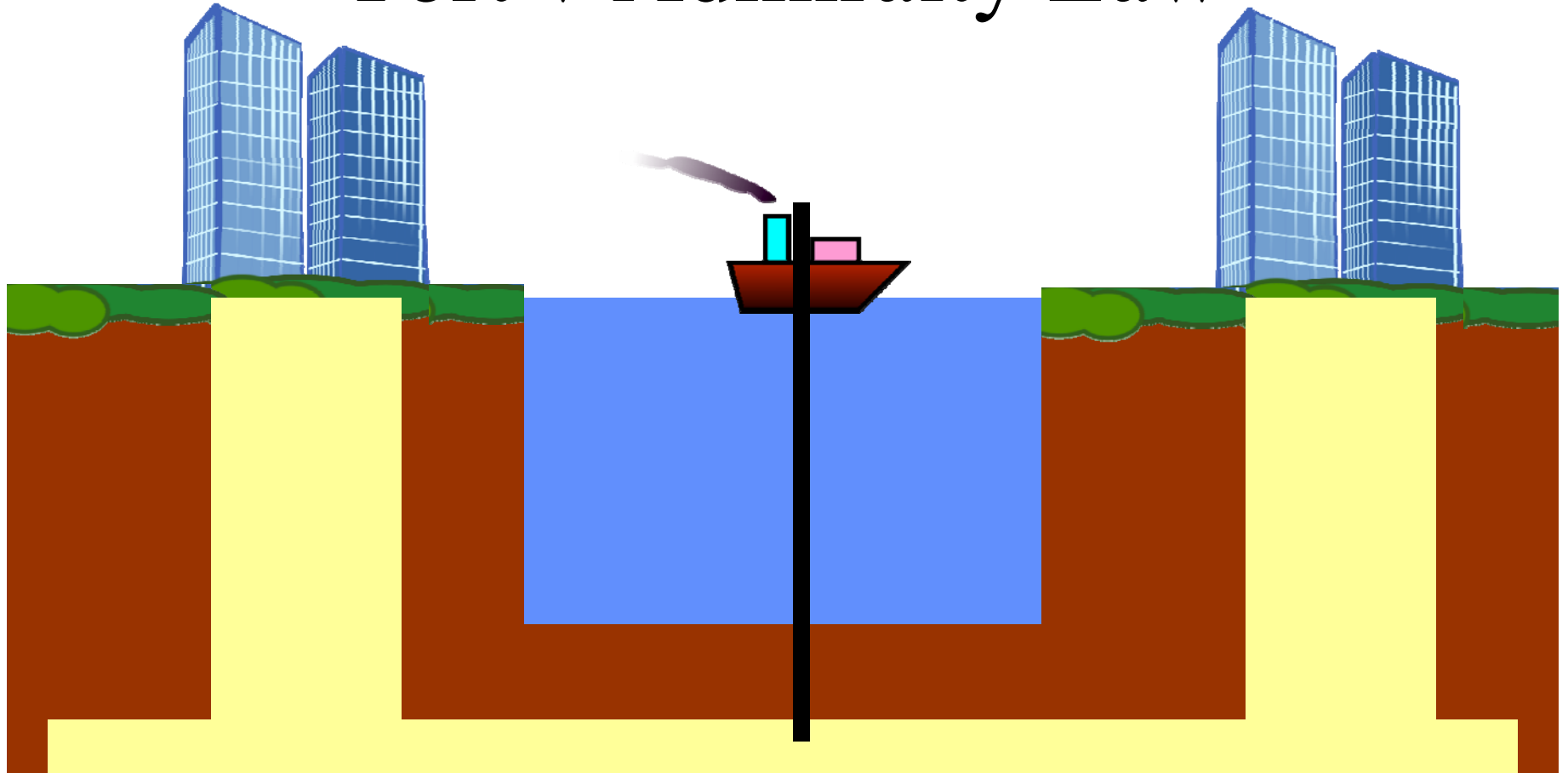


Air and Water Rights

- Air Rights
- Water Rights
- Riparian System
- Percolating Water
- Drainage
- Appropriation System



Tort v Admiralty Law



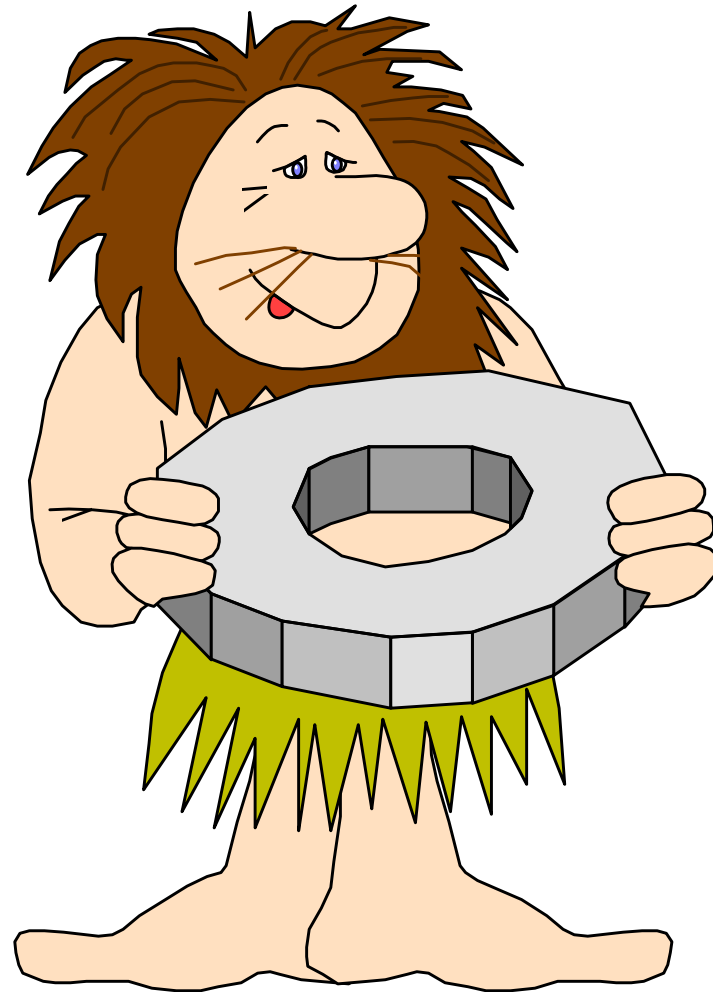
April 13, 1992 - Chicago River pile driving causes failure of tunnel
Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co. - 513 U.S. 527 (1994)

FACTUAL PATTERN FOR EXAM QUESTION

- Contractor C leases a plot of land from Owner D adjacent to the project he is working on, "to be used for temporary storage."
On this plot, without the D's prior permission or knowledge, C erects a four room field office complete with an underground septic tank system.
At the completion of the project, C prepares to dismantle the office for the salvage value of its materials.
- D sues to prevent this action. Who wins, and why?



Intellectual Property



INTELLECTUAL PROPERTY ASPECTS OF ENGINEERING & CONSTRUCTION

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Types of Intellectual Property

- Patents
- Trade Secrets
- Trademark
- Copyright

Patents

- U.S. Constitution - Article 1, Section 8, Clause 8
- Patent Act - 35 U.S.C. § 100 *et seq.*
- No State law - pre-empted
- No Common law - pre-empted
- International Patents Issued on a country-by-country basis
- Several International Patent Treaties/Conventions Exist

Types of Patents

- Utility Patents
- anything under the sun made by man
- methods, processes, apparatus, manufactured articles, compositions of matter
- or any improvement to the above
- exclusive for 20 years from the “effective” filing date (35 U.S.C. §154)
- methods of doing business – Amazon – Priceline
- Computer software

New Technologies – New Law?

ENR.com
Engineering News-Record

INFRASTRUCTURE | BLDGS | BIZ MGMT | POLICY | EQUIPMENT | PEOPLE | MULTIMEDIA | OPINION | TECH | ED

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The Next Generation

Fredric L. Plotnick, Ph.D., Esq., P.E., is an authority on CPM planning and scheduling and on legal aspects of engineering and construction. He is co-author, along with James J. O'Brien, of [CPM in Construction Management](#), now in its 7th edition. This blog will discuss CPM scheduling, engineering law and other aspects of project management.

[Will Google Voice Open the Door Again to Trustworthy Verbal Contracts?](#)

Posted by [fplotnick](#) at 4/23/2010 4:30 PM CDT

How will Google Voice transform the construction industry?

Will it return construction to the days when deals were done with verbal agreements?

If we remove the threat of "misremembering" conversations, can we return to the civility of accepting verbal agreements knowing that they will now be treated as though they are in writing?

Read on.

One of our recent postings discussed the legal ramifications of new means, methods and technologies that have been introduced over the past three years while many of our industry have been under-utilized. Another new entry that may have enormous impact is the introduction of Google Voice.

Google Voice is a service which provides you with "one incoming phone number" which will then be forwarded to one or many of your various telephone service numbers. For example, should you dial my Google Voice phone number, both my office phone and mobile phone will ring. Whichever is answered first will then be connected. I can program the service to also ring my home phone number for calls from my family, friends and selected clients. But the feature that will

New voicemail from (717) 236-2050 at 9:12 AM

File Edit View Tools Message Help

Reply Reply All Forward Print Delete Previous Next Addresses

This message is Flagged.

From: Google Voice
Date: Wednesday, July 20, 2011 9:13 AM
To: fplotnick@fplotnick.com
Subject: New voicemail from (717) 236-2050 at 9:12 AM

Voice from: (717) 236-2050 at 9:12 AM [Google voice](#)

Hi Fred, it's Jen Somers returning your call. I will try you a little bit later. Thanks. Bye.

[Play message](#)

Types of Patents

- **Utility Patents – methods of doing business – Amazon – Priceline**

- Computer software

- **How about Patenting Software Inventions in the US and China: A Comparative Approach**

- **CLE Rebroadcast October 17, 2019 – [View Online \\$95 from ProLawCLE](#)**

- **Key Topics to Be Discussed:**

- US:

- Brief history and past case law
- Statistics at the courts and PTAB since the Alice decision
- Current USPTO guidance
- Current legislative proposals and major players

- China:

- Previous curbs on patentability of software and business method-related inventions
- Revisions since April 2017
- Some cases before and after the revision
- Relevant cases from the Court
- Trends in the near future

- The patentability of software and business method-related inventions has gone through major changes both in the United States and in China. While traditionally more liberal in granting such patents, after a landmark 2014 ruling by the U.S. Supreme Court which called into question the validity of many software patents, the value of a software patent been called into question. Unhappy with the uncertainty surrounding software inventions, the US patent community has tried and continues to try to find a good balance point for such patents with decisions from the courts, administrative guidelines from the US Patent and Trademark Office, and legislative efforts in Congress.

On the other hand, Chinese Patent Office (SIPO, now CNIPA) used to be very strict regarding patentability of software and business method-related inventions before April 2017. However, under the impact by dramatic economic growth of Internet business, such as those represented by the BAT(Baidu, Alibaba and Tencent) who became more eager for patents on software and business method-related inventions to protect their technologies and business models, in the past years, such curbs have been somewhat lifted since April 1st, 2017. The current examination practice in CNIPA for such issues is more inventive step-oriented, rather than patent eligibility, and it is easier to draft patent specifications for such patent applications.

Types of Patents continued

- Design Patents
- new original ornamental design
- may only be based on non-functional aesthetic features
- exclusive for 14 years from the date of grant of the patent (35 U.S.C. § 173)
- Some overlap with copyright protection

Types of Patents continued

- Plant Patents
- asexual reproduction of new varieties
- exclusive for 20 years from the “effective” filing date (35 U.S.C. §§161 and 154)
- Plant Variety Protection Act 1970
- *Diamond v. Chakrabarty* 447 U.S. 303

Sub-Types of Utility Patents

- Examined Patents
(e.g. U.S., European Patent Office, Japan, Canada, Korea, China)
 - Substantive examination for utility, novelty and inventiveness (non-obviousness)
 - Higher cost due to substantive examination
 - Presumption of validity
 - Longer patent term
 - Longer time to grant due to substantive examination

Sub-types of Utility Patents

- Registration Patents

(e.g. South Africa, Netherlands, Germany)

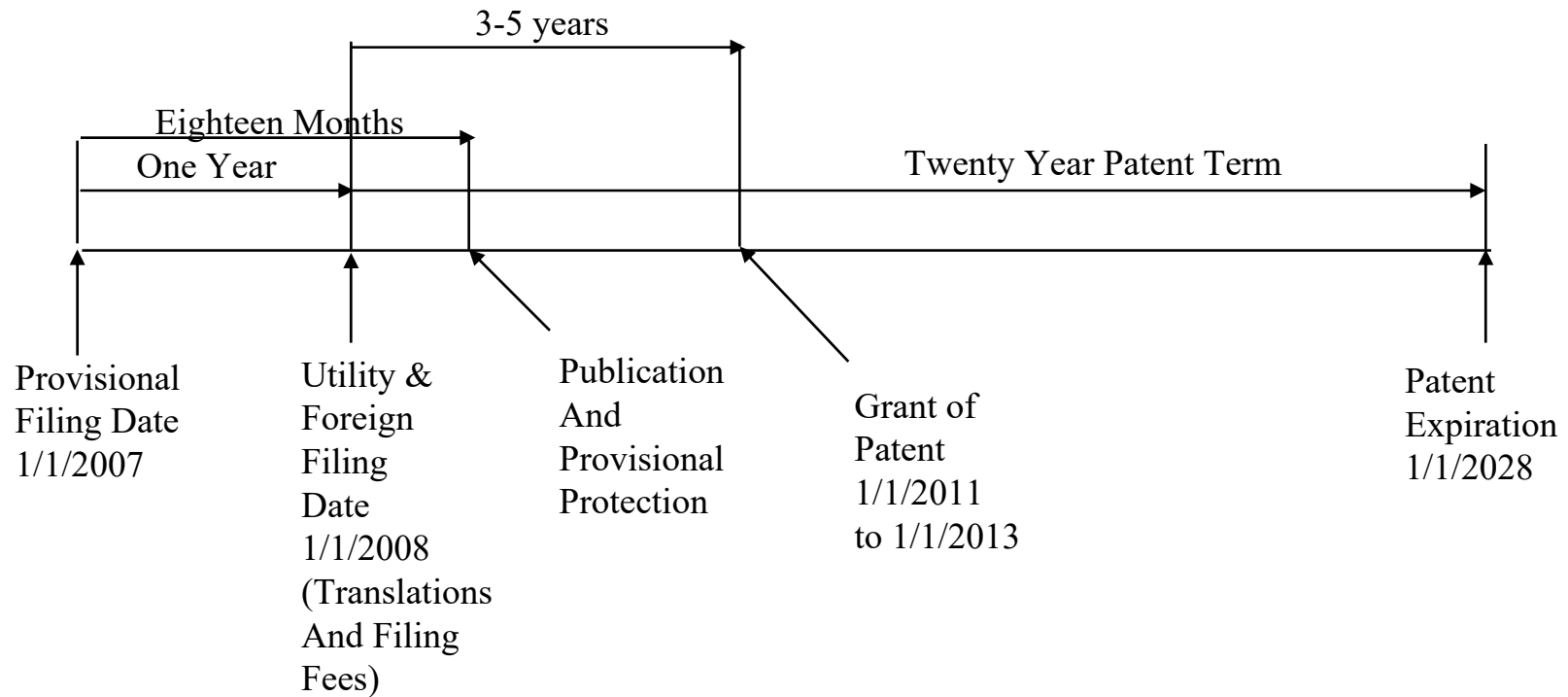
- Alternative to utility patents in many countries
- Lower cost
- No substantive examination
- Faster patent grant
- No presumption of validity
- Usually a shorter patent term (e.g. 7-15 years)
- Sometimes called “Utility Models” or “Petty Patents”

Types of Utility Patent Applications

- Regular utility application
- Provisional application
- International Application under the Patent Cooperation Treaty
- Regional Patent Applications
(Europe, Africa, Eurasia)

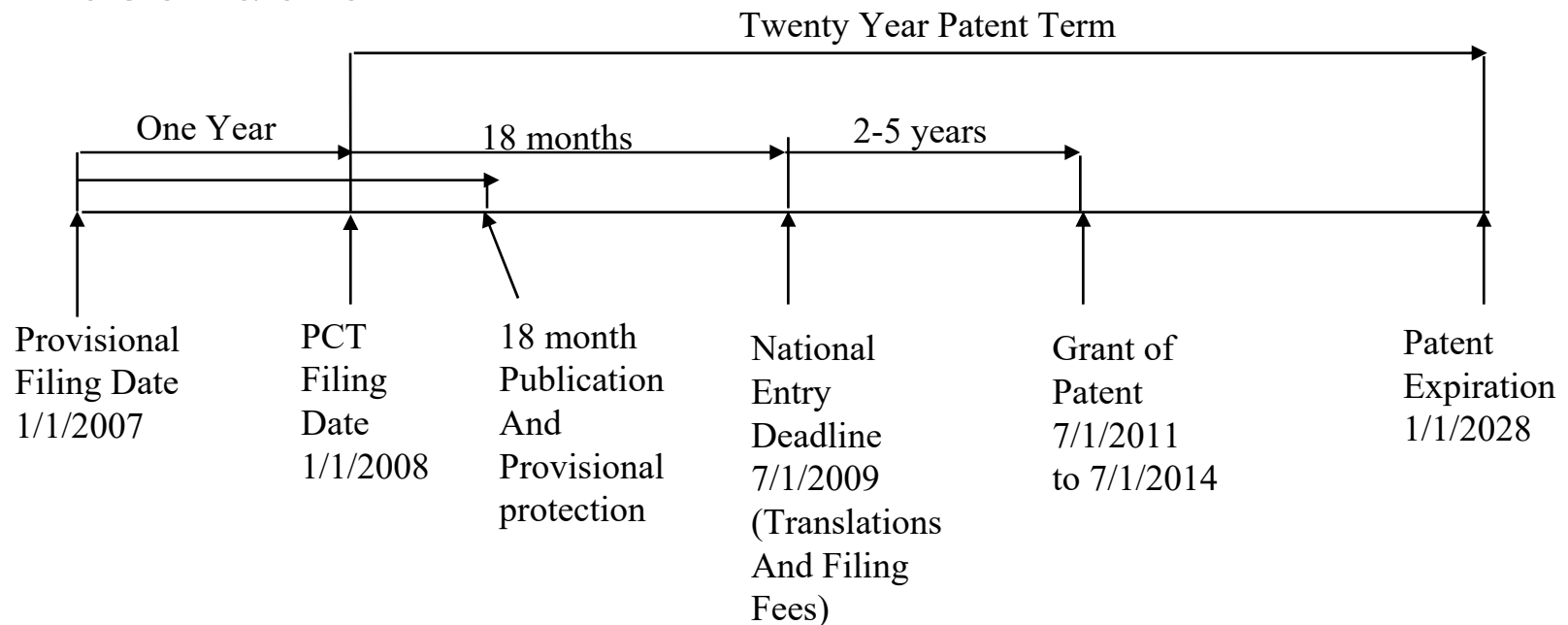
Time Line for Provisional Patent Applications

One year of cost and patent term deferral



Time Line for PCT Application

One year of patent term deferral, 30 months of cost deferral



What is a Patentable Invention?

- Useful
 - Utility (United States)
 - Industrial Applicability (Europe, Japan)
- Novel
- Inventive or Unobvious
 - Identify a new problem, or
 - Identify a non-obvious solution to an old problem

Patent Costs

- \$10,000-\$25,000 per U.S. Patent for a market of 300 million people
- 5-10 times the cost for European and Japanese patents based on equivalent market size
- Most important cost components are:
 - Attorney fees for drafting and prosecution,
 - Patent office fees,
 - Translations, and
 - Annual renewal fees.

Patent Value

- The right to exclude others from:
 - Making,
 - Using
 - Selling,
 - Importing,
 - Offering for Sale, and
 - Applying for FDA approval.
- Some estimates place up to 75% of intrinsic corporate value on intangible assets such as Intellectual Property.

Patent Remedies

- Injunctive relief after grant
- Damages after grant
 - Reasonable royalty, or
 - Lost profits.
- Up to treble damages for willful infringement
- Reasonable compensation from perfection of provisional protection until grant.

Trade Secrets



- Economic Espionage Act of 1996 - 18 U.S.C. § 1831 *et seq.*
- Uniform Trade Secrets Act - Theft of Trade Secrets Act, 18 Pa. C.S.A. § 3930
- Common law - by each State
- International - by each country
- Protection for secret information
- Does not protect against independent development and/or patenting by a third party



Trade Secrets

- Information must not be publicly available
- Owner must take reasonable steps to preserve the secrecy of the information
- Laws will protect against or compensate for unauthorized use or disclosure of properly maintained trade secrets

Trade Secrets – Examples of Subject Matter

- Industrial Processes or process tricks
- Product formulae (e.g. Coca-Cola[®])
- Customer information
- Financial data

Trade Secrets vs. Patents

- Trade secrets offer potentially unlimited duration of protection (i.e. as long as the secret is maintained)
- No filing, prosecution or maintenance costs
- No availability to competitors due to publication
- No protection against independent development and/or patenting by third parties
- Not useful for subject matter that can be reverse engineered
- Requires implementation of steps to maintain secrecy
- Injunctive relief and damages available
- May be costly to enforce, particularly in an environment where competitors frequently poach employees

Copyrights

- U.S. Constitution - Article 1, Section 8, Clause 8
- Copyright Act of 1976 - 17 U.S.C. § 101 *et seq.*
- Digital Millennium Copyright Act - P.L. 105-304, Oct. 28, 1998
- International Treaties - Berne Convention - Universal Copyright Convention
- No State law - pre-empted
- No Common law - pre-empted
- Computer Software Copyright Act of 1980 - 17 U.S.C. § 117
- Architectural Works Copyright Act of 1990 - 17 U.S.C. § 102
- Audio Home Recording Act of 1992 - 17 U.S.C. § 1000 *et seq.*
- Other Statutory Extensions
- Other Judicial Extensions

Copyright Exclusive Rights

- to Copy or Reproduce the Work
- to Prepare Derivative Works
- to Distribute Copies
- to Perform the Work
- to Display the Work
- to Transmit the Work

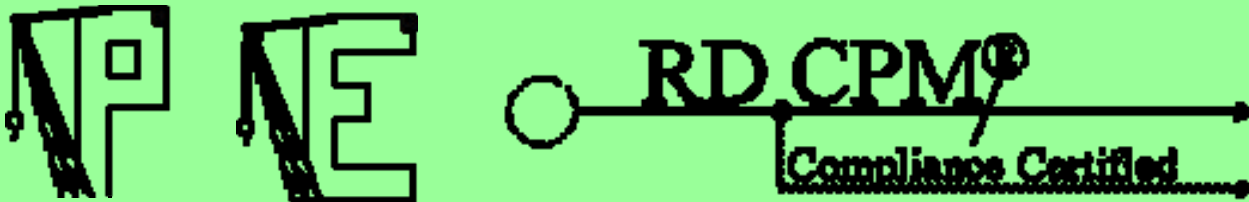
What is Protected?

- Literary and Artistic Expressions
- Pictorial and Graphic and Sculptural Works
- *any* expression of information - fixed in a tangible medium of expression
- however, mere ideas and concepts and methods are not covered by copyright
- Computer Programs - But Not Algorithms
- Architectural Design - from drawing or from structure
- Content - Layout - Look - All Five Senses
- Life + 70 years
- 95 to 125 years if for hire

How to Protect

- Copyright Notice - no longer required - but
- “Copyright” - “Copr.” - “©”
- Name of Copyright Holder - Year first Published
- Registration - <http://www.loc.gov/copyright> 202-707-3000
 - \$30 fee and form with sample of work - w/i 3 months
 - recovery of statutory damages & attorney’s fees
 - Registration not required though certain rights can only be obtained via registration

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Copyright

- Music is typically protected by copyright
 - BMI and ASCAP Copyright clearinghouses
 - Unauthorized copying (e.g. file sharing) is a violation of the copyright laws
- Software is typically protected by copyright
 - Shrink-wrap licensing

Copyright

- Civil Penalties
 - Injunctive relief
 - recovery of statutory damages & attorney's fees
- Criminal Penalties
 - Fine
 - Imprisonment
 - Or both

Copyright Infringement

- Substantial copying
 - Sampling of songs
- Fair use
 - criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright.
 - (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
 - (2) the nature of the copyrighted work;
 - (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
 - (4) the effect of the use upon the potential market for or value of the copyrighted work.

Trademarks

- Trademark Revision Act of 1988 - 15 U.S.C. § 1051 *et seq.*
- Trademark Act of 1946 - “Lanham Act” - use of ®
- Model State Trademark Act - Pennsylvania 54 Pa. C.S.A. § 1101
- Common Law - “Use or Lose” - Local - ™ - SM
- International - Register in each Country
- Local usage may override State and Federal Registration
- Trade Dress - 15 U.S.C. § 1125(a) - product design v. product dress
- Anticybersquatter Consumer Protection Act - P.L. 106-113, Nov. 17, 1999

Trademarks

- Common Law (unregistered)
- State Registration
- Federal Registration

- Trademark Rights accrue from use of the trademark in conjunction with the sale of goods or services in commerce

Trademarks

- State and Federal Registration confers additional rights to trademark owners
 - Statewide or nationwide actual notice to third parties
 - Access to the Federal Courts and remedies
 - The ability to reserve a trademark for a limited period of time (usually 4-5 years) by an intent-to-use application

Federal Trademark Registrability

- Not confusingly similar to an existing mark
- Not descriptive of the goods or services
 - Must acquire secondary meaning to the public
- Not deceptively mis-descriptive (e.g. false indication of geographic origin)
- Not primarily merely a surname
 - Must acquire secondary meaning to the public
- Proof of actual use in interstate commerce

Trademark Infringement

- Confusing similarity test
 - Visual Similarity of the trademarks
 - Spelling
 - Sound
 - Similarity of goods/services
 - Channels of trade
 - Overlap of customer base
 - Sophistication of customers

Ownership of Intellectual Property

- Determined under State Law
- Employee Inventions generally the employer's if:
 - Employment agreement says so,
 - Made in the course of the employee's duties using employer's facilities,
 - Employee hired to invent, or
 - Employee has a fiduciary duty to employer (e.g. corporate officers).
- Copyright Works for Hire Owned by employer
- Trademarks are owned by the entity that
 - Uses the mark in commerce, and
 - Controls the quality of the goods and services.

Other Topics of Interest

- Uniform Computer Information Transactions Act
- Uniform Electronic Transaction Act
- Electronic Signatures in Global and National Commerce Act
- Application Service Providers
- Electronic Self Help



See also:

www.pspe-philly.org

MCECourses/BuyNow-1.htm

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