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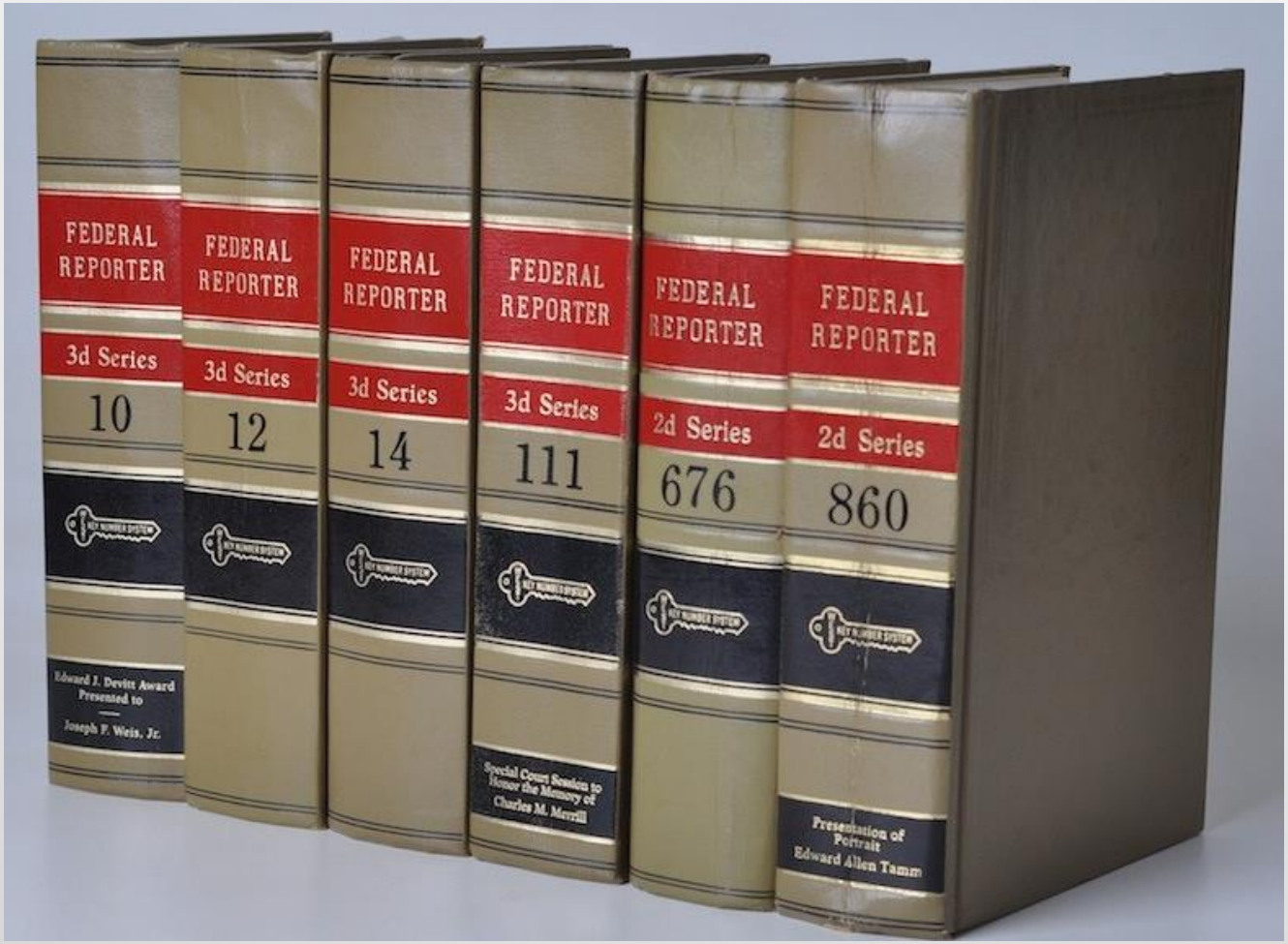

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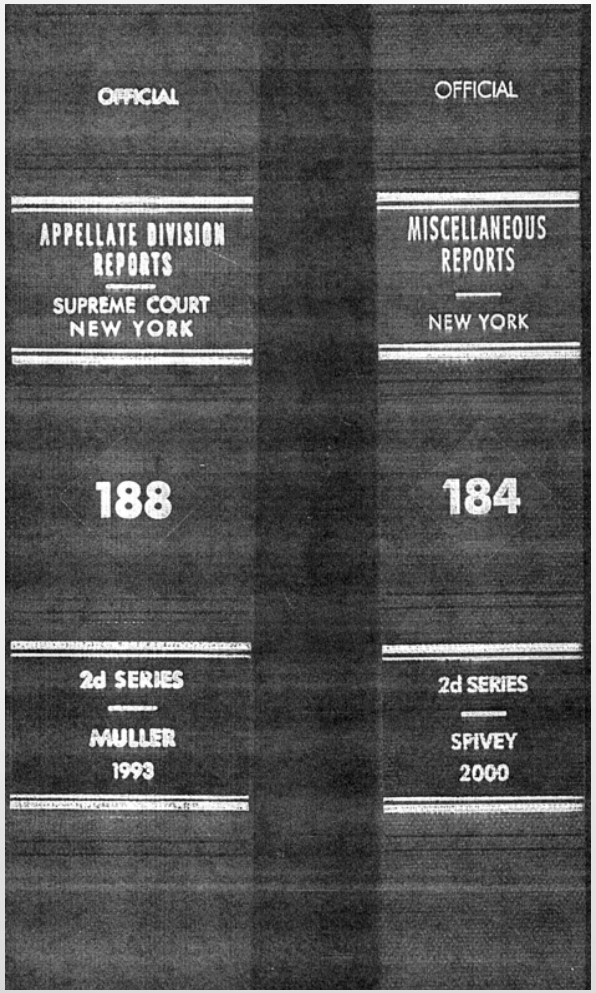

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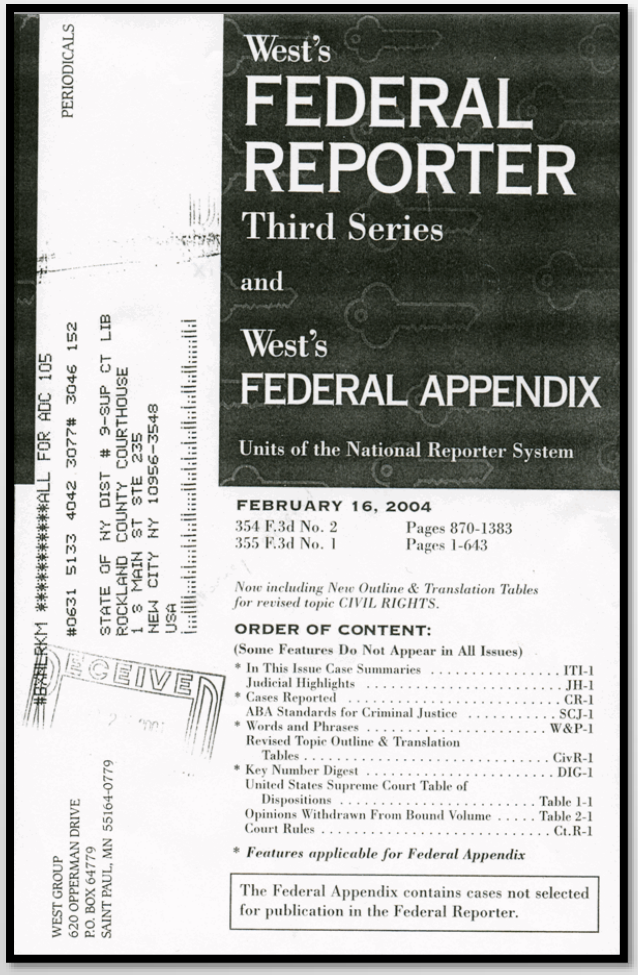

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354 F.3d No. 2 Pages 870-1383
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Now including New Outline & Translation Tables for revised topic CIVIL RIGHTS.

ORDER OF CONTENT:

(Some Features Do Not Appear in All Issues)

* *Features applicable for Federal Appendix*

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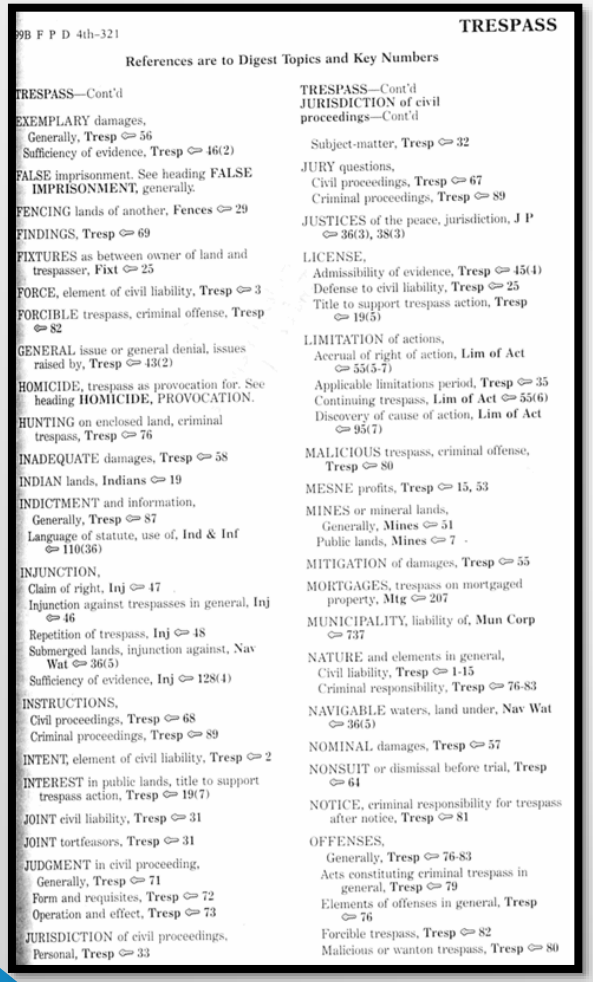

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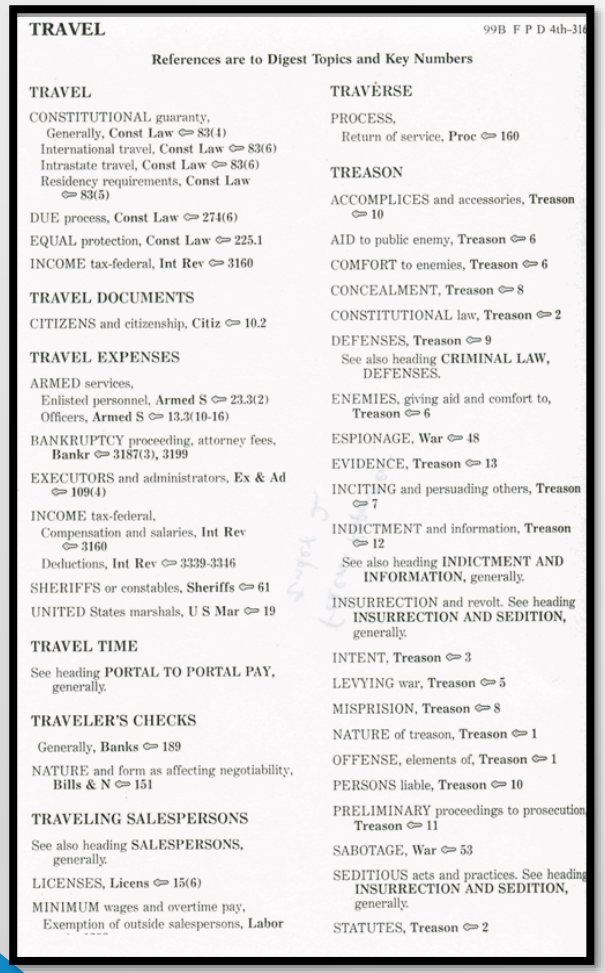

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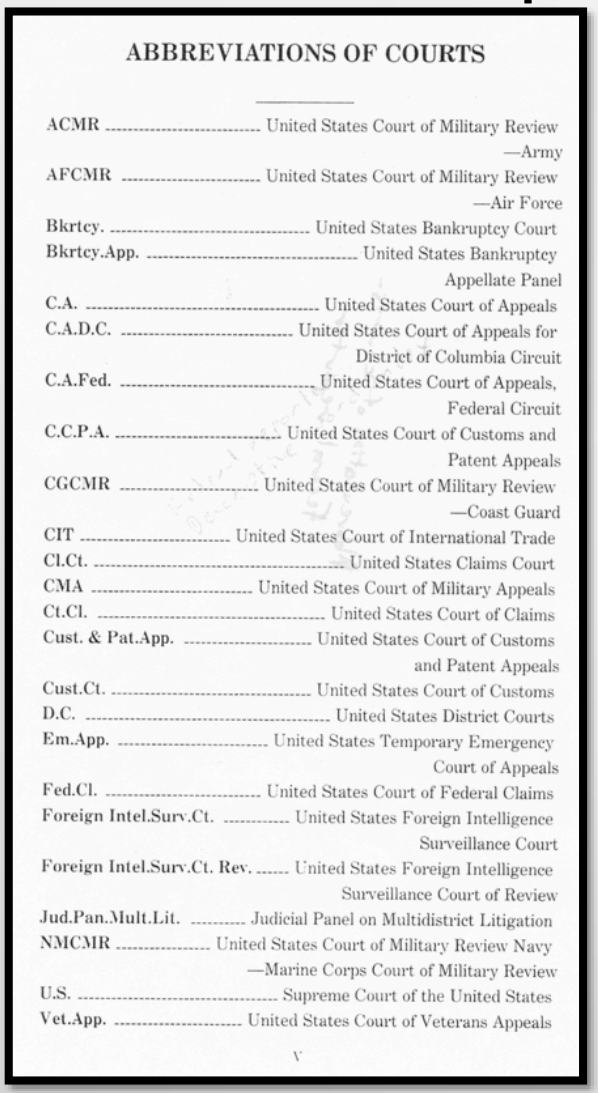

ABBREVIATIONS OF COURTS

ACMR ..... United States Court of Military Review —Army
AFCMR ..... United States Court of Military Review —Air Force
Bkrtcy. ..... United States Bankruptcy Court
Bkrtcy.App. ..... United States Bankruptcy Appellate Panel
C.A. ..... United States Court of Appeals
C.A.D.C. ..... United States Court of Appeals for District of Columbia Circuit
C.A.Fed. ..... United States Court of Appeals, Federal Circuit
C.C.P.A. ..... United States Court of Customs and Patent Appeals
CGCMR ..... United States Court of Military Review —Coast Guard
CIT ..... United States Court of International Trade
Cl.Ct. ..... United States Claims Court
CMA ..... United States Court of Military Appeals
Ct.Cl. ..... United States Court of Claims
Cust. & Pat.App. ..... United States Court of Customs and Patent Appeals
Cust.Ct. ..... United States Court of Customs
D.C. ..... United States District Courts
Em.App. ..... United States Temporary Emergency Court of Appeals
Fed.Cl. ..... United States Court of Federal Claims
Foreign Intel.Surv.Ct. ..... United States Foreign Intelligence Surveillance Court
Foreign Intel.Surv.Ct. Rev. ..... United States Foreign Intelligence Surveillance Court of Review
Jud.Pan.Mult.Lit. ..... Judicial Panel on Multidistrict Litigation
NMCMR ..... United States Court of Military Review Navy —Marine Corps Court of Military Review
U.S. ..... Supreme Court of the United States
Vet.App. ..... United States Court of Veterans Appeals

v

ABBREVIATIONS OF COURTS

ACMR ..... United States Court of Military Review —Army
AFCMR ..... United States Court of Military Review —Air Force
Bkrtcy. ..... United States Bankruptcy Court
Bkrtcy.App. ..... United States Bankruptcy Appellate Panel
C.A. ..... United States Court of Appeals
C.A.D.C. ..... United States Court of Appeals for District of Columbia Circuit
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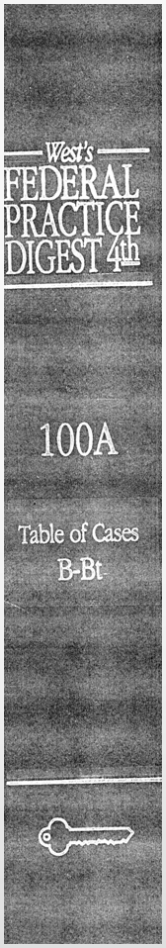

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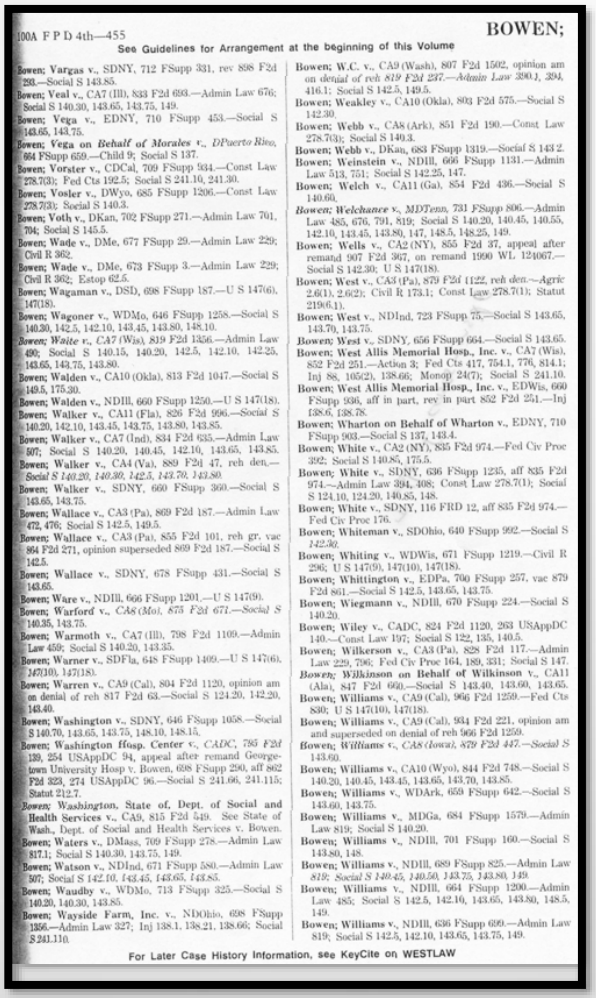

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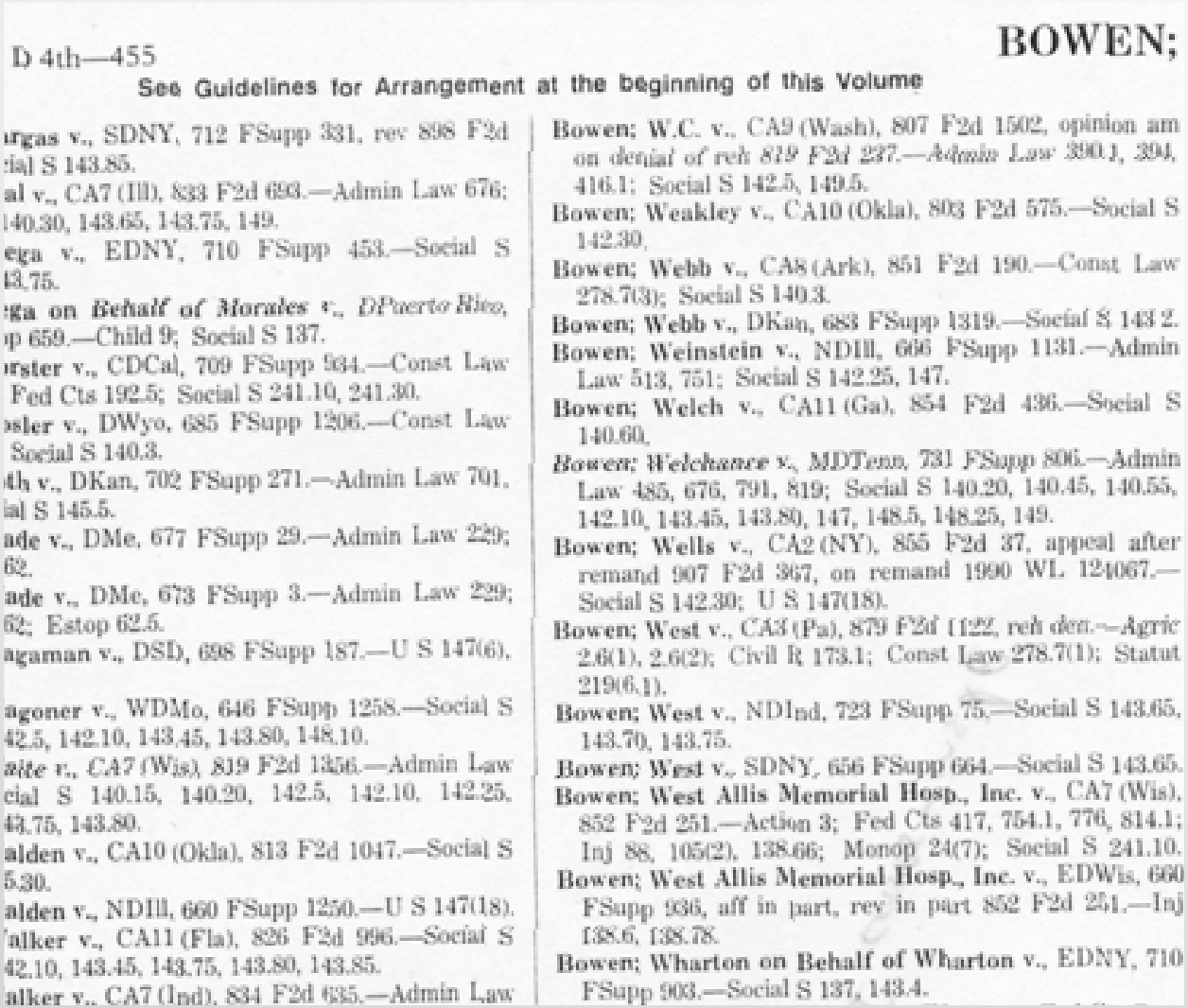

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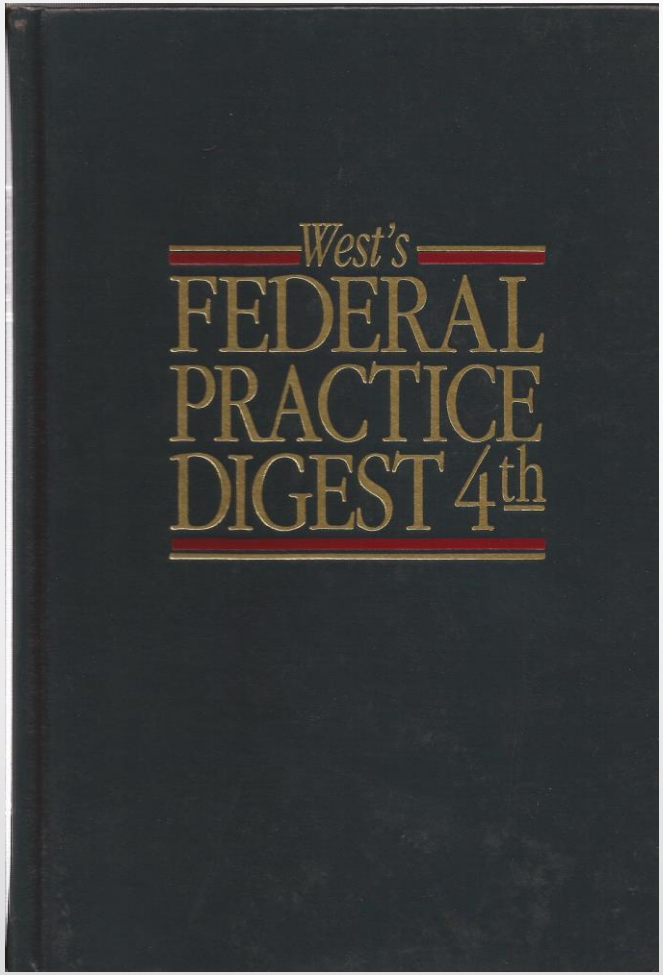
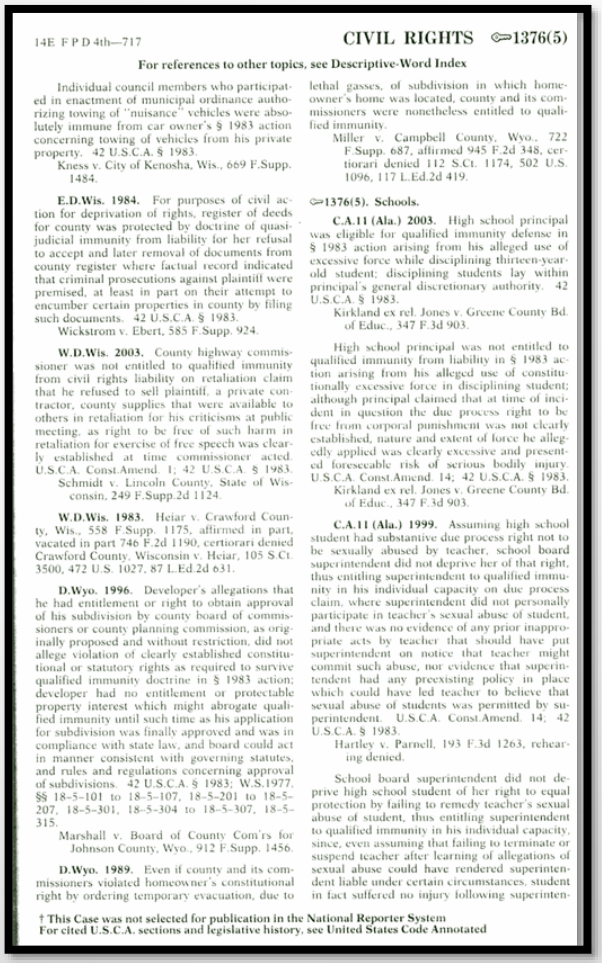
5.30.
alden v., NDIll, 660 FSupp 1250.—U S 147(18).
'alker v., CA11 (Fla), 826 F2d 996.—Social S
42.10, 143.45, 143.75, 143.80, 143.85.
alker v., CA7 (Ind), 834 F2d 635.—Admin Law

Bowen; W.C. v., CA9 (Wash), 807 F2d 1502, opinion am on *denial of reh 819 F2d 237*.—*Admin Law* 390.1, 394, 416.1; Social S 142.5, 149.5.
Bowen; Weakley v., CA10 (Okla), 803 F2d 575.—Social S 142.30.
Bowen; Webb v., CA8 (Ark), 851 F2d 190.—Const Law 278.7(3); Social S 140.3.
Bowen; Webb v., DKan, 683 FSupp 1319.—Social S 143.2.
Bowen; Weinstein v., NDIll, 666 FSupp 1131.—Admin Law 513, 751; Social S 142.25, 147.
Bowen; Welch v., CA11 (Ga), 854 F2d 436.—Social S 140.60.
Bowen; Welchance v., *MDTenn*, 731 FSupp 806.—Admin Law 485, 676, 791, 819; Social S 140.20, 140.45, 140.55, 142.10, 143.45, 143.80, 147, 148.5, 148.25, 149.
Bowen; Wells v., CA2 (NY), 855 F2d 37, appeal after remand 907 F2d 367, on remand 1990 WL 124067.—Social S 142.30; U S 147(18).
Bowen; West v., CA3 (Pa), 879 F2d 1122, reh den.—Agric 2.6(1), 2.6(2); Civil R 173.1; Const Law 278.7(1); Statut 219(6.1).
Bowen; West v., NDInd, 723 FSupp 75.—Social S 143.65, 143.70, 143.75.
Bowen; West v., SDNY, 656 FSupp 664.—Social S 143.65.
Bowen; West Allis Memorial Hosp., Inc. v., CA7 (Wis), 852 F2d 251.—Action 3; Fed Cts 417, 754.1, 776, 814.1; Inj 88, 105(2), 138.66; Monop 24(7); Social S 241.10.
Bowen; West Allis Memorial Hosp., Inc. v., EDWis, 660 FSupp 936, aff in part, rev in part 852 F2d 251.—Inj 138.6, 138.78.
Bowen; Wharton on Behalf of Wharton v., EDNY, 710 FSupp 903.—Social S 137, 143.4.

Federal Practice Digest – Cover



Federal Practice Digest – Inside



14E F P D 4th—717 CIVIL RIGHTS ⇐1376(5)

For references to other topics, see Descriptive-Word Index

Individual council members who participated in enactment of municipal ordinance authorizing towing of "nuisance" vehicles were absolutely immune from car owner's § 1983 action concerning towing of vehicles from his private property. 42 U.S.C.A. § 1983.
Kness v. City of Kenosha, Wis., 669 F.Supp. 1484.

E.D.Wis. 1984. For purposes of civil action for deprivation of rights, register of deeds for county was protected by doctrine of quasi-judicial immunity from liability for her refusal to accept and later removal of documents from county register where factual record indicated that criminal prosecutions against plaintiff were premised, at least in part on their attempt to encumber certain properties in county by filing such documents. 42 U.S.C.A. § 1983.
Wickstrom v. Ebert, 585 F.Supp. 924.

W.D.Wis. 2003. County highway commissioner was not entitled to qualified immunity from civil rights liability on retaliation claim that he refused to sell plaintiff, a private contractor, county supplies that were available to others in retaliation for his criticisms at public meeting, as right to be free of such harm in retaliation for exercise of free speech was clearly established at time commissioner acted. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.
Schmidt v. Lincoln County, State of Wisconsin, 249 F.Supp.2d 1124.

W.D.Wis. 1983. Heiar v. Crawford County, Wis., 558 F.Supp. 1175, affirmed in part, vacated in part 746 F.2d 1190, certiorari denied Crawford County, Wisconsin v. Heiar, 105 S.Ct. 3500, 472 U.S. 1027, 87 L.Ed.2d 631.

D.Wyo. 1996. Developer's allegations that he had entitlement or right to obtain approval of his subdivision by county board of commissioners or county planning commission, as originally proposed and without restriction, did not allege violation of clearly established constitutional or statutory rights as required to survive qualified immunity doctrine in § 1983 action; developer had no entitlement or protectable property interest which might abrogate qualified immunity until such time as his application for subdivision was finally approved and was in compliance with state law, and board could act in manner consistent with governing statutes, and rules and regulations concerning approval of subdivisions. 42 U.S.C.A. § 1983; W.S.1977, §§ 18-5-101 to 18-5-107, 18-5-201 to 18-5-207, 18-5-301, 18-5-304 to 18-5-307, 18-5-315.
Marshall v. Board of County Com'rs for Johnson County, Wyo., 912 F.Supp. 1456.

D.Wyo. 1989. Even if county and its commissioners violated homeowner's constitutional right by ordering temporary evacuation, due to lethal gasses, of subdivision in which homeowner's home was located, county and its commissioners were nonetheless entitled to qualified immunity.
Miller v. Campbell County, Wyo., 722 F.Supp. 687, affirmed 945 F.2d 348, certiorari denied 112 S.Ct. 1174, 502 U.S. 1096, 117 L.Ed.2d 419.

⇐1376(5). Schools.

C.A.11 (Ala.) 2003. High school principal was eligible for qualified immunity defense in § 1983 action arising from his alleged use of excessive force while disciplining thirteen-year-old student; disciplining students lay within principal's general discretionary authority. 42 U.S.C.A. § 1983.
Kirkland ex rel. Jones v. Greene County Bd. of Educ., 347 F.3d 903.

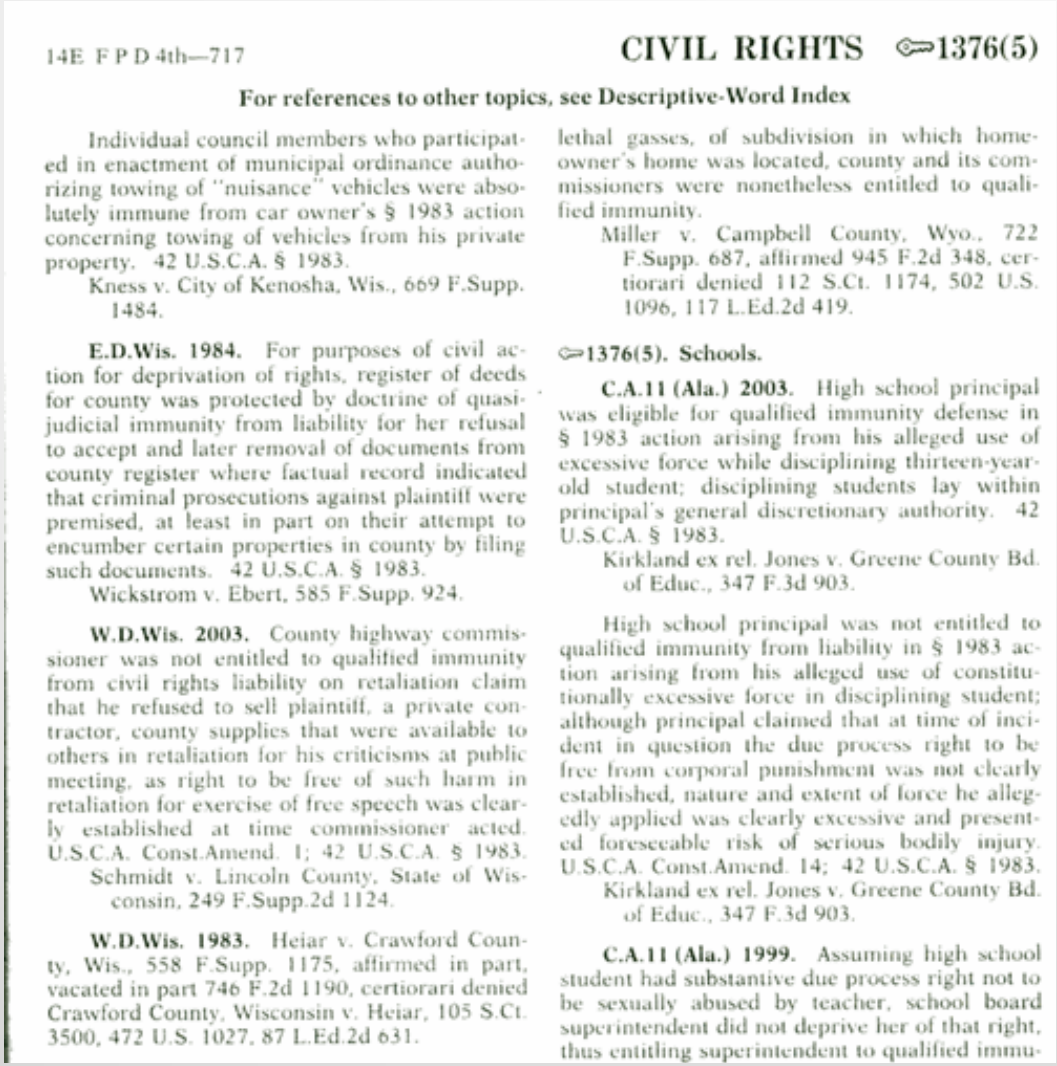
High school principal was not entitled to qualified immunity from liability in § 1983 action arising from his alleged use of constitutionally excessive force in disciplining student; although principal claimed that at time of incident in question the due process right to be free from corporal punishment was not clearly established, nature and extent of force he allegedly applied was clearly excessive and presented foreseeable risk of serious bodily injury. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.
Kirkland ex rel. Jones v. Greene County Bd. of Educ., 347 F.3d 903.

C.A.11 (Ala.) 1999. Assuming high school student had substantive due process right not to be sexually abused by teacher, school board superintendent did not deprive her of that right, thus entitling superintendent to qualified immunity in his individual capacity on due process claim, where superintendent did not personally participate in teacher's sexual abuse of student, and there was no evidence of any prior inappropriate acts by teacher that should have put superintendent on notice that teacher might commit such abuse, nor evidence that superintendent had any preexisting policy in place which could have led teacher to believe that sexual abuse of students was permitted by superintendent. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.
Hartley v. Parnell, 193 F.3d 1263, rehearing denied.

School board superintendent did not deprive high school student of her right to equal protection by failing to remedy teacher's sexual abuse of student, thus entitling superintendent to qualified immunity in his individual capacity, since, even assuming that failing to terminate or suspend teacher after learning of allegations of sexual abuse could have rendered superintendent liable under certain circumstances, student in fact suffered no injury following superinten-

† This Case was not selected for publication in the National Reporter System
For cited U.S.C.A. sections and legislative history, see United States Code Annotated

Federal Practice Digest – Inside (cont.)



14E F P D 4th—717

CIVIL RIGHTS ⇨1376(5)

For references to other topics, see Descriptive-Word Index

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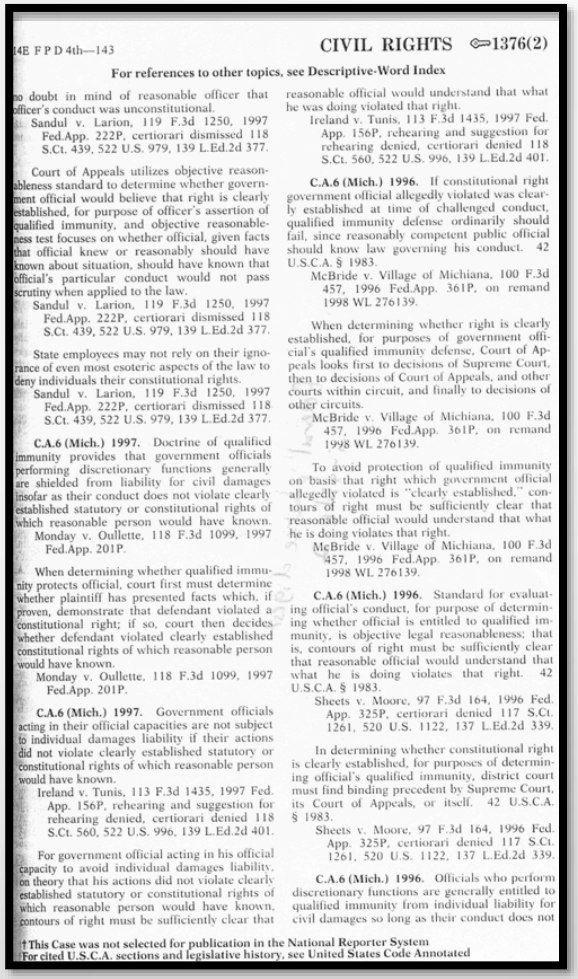
Federal Practice Digest – Inside (cont.)



14E F P D 4th—143

CIVIL RIGHTS ⇐1376(2)

For references to other topics, see Descriptive-Word Index

no doubt in mind of reasonable officer that officer's conduct was unconstitutional.
Sandul v. Larion, 119 F.3d 1250, 1997 Fed.App. 222P, certiorari dismissed 118 S.Ct. 439, 522 U.S. 979, 139 L.Ed.2d 377.

Court of Appeals utilizes objective reasonableness standard to determine whether government official would believe that right is clearly established, for purpose of officer's assertion of qualified immunity, and objective reasonableness test focuses on whether official, given facts that official knew or reasonably should have known about situation, should have known that official's particular conduct would not pass scrutiny when applied to the law.
Sandul v. Larion, 119 F.3d 1250, 1997 Fed.App. 222P, certiorari dismissed 118 S.Ct. 439, 522 U.S. 979, 139 L.Ed.2d 377.

State employees may not rely on their ignorance of even most esoteric aspects of the law to deny individuals their constitutional rights.
Sandul v. Larion, 119 F.3d 1250, 1997 Fed.App. 222P, certiorari dismissed 118 S.Ct. 439, 522 U.S. 979, 139 L.Ed.2d 377.

C.A.6 (Mich.) 1997. Doctrine of qualified immunity provides that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.
Monday v. Oullette, 118 F.3d 1099, 1997 Fed.App. 201P.

When determining whether qualified immunity protects official, court first must determine whether plaintiff has presented facts which, if proven, demonstrate that defendant violated a constitutional right; if so, court then decides whether defendant violated clearly established constitutional rights of which reasonable person would have known.
Monday v. Oullette, 118 F.3d 1099, 1997 Fed.App. 201P.

C.A.6 (Mich.) 1997. Government officials acting in their official capacities are not subject to individual damages liability if their actions did not violate clearly established statutory or constitutional rights of which reasonable person would have known.
Ireland v. Tunis, 113 F.3d 1435, 1997 Fed. App. 156P, rehearing and suggestion for rehearing denied, certiorari denied 118 S.Ct. 560, 522 U.S. 996, 139 L.Ed.2d 401.

For government official acting in his official capacity to avoid individual damages liability, on theory that his actions did not violate clearly established statutory or constitutional rights of which reasonable person would have known, contours of right must be sufficiently clear that reasonable official would understand that what he was doing violated that right.
Ireland v. Tunis, 113 F.3d 1435, 1997 Fed. App. 156P, rehearing and suggestion for rehearing denied, certiorari denied 118 S.Ct. 560, 522 U.S. 996, 139 L.Ed.2d 401.

C.A.6 (Mich.) 1996. If constitutional right government official allegedly violated was clearly established at time of challenged conduct, qualified immunity defense ordinarily should fail, since reasonably competent public official should know law governing his conduct. 42 U.S.C.A. § 1983.
McBride v. Village of Michiana, 100 F.3d 457, 1996 Fed.App. 361P, on remand 1998 WL 276139.

When determining whether right is clearly established, for purposes of government official's qualified immunity defense, Court of Appeals looks first to decisions of Supreme Court, then to decisions of Court of Appeals, and other courts within circuit, and finally to decisions of other circuits.
McBride v. Village of Michiana, 100 F.3d 457, 1996 Fed.App. 361P, on remand 1998 WL 276139.

To avoid protection of qualified immunity on basis that right which government official allegedly violated is "clearly established," contours of right must be sufficiently clear that reasonable official would understand that what he is doing violates that right.
McBride v. Village of Michiana, 100 F.3d 457, 1996 Fed.App. 361P, on remand 1998 WL 276139.

C.A.6 (Mich.) 1996. Standard for evaluating official's conduct, for purpose of determining whether official is entitled to qualified immunity, is objective legal reasonableness; that is, contours of right must be sufficiently clear that reasonable official would understand that what he is doing violates that right. 42 U.S.C.A. § 1983.
Sheets v. Moore, 97 F.3d 164, 1996 Fed. App. 325P, certiorari denied 117 S.Ct. 1261, 520 U.S. 1122, 137 L.Ed.2d 339.

In determining whether constitutional right is clearly established, for purposes of determining official's qualified immunity, district court must find binding precedent by Supreme Court, its Court of Appeals, or itself. 42 U.S.C.A. § 1983.
Sheets v. Moore, 97 F.3d 164, 1996 Fed. App. 325P, certiorari denied 117 S.Ct. 1261, 520 U.S. 1122, 137 L.Ed.2d 339.

C.A.6 (Mich.) 1996. Officials who perform discretionary functions are generally entitled to qualified immunity from individual liability for civil damages so long as their conduct does not

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Federal Practice Digest – Inside (cont.)

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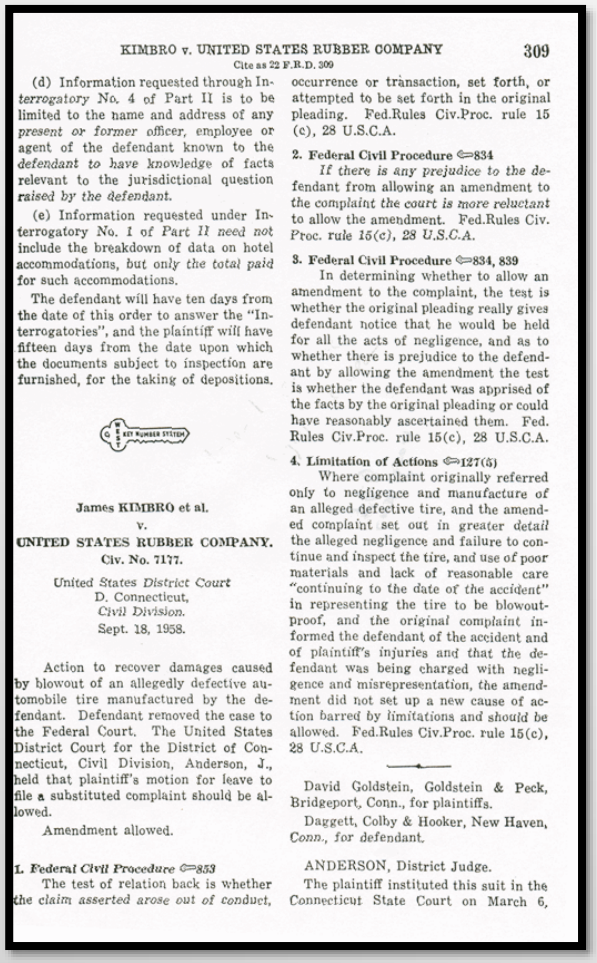
Case from Federal Rules Decisions



KIMBRO v. UNITED STATES RUBBER COMPANY 309
Cite as 22 F.R.D. 309

(d) Information requested through Interrogatory No. 4 of Part II is to be limited to the name and address of any present or former officer, employee or agent of the defendant known to the defendant to have knowledge of facts relevant to the jurisdictional question raised by the defendant.

(e) Information requested under Interrogatory No. 1 of Part II need not include the breakdown of data on hotel accommodations, but only the total paid for such accommodations.

The defendant will have ten days from the date of this order to answer the "Interrogatories", and the plaintiff will have fifteen days from the date upon which the documents subject to inspection are furnished, for the taking of depositions.

James KIMBRO et al.
v.
UNITED STATES RUBBER COMPANY.
Civ. No. 7177.

United States District Court
D. Connecticut,
Civil Division.
Sept. 18, 1958.

Action to recover damages caused by blowout of an allegedly defective automobile tire manufactured by the defendant. Defendant removed the case to the Federal Court. The United States District Court for the District of Connecticut, Civil Division, Anderson, J., held that plaintiff's motion for leave to file a substituted complaint should be allowed.

Amendment allowed.

1. Federal Civil Procedure ⇐853
The test of relation back is whether the claim asserted arose out of conduct, occurrence or transaction, set forth, or attempted to be set forth in the original pleading. Fed.Rules Civ.Proc. rule 15 (c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐834
If there is any prejudice to the defendant from allowing an amendment to the complaint the court is more reluctant to allow the amendment. Fed.Rules Civ. Proc. rule 15(c), 28 U.S.C.A.

3. Federal Civil Procedure ⇐834, 839
In determining whether to allow an amendment to the complaint, the test is whether the original pleading really gives defendant notice that he would be held for all the acts of negligence, and as to whether there is prejudice to the defendant by allowing the amendment the test is whether the defendant was apprised of the facts by the original pleading or could have reasonably ascertained them. Fed. Rules Civ.Proc. rule 15(c), 28 U.S.C.A.

4. Limitation of Actions ⇐127(5)
Where complaint originally referred only to negligence and manufacture of an alleged defective tire, and the amended complaint set out in greater detail the alleged negligence and failure to continue and inspect the tire, and use of poor materials and lack of reasonable care "continuing to the date of the accident" in representing the tire to be blowout-proof, and the original complaint informed the defendant of the accident and of plaintiff's injuries and that the defendant was being charged with negligence and misrepresentation, the amendment did not set up a new cause of action barred by limitations and should be allowed. Fed.Rules Civ.Proc. rule 15(c), 28 U.S.C.A.

David Goldstein, Goldstein & Peck, Bridgeport, Conn., for plaintiffs.

Daggett, Colby & Hooker, New Haven, Conn., for defendant.

ANDERSON, District Judge.

The plaintiff instituted this suit in the Connecticut State Court on March 6,

KIMBRO v. UNITED STATES RUBBER COMPANY 309
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Case from Federal Rules Decisions (cont.)

further proceedings consistent with this opinion.

It is so ordered.

Supap KIRTSAENG, dba Bluechristine99,
Petitioner

v.

JOHN WILEY & SONS, INC.
No. 11–697.

Argued Oct. 29, 2012.

Decided March 19, 2013.

Background: Publisher filed action against domestic reseller of textbooks manufactured and first sold abroad, alleg-

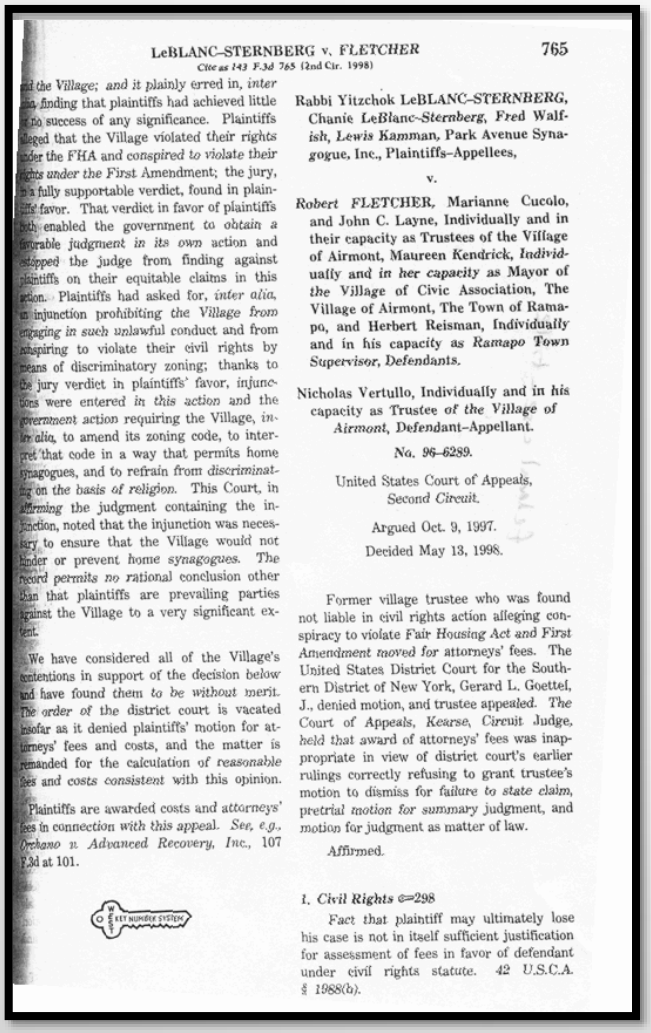
Justice Kagan filed a concurring opinion, in which Justice Alito joined.

Justice Ginsburg filed a dissenting opinion, which Justice Kennedy joined and Justice Scalia joined in part.

1. Copyrights and Intellectual Property
⇐38.5

The first sale doctrine, as codified in the Copyright Act to provide that the owner of a particular copy of a copyrighted work "lawfully made under this title" is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy, applies to copies lawfully made abroad; abrogating *Omega S.A. v. Costco Wholesale Corp.*, 541 F.3d 982, *Denbicare U.S.A. Inc. v. Toys "R" Us, Inc.*, 84 F.3d 1143, and *Columbia Broadcasting System, Inc. v. Scorpio Music Distributors, Inc.*, 569 F.Supp. 47. 17 U.S.C.A. §§ 106(3), 109(a), 602(a)(1).

Federal Case - Title



LeBLANC–STERNBERG v. FLETCHER 765
Cite as 143 F.3d 765 (2nd Cir. 1998)

...nd the Village; and it plainly erred in, inter ...finding that plaintiffs had achieved little ...no success of any significance. Plaintiffs ...leged that the Village violated their rights ...der the FHA and conspired to violate their ...ghts under the First Amendment; the jury, ...a fully supportable verdict, found in plain...iffs' favor. That verdict in favor of plaintiffs ...th enabled the government to obtain a ...vorable judgment in its own action and ...stopped the judge from finding against ...laintiffs on their equitable claims in this ...ction. Plaintiffs had asked for, inter alia, ...n injunction prohibiting the Village from ...ngaging in such unlawful conduct and from ...nspiring to violate their civil rights by ...eans of discriminatory zoning; thanks to ...e jury verdict in plaintiffs' favor, injunc...ons were entered in this action and the ...overnment action requiring the Village, in...er alia, to amend its zoning code, to inter...ret that code in a way that permits home ...nagogues, and to refrain from discriminat...g on the basis of religion. This Court, in ...firming the judgment containing the in...nction, noted that the injunction was neces...ary to ensure that the Village would not ...inder or prevent home synagogues. The ...ecord permits no rational conclusion other ...han that plaintiffs are prevailing parties ...gainst the Village to a very significant ex...ent.

We have considered all of the Village's ...ntentions in support of the decision below ...nd have found them to be without merit. ...he order of the district court is vacated ...nsofar as it denied plaintiffs' motion for at...orneys' fees and costs, and the matter is ...emanded for the calculation of reasonable ...ees and costs consistent with this opinion.

Plaintiffs are awarded costs and attorneys' ...ees in connection with this appeal. See, e.g., ...rchano v. Advanced Recovery, Inc., 107 ...3d at 101.

Rabbi Yitzchok LeBLANC–STERNBERG, Chanie LeBlanc–Sternberg, Fred Walfish, Lewis Kamman, Park Avenue Synagogue, Inc., Plaintiffs–Appellees,

v.

Robert FLETCHER, Marianne Cucolo, and John C. Layne, Individually and in their capacity as Trustees of the Village of Airmont, Maureen Kendrick, Individually and in her capacity as Mayor of the Village of Civic Association, The Village of Airmont, The Town of Ramapo, and Herbert Reisman, Individually and in his capacity as Ramapo Town Supervisor, Defendants.

Nicholas Vertullo, Individually and in his capacity as Trustee of the Village of Airmont, Defendant–Appellant.

No. 96–6289.

United States Court of Appeals, Second Circuit.

Argued Oct. 9, 1997.

Decided May 13, 1998.

Former village trustee who was found not liable in civil rights action alleging conspiracy to violate Fair Housing Act and First Amendment moved for attorneys' fees. The United States District Court for the Southern District of New York, Gerard L. Goettel, J., denied motion, and trustee appealed. The Court of Appeals, Kearse, Circuit Judge, held that award of attorneys' fees was inappropriate in view of district court's earlier rulings correctly refusing to grant trustee's motion to dismiss for failure to state claim, pretrial motion for summary judgment, and motion for judgment as matter of law.

Affirmed.

1. Civil Rights ⇐298

Fact that plaintiff may ultimately lose his case is not in itself sufficient justification for assessment of fees in favor of defendant under civil rights statute. 42 U.S.C.A. § 1988(b).

ERG v. FLETCHER 765
(2nd Cir. 1998)

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v.

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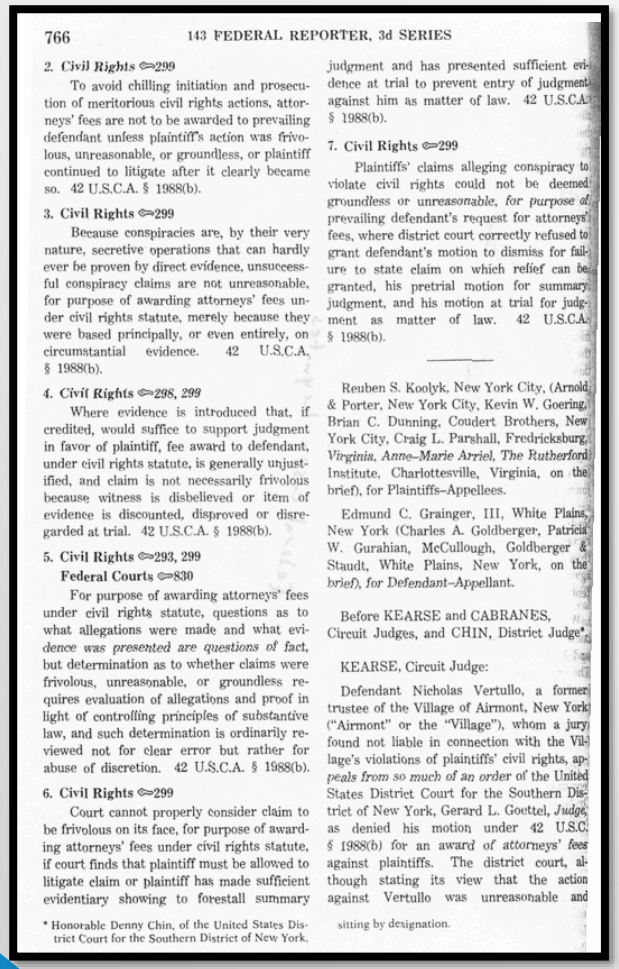
Federal Case - Keynotes



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2. *Civil Rights* ⇐299

To avoid chilling initiation and prosecution of meritorious civil rights actions, attorneys' fees are not to be awarded to prevailing defendant unless plaintiff's action was frivolous, unreasonable, or groundless, or plaintiff continued to litigate after it clearly became so. 42 U.S.C.A. § 1988(b).

3. Civil Rights ⇐299

Because conspiracies are, by their very nature, secretive operations that can hardly ever be proven by direct evidence, unsuccessful conspiracy claims are not unreasonable, for purpose of awarding attorneys' fees under civil rights statute, merely because they were based principally, or even entirely, on circumstantial evidence. 42 U.S.C.A. § 1988(b).

4. *Civil Rights* ⇐*298, 299*

Where evidence is introduced that, if credited, would suffice to support judgment in favor of plaintiff, fee award to defendant, under civil rights statute, is generally unjustified, and claim is not necessarily frivolous because witness is disbelieved or item of evidence is discounted, disproved or disregarded at trial. 42 U.S.C.A. § 1988(b).

5. Civil Rights ⇐293, 299
Federal Courts ⇐830

For purpose of awarding attorneys' fees under civil rights statute, questions as to what allegations were made and what evidence was presented are questions of fact, but determination as to whether claims were frivolous, unreasonable, or groundless requires evaluation of allegations and proof in light of controlling principles of substantive law, and such determination is ordinarily reviewed not for clear error but rather for abuse of discretion. 42 U.S.C.A. § 1988(b).

6. Civil Rights ⇐299

Court cannot properly consider claim to be frivolous on its face, for purpose of awarding attorneys' fees under civil rights statute, if court finds that plaintiff must be allowed to litigate claim or plaintiff has made sufficient evidentiary showing to forestall summary judgment and has presented sufficient evidence at trial to prevent entry of judgment against him as matter of law. 42 U.S.C.A. § 1988(b).

7. Civil Rights ⇐299

Plaintiffs' claims alleging conspiracy to violate civil rights could not be deemed groundless or unreasonable, for purpose of prevailing defendant's request for attorneys' fees, where district court correctly refused to grant defendant's motion to dismiss for failure to state claim on which relief can be granted, his pretrial motion for summary judgment, and his motion at trial for judgment as matter of law. 42 U.S.C.A. § 1988(b).

Reuben S. Koolyk, New York City, (Arnold & Porter, New York City, Kevin W. Goering, Brian C. Dunning, Coudert Brothers, New York City, Craig L. Parshall, Fredricksburg, *Virginia, Anne-Marie Arriel, The Rutherford* Institute, Charlottesville, Virginia, on the brief), for Plaintiffs-Appellees.

Edmund C. Grainger, III, White Plains, New York (Charles A. Goldberger, Patricia W. Gurahian, McCullough, Goldberger & Staudt, White Plains, New York, on the brief), *for Defendant-Appellant.*

Before KEARSE and CABRANES, Circuit Judges, and CHIN, District Judge*.

KEARSE, Circuit Judge:

Defendant Nicholas Vertullo, a former trustee of the Village of Airmont, New York ("Airmont" or the "Village"), whom a jury found not liable in connection with the Village's violations of plaintiffs' civil rights, appeals from so much of an order of the United States District Court for the Southern District of New York, Gerard L. Goettel, *Judge*, as denied his motion under 42 U.S.C. § 1988(b) for an award of attorneys' fees against plaintiffs. The district court, although stating its view that the action against Vertullo was unreasonable and

* Honorable Denny Chin, of the United States District Court for the Southern District of New York, sitting by designation.

766 143 FEDERAL REPORTER, 3d SERIES

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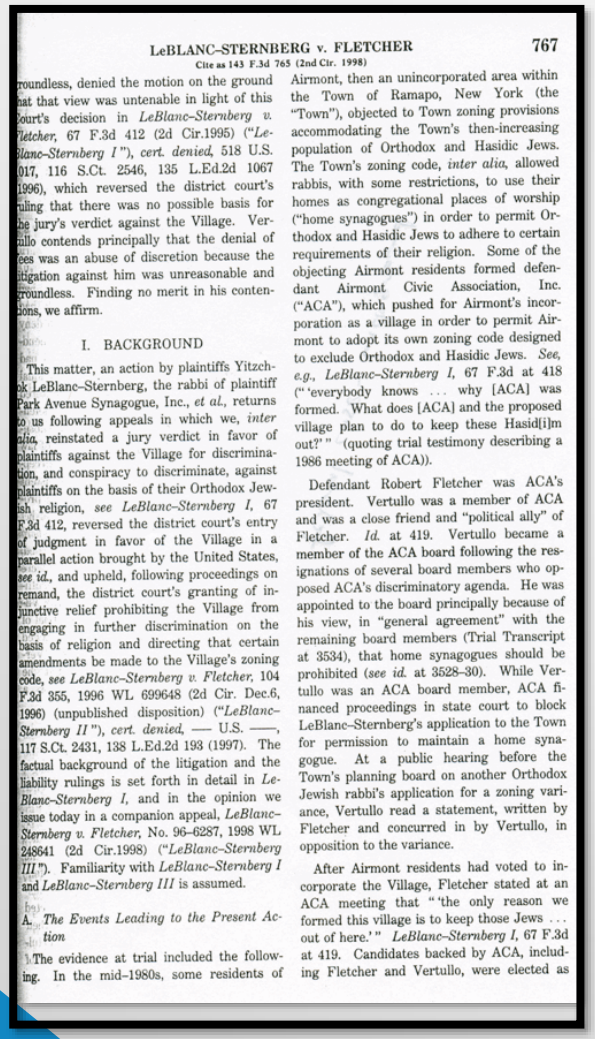
Federal Case – Background



LeBLANC–STERNBERG v. FLETCHER 767
Cite as 143 F.3d 765 (2nd Cir. 1998)

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I. BACKGROUND

This matter, an action by plaintiffs Yitzch-ok LeBlanc–Sternberg, the rabbi of plaintiff Park Avenue Synagogue, Inc., *et al.*, returns to us following appeals in which we, *inter alia*, reinstated a jury verdict in favor of plaintiffs against the Village for discrimina-tion, and conspiracy to discriminate, against plaintiffs on the basis of their Orthodox Jew-ish religion, *see LeBlanc–Sternberg I*, 67 F.3d 412, reversed the district court's entry of judgment in favor of the Village in a parallel action brought by the United States, *see id.*, and upheld, following proceedings on remand, the district court's granting of in-junctive relief prohibiting the Village from engaging in further discrimination on the basis of religion and directing that certain amendments be made to the Village's zoning code, *see LeBlanc–Sternberg v. Fletcher*, 104 F.3d 355, 1996 WL 699648 (2d Cir. Dec.6, 1996) (unpublished disposition) ("*LeBlanc–Sternberg II*"), *cert. denied*, — U.S. —, 117 S.Ct. 2431, 138 L.Ed.2d 193 (1997). The factual background of the litigation and the liability rulings is set forth in detail in *LeBlanc–Sternberg I*, and in the opinion we issue today in a companion appeal, *LeBlanc–Sternberg v. Fletcher*, No. 96–6287, 1998 WL 248641 (2d Cir.1998) ("*LeBlanc–Sternberg III*"). Familiarity with *LeBlanc–Sternberg I* and *LeBlanc–Sternberg III* is assumed.

A. *The Events Leading to the Present Action*

The evidence at trial included the follow-ing. In the mid–1980s, some residents of Airmont, then an unincorporated area within the Town of Ramapo, New York (the "Town"), objected to Town zoning provisions accommodating the Town's then-increasing population of Orthodox and Hasidic Jews. The Town's zoning code, *inter alia*, allowed rabbis, with some restrictions, to use their homes as congregational places of worship ("home synagogues") in order to permit Or-thodox and Hasidic Jews to adhere to certain requirements of their religion. Some of the objecting Airmont residents formed defen-dant Airmont Civic Association, Inc. ("ACA"), which pushed for Airmont's incor-poration as a village in order to permit Air-mont to adopt its own zoning code designed to exclude Orthodox and Hasidic Jews. *See, e.g., LeBlanc–Sternberg I*, 67 F.3d at 418 (" 'everybody knows ... why [ACA] was formed. What does [ACA] and the proposed village plan to do to keep these Hasid[i]m out?' " (quoting trial testimony describing a 1986 meeting of ACA)).

Defendant Robert Fletcher was ACA's president. Vertullo was a member of ACA and was a close friend and "political ally" of Fletcher. *Id.* at 419. Vertullo became a member of the ACA board following the res-ignations of several board members who op-posed ACA's discriminatory agenda. He was appointed to the board principally because of his view, in "general agreement" with the remaining board members (Trial Transcript at 3534), that home synagogues should be prohibited (*see id.* at 3528–30). While Ver-tullo was an ACA board member, ACA fi-nanced proceedings in state court to block LeBlanc–Sternberg's application to the Town for permission to maintain a home synа-gogue. At a public hearing before the Town's planning board on another Orthodox Jewish rabbi's application for a zoning vari-ance, Vertullo read a statement, written by Fletcher and concurred in by Vertullo, in opposition to the variance.

After Airmont residents had voted to in-corporate the Village, Fletcher stated at an ACA meeting that " 'the only reason we formed this village is to keep those Jews ... out of here.' " *LeBlanc–Sternberg I*, 67 F.3d at 419. Candidates backed by ACA, includ-ing Fletcher and Vertullo, were elected as

LeBLANC–STERNBERG v. FLETCHER 767
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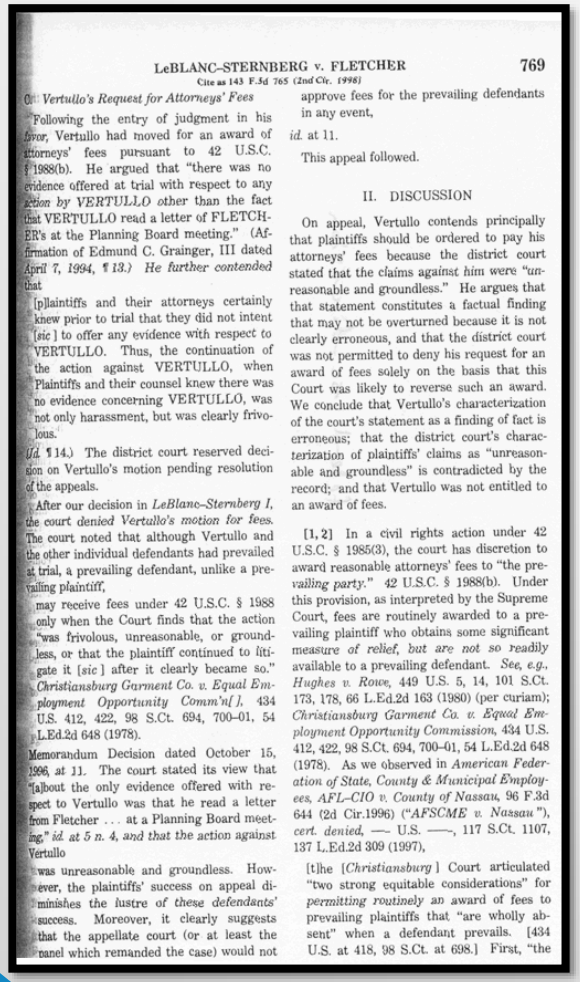
Federal Case - Discussion



LeBLANC–STERNBERG v. FLETCHER 769
Cite as 143 F.3d 765 (2nd Cir. 1998)

Vertullo's Request for Attorneys' Fees

Following the entry of judgment in his favor, Vertullo had moved for an award of attorneys' fees pursuant to 42 U.S.C. § 1988(b). He argued that "there was no evidence offered at trial with respect to any action by VERTULLO other than the fact that VERTULLO read a letter of FLETCHER's at the Planning Board meeting." (Affirmation of Edmund C. Grainger, III dated April 7, 1994, ¶ 13.) He further contended that

> [p]laintiffs and their attorneys certainly knew prior to trial that they did not intent [sic] to offer any evidence with respect to VERTULLO. Thus, the continuation of the action against VERTULLO, when Plaintiffs and their counsel knew there was no evidence concerning VERTULLO, was not only harassment, but was clearly frivolous.

(*Id.* ¶ 14.) The district court reserved decision on Vertullo's motion pending resolution of the appeals.

After our decision in *LeBlanc–Sternberg I*, the court denied Vertullo's motion for fees. The court noted that although Vertullo and the other individual defendants had prevailed at trial, a prevailing defendant, unlike a prevailing plaintiff,

> may receive fees under 42 U.S.C. § 1988 only when the Court finds that the action "was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate it [sic] after it clearly became so." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n[ ]*, 434 U.S. 412, 422, 98 S.Ct. 694, 700–01, 54 L.Ed.2d 648 (1978).

Memorandum Decision dated October 15, 1996, at 11. The court stated its view that "[a]bout the only evidence offered with respect to Vertullo was that he read a letter from Fletcher . . . at a Planning Board meeting," *id. at 5 n. 4, and that the action against Vertullo*

> was unreasonable and groundless. However, the plaintiffs' success on appeal diminishes the lustre of these defendants' success. Moreover, it clearly suggests that the appellate court (or at least the panel which remanded the case) would not approve fees for the prevailing defendants in any event,

id. at 11.

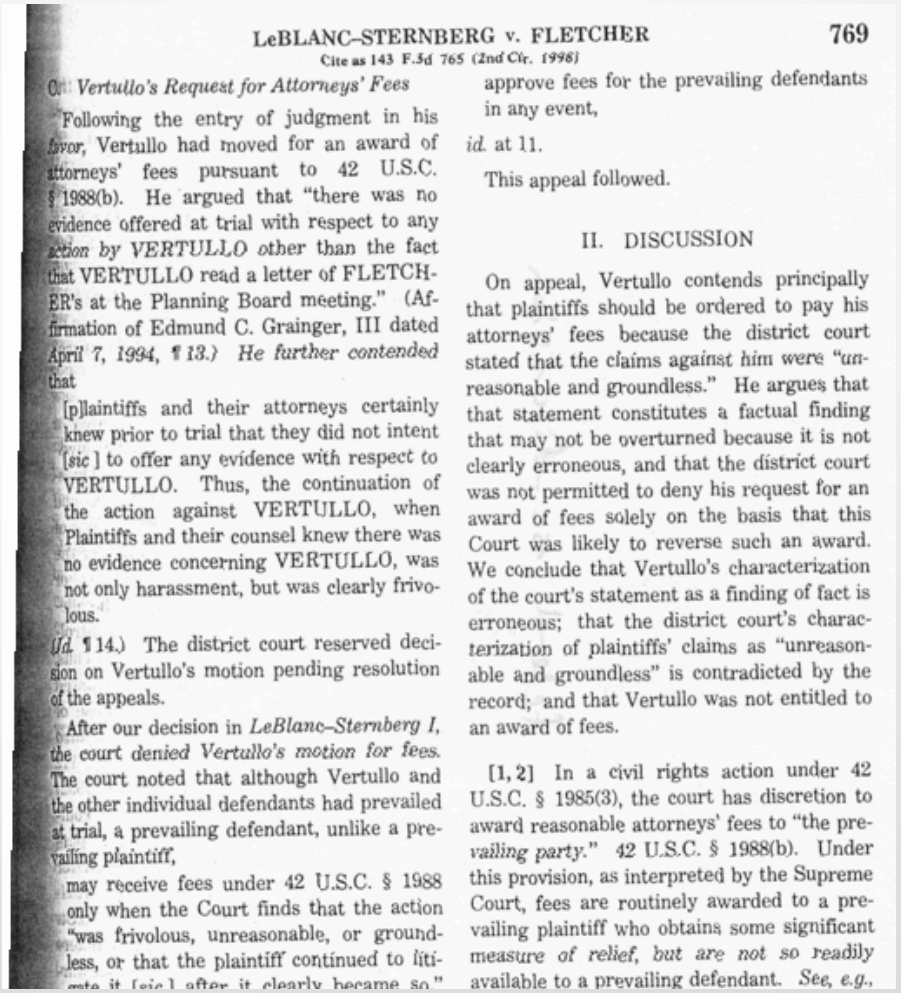
This appeal followed.

II. DISCUSSION

On appeal, Vertullo contends principally that plaintiffs should be ordered to pay his attorneys' fees because the district court stated that the claims against *him* were "unreasonable and groundless." He argues that that statement constitutes a factual finding that may not be overturned because it is not clearly erroneous, and that the district court was not permitted to deny his request for an award of fees solely on the basis that this Court was likely to reverse such an award. We conclude that Vertullo's characterization of the court's statement as a finding of fact is erroneous; that the district court's characterization of plaintiffs' claims as "unreasonable and groundless" is contradicted by the record; and that Vertullo was not entitled to an award of fees.

[1, 2] In a civil rights action under 42 U.S.C. § 1985(3), the court has discretion to award reasonable attorneys' fees to "the prevailing party." 42 U.S.C. § 1988(b). Under this provision, as interpreted by the Supreme Court, fees are routinely awarded to a prevailing plaintiff who obtains some significant measure of relief, but are not so readily available to a prevailing defendant. *See, e.g., Hughes v. Rowe*, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980) (per curiam); *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 422, 98 S.Ct. 694, 700–01, 54 L.Ed.2d 648 (1978). As we observed in *American Federation of State, County & Municipal Employees, AFL–CIO v. County of Nassau*, 96 F.3d 644 (2d Cir.1996) ("*AFSCME v. Nassau*"), *cert. denied*, — U.S. —, 117 S.Ct. 1107, 137 L.Ed.2d 309 (1997),

> [t]he [*Christiansburg*] Court articulated "two strong equitable considerations" for *permitting routinely* an award of fees to prevailing plaintiffs that "are wholly absent" when a defendant prevails. [434 U.S. at 418, 98 S.Ct. at 698.] First, "the



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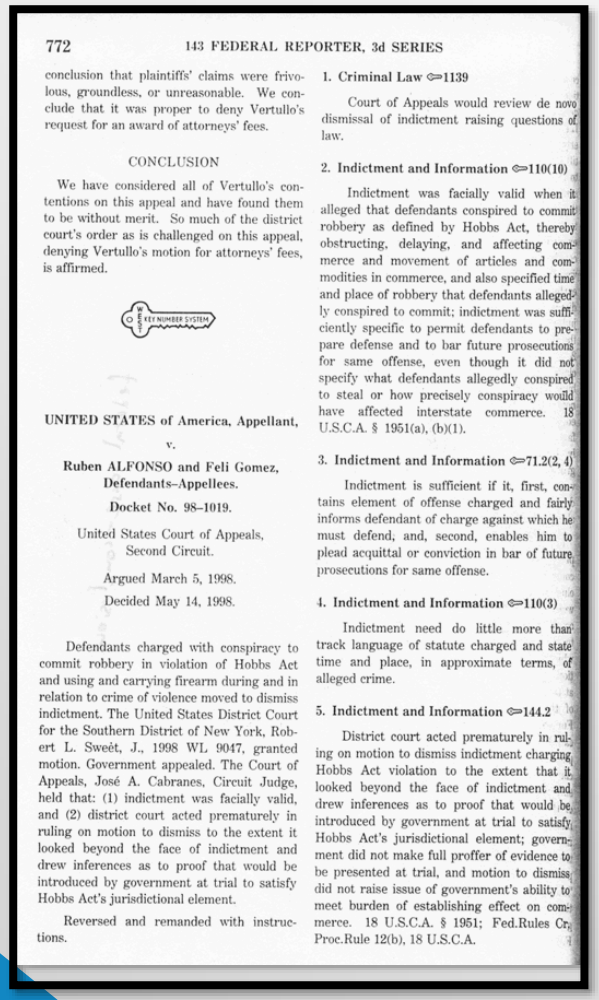
Federal Case - Conclusion



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conclusion that plaintiffs' claims were frivolous, groundless, or unreasonable. We conclude that it was proper to deny Vertullo's request for an award of attorneys' fees.

CONCLUSION

We have considered all of Vertullo's contentions on this appeal and have found them to be without merit. So much of the district court's order as is challenged on this appeal, denying Vertullo's motion for attorneys' fees, is affirmed.

KEY NUMBER SYSTEM

UNITED STATES of America, Appellant,

v.

Ruben ALFONSO and Feli Gomez, Defendants–Appellees.

Docket No. 98–1019.

United States Court of Appeals, Second Circuit.

Argued March 5, 1998.

Decided May 14, 1998.

Defendants charged with conspiracy to commit robbery in violation of Hobbs Act and using and carrying firearm during and in relation to crime of violence moved to dismiss indictment. The United States District Court for the Southern District of New York, Robert L. Sweet, J., 1998 WL 9047, granted motion. Government appealed. The Court of Appeals, José A. Cabranes, Circuit Judge, held that: (1) indictment was facially valid, and (2) district court acted prematurely in ruling on motion to dismiss to the extent it looked beyond the face of indictment and drew inferences as to proof that would be introduced by government at trial to satisfy Hobbs Act's jurisdictional element.

Reversed and remanded with instructions.

1. Criminal Law ⇐1139

Court of Appeals would review de novo dismissal of indictment raising questions of law.

2. Indictment and Information ⇐110(10)

Indictment was facially valid when it alleged that defendants conspired to commit robbery as defined by Hobbs Act, thereby obstructing, delaying, and affecting commerce and movement of articles and commodities in commerce, and also specified time and place of robbery that defendants allegedly conspired to commit; indictment was sufficiently specific to permit defendants to prepare defense and to bar future prosecutions for same offense, even though it did not specify what defendants allegedly conspired to steal or how precisely conspiracy would have affected interstate commerce. 18 U.S.C.A. § 1951(a), (b)(1).

3. Indictment and Information ⇐71.2(2, 4)

Indictment is sufficient if it, first, contains element of offense charged and fairly informs defendant of charge against which he must defend, and, second, enables him to plead acquittal or conviction in bar of future prosecutions for same offense.

4. Indictment and Information ⇐110(3)

Indictment need do little more than track language of statute charged and state time and place, in approximate terms, of alleged crime.

5. Indictment and Information ⇐144.2

District court acted prematurely in ruling on motion to dismiss indictment charging Hobbs Act violation to the extent that it looked beyond the face of indictment and drew inferences as to proof that would be introduced by government at trial to satisfy Hobbs Act's jurisdictional element; government did not make full proffer of evidence to be presented at trial, and motion to dismiss did not raise issue of government's ability to meet burden of establishing effect on commerce. 18 U.S.C.A. § 1951; Fed.Rules Cr.Proc.Rule 12(b), 18 U.S.C.A.

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conclusion that plaintiffs' claims were frivolous, groundless, or unreasonable. We conclude that it was proper to deny Vertullo's request for an award of attorneys' fees.

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Hornbook – Inside

Chapter 35

JUDICIAL NOTICE

Table of Sections

§ 328. The Need for and the Effect of Judicial Notice[1]

The traditional notion that trials are bifurcated proceedings involving both a judge and a panel of twelve jurors has obviously had a profound impact on the overall development of common law doctrine pertaining to evidence. The very existence of the jury, after all, helped create the demand for the rigorous guarantees of accuracy which typify the law of evidence, witness the insistence upon proof by witnesses having first-hand knowledge, the mistrust of hearsay, and the insistence upon original documents and their authentication by witnesses. Thus it is that the facts in dispute are commonly established by the jury after the carefully controlled introduction of formal evidence, which ordinarily consists of the testimony of witnesses. In light of the role of the jury, therefore, it is easy enough to conclude that, whereas questions concerning the tenor of the law to be applied to a case fall within the province of the judge, the determination of questions pertaining to propositions of fact is uniquely the function of the jury. The life of the law has never been quite so elementary, however, because judges on numerous occasions take charge of questions of fact and excuse the party having the

§ 328

1. See generally, Wigmore, 9 Evidence in Trials at Common Law, §§ 2565-2583 (Chadbourn rev. 1981); James B. Thayer, A Preliminary Treatise on Evidence at the Common Law, c. 7 (1898); Davis, *Official Notice*, 62 Harv.L.Rev. 537 (1949), Judicial Notice, 55 Colum.L.Rev. 945 (1955); Morgan, *Judicial Notice*, 57 Harv.L.Rev. 269 (1944); Roberts, *Preliminary Notes Toward a Study of Judicial Notice*, 52 Cornell L.Q. 210 (1967).

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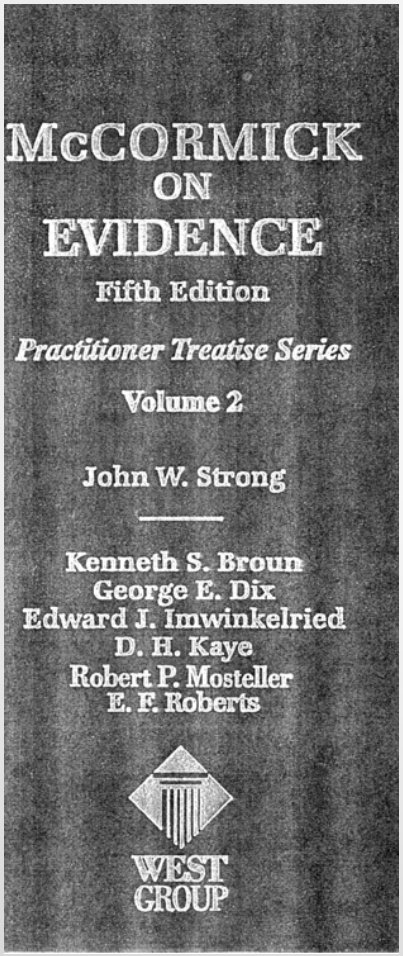
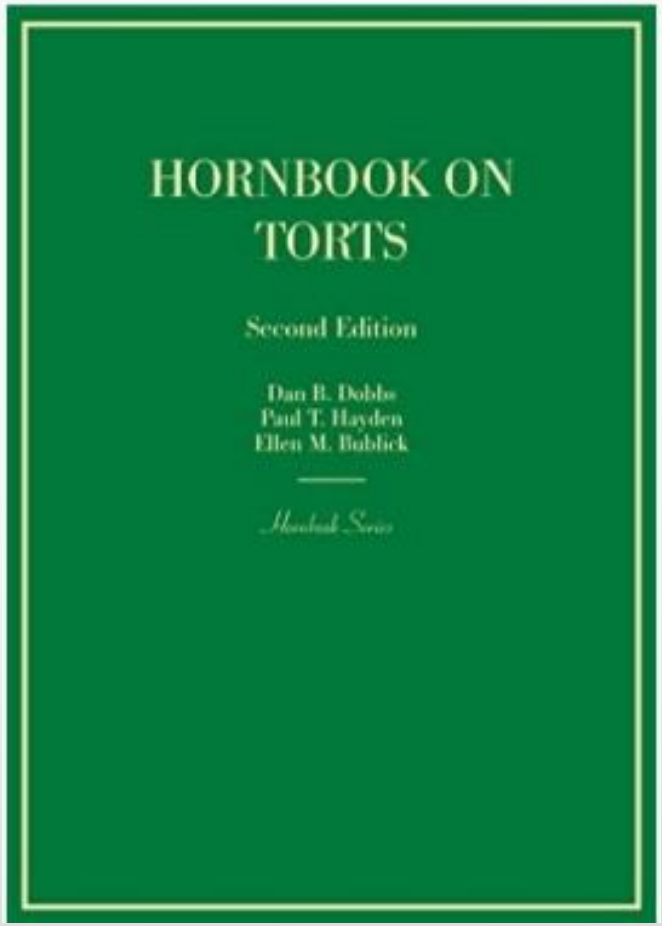
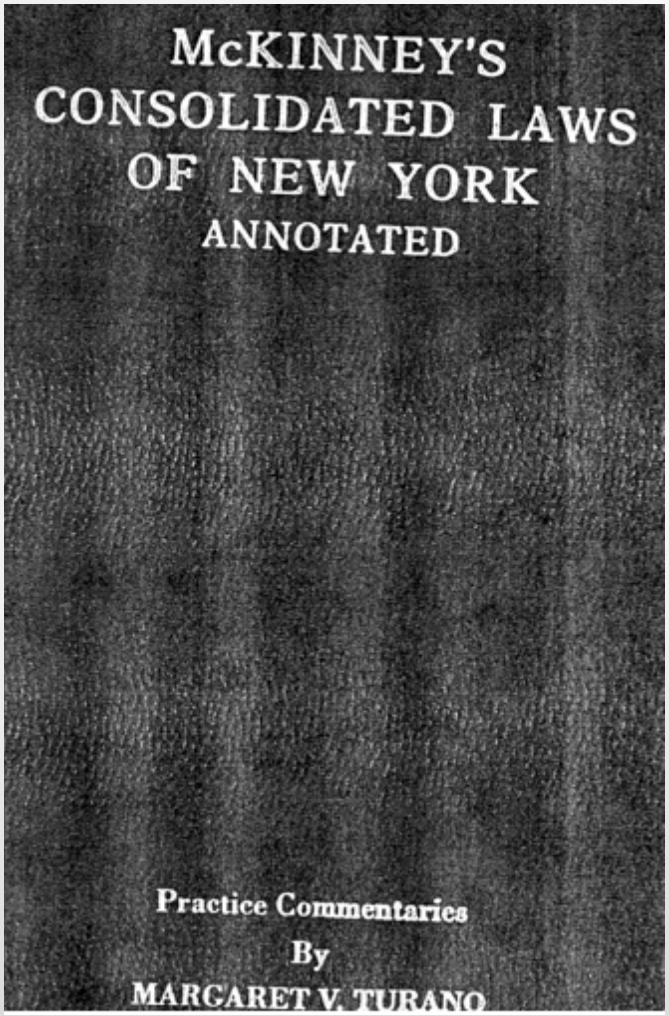
Hornbook – Outside

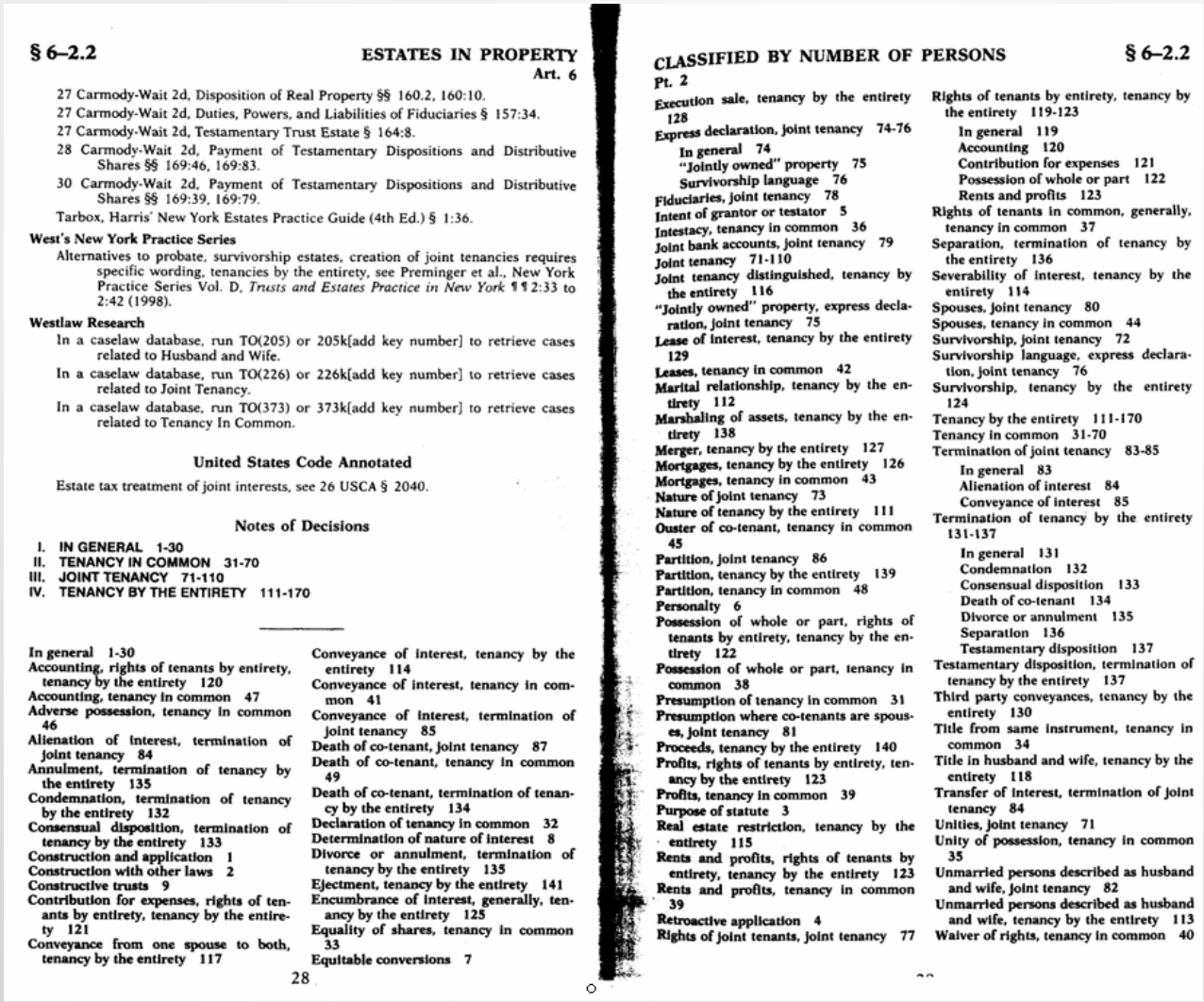




Statute – Volume – Outside



Statute – Notes of Decisions – Table of Contents



27 Carmody-Wait 2d, Disposition of Real Property §§ 160.2, 160:10.

27 Carmody-Wait 2d, Duties, Powers, and Liabilities of Fiduciaries § 157:34.

27 Carmody-Wait 2d, Testamentary Trust Estate § 164:8.

28 Carmody-Wait 2d, Payment of Testamentary Dispositions and Distributive Shares §§ 169:46, 169:83.

30 Carmody-Wait 2d, Payment of Testamentary Dispositions and Distributive Shares §§ 169:39, 169:79.

Tarbox, Harris' New York Estates Practice Guide (4th Ed.) § 1:36.

West's New York Practice Series

Alternatives to probate, survivorship estates, creation of joint tenancies requires specific wording, tenancies by the entirety, see Preminger et al., New York Practice Series Vol. D, *Trusts and Estates Practice in New York* ¶¶2:33 to 2:42 (1998).

Westlaw Research

In a caselaw database, run TO(205) or 205k[add key number] to retrieve cases related to Husband and Wife.

In a caselaw database, run TO(226) or 226k[add key number] to retrieve cases related to Joint Tenancy.

In a caselaw database, run TO(373) or 373k[add key number] to retrieve cases related to Tenancy In Common.

United States Code Annotated

Estate tax treatment of joint interests, see 26 USCA § 2040.

Notes of Decisions

Statute – Inside

Partnership not established by common ownership, see Partnership Law § 11.

Separate action by joint tenant or tenant in common to recover share of property, see RPAPL § 621.

Waste action by joint tenant or tenant in common against co-tenant, see RPAPL § 817.

American Law Reports

What acts by one or more of joint tenants will sever or terminate the tenancy. 64 ALR2d 918.

Validity and effect of one spouse's conveyance to other spouse of interest in property held as estate by the entireties. 18 ALR5th 230.

Library References

American Digest System

Estates in Property ⇦1.

Husband and Wife ⇦14.2.

Joint Tenancy ⇦1 to 11.

Tenancy in Common ⇦1 to 55.

Encyclopedias

56 NY Jur 2d, Estates, Powers, and Restraints on Alienation § 2.

20 Am Jur 2d, Cotenancy and Joint Ownership §§ 3 et seq., 9, 22 et seq.

28 Am Jur 2d, Estates § 2.

C.J.S. Estates §§ 2 to 5, 8, 15 to 21, 116 to 128, 137, 243.

C.J.S. Husband and Wife §§ 18 to 19, 27.

C.J.S. Joint Tenancy §§ 2 to 34, 38 to 40.

C.J.S. Tenancy In Common §§ 2 to 50, 53 to 85, 87 to 151.

Texts and Treatises

28 Carmody-Wait 2d, Payment of Testamentary Dispositions and Distributive Shares § 169:83.

30 Carmody-Wait 2d, Payment of Testamentary Dispositions and Distributive Shares § 169:79.

Tarbox, Harris' New York Estates Practice Guide (4th Ed.) § 1:36.

Westlaw Research

In a caselaw database, run TO(154) or 154k[add key number] to retrieve cases related to Estates in Property.

In a caselaw database, run TO(205) or 205k[add key number] to retrieve cases related to Husband and Wife.

In a caselaw database, run TO(226) or 226k[add key number] to retrieve cases related to Joint Tenancy.

In a caselaw database, run TO(373) or 373k[add key number] to retrieve cases related to Tenancy In Common.

§ 6–2.2 When estate is in common, in joint tenancy or by the entirety

(a) A disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy.

(b) A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common.

(c) A disposition on or after January first, nineteen hundred ninety-six of the shares of stock of a cooperative apartment corporation allocated to an apartment or unit together with the appurtenant proprietary lease to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in the common.

(d) A disposition of real property, or a disposition on or after January first, nineteen hundred ninety-six of the shares of stock of a cooperative apartment corporation allocated to an apartment or unit together with the appurtenant proprietary lease, to persons who are not legally married to one another but who are described in the disposition as husband and wife creates in them a joint tenancy, unless expressly declared to be a tenancy in common.

(e) A disposition of property to two or more persons as executors, trustees or guardians creates in them a joint tenancy.

(f) Property passing in intestacy to two or more persons is taken by them as tenants in common.

(L.1966, c. 952; amended L.1975, c. 263, §§ 1, 2; L.1995, c. 480, § 2.)

Historical and Statutory Notes

L.1995, c. 480 legislation

Subd. (c). L.1995, c. 480, § 2, eff. Jan. 1, 1996, added subd. (c) and designated former subd. (c) as subd. (d).

Subd. (d). L.1995, c. 480, § 2, eff. Jan. 1, 1996, redesignated as subd. (d) former subd. (c); redesignated former subd. (d) as subd. (e); added to classification of joint tenancy shares of stock of a cooperative apartment corporation allocated to an apartment or unit together with the appurtenant proprietary lease; and, made such classification effective Jan. 1, 1996.

Subd. (e). L.1995, c. 480, § 2, eff. Jan. 1, 1996, redesignated as subd. (e) former subd. (d) and redesignated former subd. (e) as subd. (f).

Subd. (f). L.1995, c. 480, § 2, eff. Jan. 1, 1996, redesignated as subd. (f) former subd. (e).

Derivation

Section derived from RPL § 66 and DEL § 84.

Said RPL § 66 was from L.1896, c. 547, § 56; originally revised from R.S., pt. 2, c. 1, tit. 2, § 44.

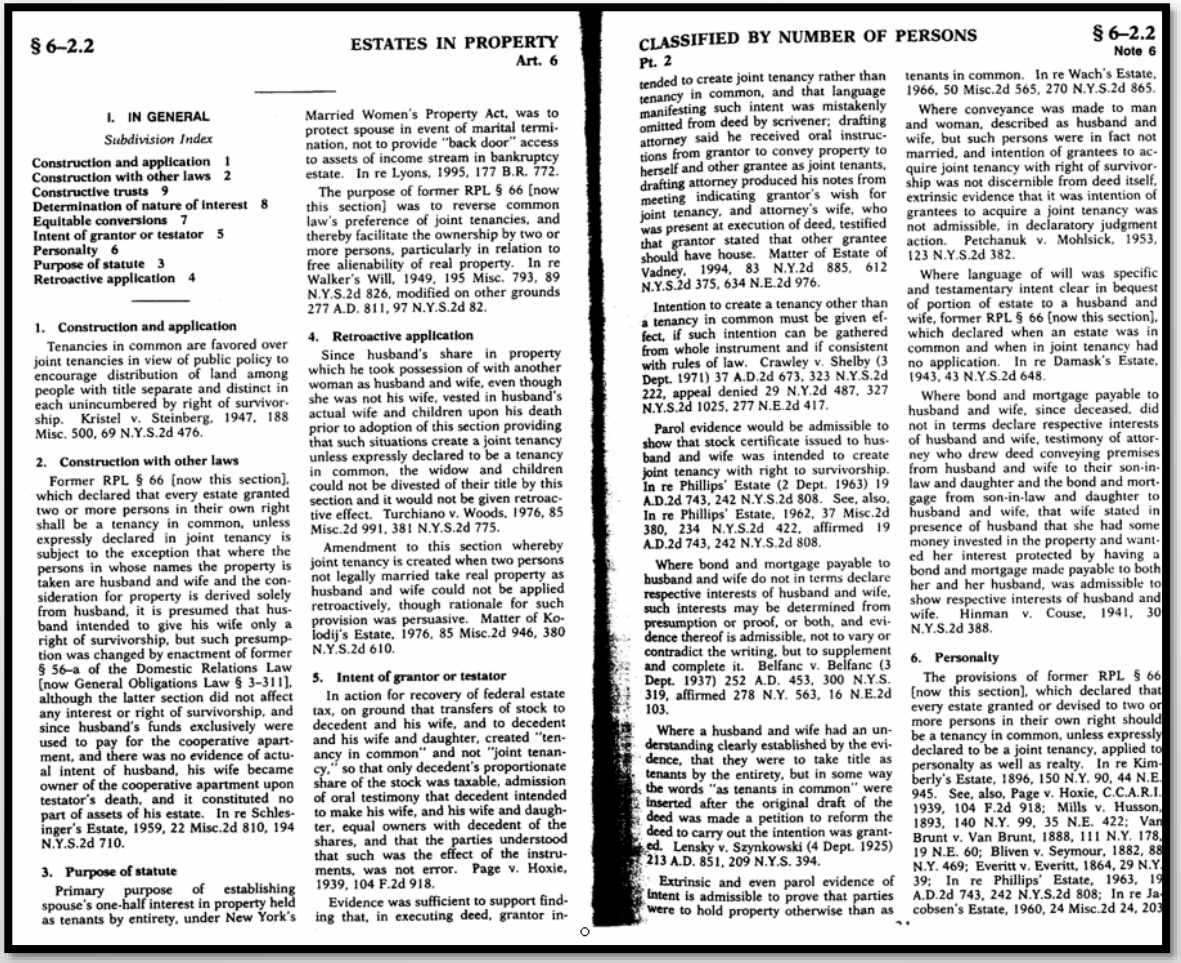
Said DEL § 84, amended L.1929, c. 229, § 6, was from former § 94; originally revised from L.1896, c. 547, § 284.

Practice Commentaries

By Margaret Valentine Turano

This section creates default rules governing the way multiple owners take title to property when the transferor does not specify tenancy in common, joint tenancy, or tenancy by the entirety.

Statute – Case Notes



§ 6–2.2 ESTATES IN PROPERTY Art. 6

I. IN GENERAL

Subdivision Index

1. Construction and application

Tenancies in common are favored over joint tenancies in view of public policy to encourage distribution of land among people with title separate and distinct in each unincumbered by right of survivorship. Kristel v. Steinberg, 1947, 188 Misc. 500, 69 N.Y.S.2d 476.

2. Construction with other laws

Former RPL § 66 [now this section], which declared that every estate granted two or more persons in their own right shall be a tenancy in common, unless expressly declared in joint tenancy is subject to the exception that where the persons in whose names the property is taken are husband and wife and the consideration for property is derived solely from husband, it is presumed that husband intended to give his wife only a right of survivorship, but such presumption was changed by enactment of former § 56–a of the Domestic Relations Law [now General Obligations Law § 3–311], although the latter section did not affect any interest or right of survivorship, and since husband's funds exclusively were used to pay for the cooperative apartment, and there was no evidence of actual intent of husband, his wife became owner of the cooperative apartment upon testator's death, and it constituted no part of assets of his estate. In re Schlesinger's Estate, 1959, 22 Misc.2d 810, 194 N.Y.S.2d 710.

3. Purpose of statute

Primary purpose of establishing spouse's one-half interest in property held as tenants by entirety, under New York's Married Women's Property Act, was to protect spouse in event of marital termination, not to provide "back door" access to assets of income stream in bankruptcy estate. In re Lyons, 1995, 177 B.R. 772.

The purpose of former RPL § 66 [now this section] was to reverse common law's preference of joint tenancies, and thereby facilitate the ownership by two or more persons, particularly in relation to free alienability of real property. In re Walker's Will, 1949, 195 Misc. 793, 89 N.Y.S.2d 826, modified on other grounds 277 A.D. 811, 97 N.Y.S.2d 82.

4. Retroactive application

Since husband's share in property which he took possession of with another woman as husband and wife, even though she was not his wife, vested in husband's actual wife and children upon his death prior to adoption of this section providing that such situations create a joint tenancy unless expressly declared to be a tenancy in common, the widow and children could not be divested of their title by this section and it would not be given retroactive effect. Turchiano v. Woods, 1976, 85 Misc.2d 991, 381 N.Y.S.2d 775.

Amendment to this section whereby joint tenancy is created when two persons not legally married take real property as husband and wife could not be applied retroactively, though rationale for such provision was persuasive. Matter of Kodiji's Estate, 1976, 85 Misc.2d 946, 380 N.Y.S.2d 610.

5. Intent of grantor or testator

In action for recovery of federal estate tax, on ground that transfers of stock to decedent and his wife, and to decedent and his wife and daughter, created "tenancy in common" and not "joint tenancy," so that only decedent's proportionate share of the stock was taxable, admission of oral testimony that decedent intended to make his wife, and his wife and daughter, equal owners with decedent of the shares, and that the parties understood that such was the effect of the instruments, was not error. Page v. Hoxie, 1939, 104 F.2d 918.

Evidence was sufficient to support finding that, in executing deed, grantor intended to create joint tenancy rather than tenancy in common, and that language manifesting such intent was mistakenly omitted from deed by scrivener; drafting attorney said he received oral instructions from grantor to convey property to herself and other grantee as joint tenants, drafting attorney produced his notes from meeting indicating grantor's wish for joint tenancy, and attorney's wife, who was present at execution of deed, testified that grantor stated that other grantee should have house. Matter of Estate of Vadney, 1994, 83 N.Y.2d 885, 612 N.Y.S.2d 375, 634 N.E.2d 976.

Intention to create a tenancy other than a tenancy in common must be given effect, if such intention can be gathered from whole instrument and if consistent with rules of law. Crawley v. Shelby (3 Dept. 1971) 37 A.D.2d 673, 323 N.Y.S.2d 222, appeal denied 29 N.Y.2d 487, 327 N.Y.S.2d 1025, 277 N.E.2d 417.

Parol evidence would be admissible to show that stock certificate issued to husband and wife was intended to create joint tenancy with right to survivorship. In re Phillips' Estate (2 Dept. 1963) 19 A.D.2d 743, 242 N.Y.S.2d 808. See, also, In re Phillips' Estate, 1962, 37 Misc.2d 380, 234 N.Y.S.2d 422, affirmed 19 A.D.2d 743, 242 N.Y.S.2d 808.

Where bond and mortgage payable to husband and wife do not in terms declare respective interests of husband and wife, such interests may be determined from presumption or proof, or both, and evidence thereof is admissible, not to vary or contradict the writing, but to supplement and complete it. Belfanc v. Belfanc (3 Dept. 1937) 252 A.D. 453, 300 N.Y.S. 319, affirmed 278 N.Y. 563, 16 N.E.2d 103.

Where a husband and wife had an understanding clearly established by the evidence, that they were to take title as tenants by the entirety, but in some way the words "as tenants in common" were inserted after the original draft of the deed was made a petition to reform the deed to carry out the intention was granted. Lensky v. Szynkowski (4 Dept. 1925) 213 A.D. 851, 209 N.Y.S. 394.

Extrinsic and even parol evidence of intent is admissible to prove that parties were to hold property otherwise than as tenants in common. In re Wach's Estate, 1966, 50 Misc.2d 565, 270 N.Y.S.2d 865.

Where conveyance was made to man and woman, described as husband and wife, but such persons were in fact not married, and intention of grantees to acquire joint tenancy with right of survivorship was not discernible from deed itself, extrinsic evidence that it was intention of grantees to acquire a joint tenancy was not admissible, in declaratory judgment action. Petchanuk v. Mohlsick, 1953, 123 N.Y.S.2d 382.

Where language of will was specific and testamentary intent clear in bequest of portion of estate to a husband and wife, former RPL § 66 [now this section], which declared when an estate was in common and when in joint tenancy had no application. In re Damask's Estate, 1943, 43 N.Y.S.2d 648.

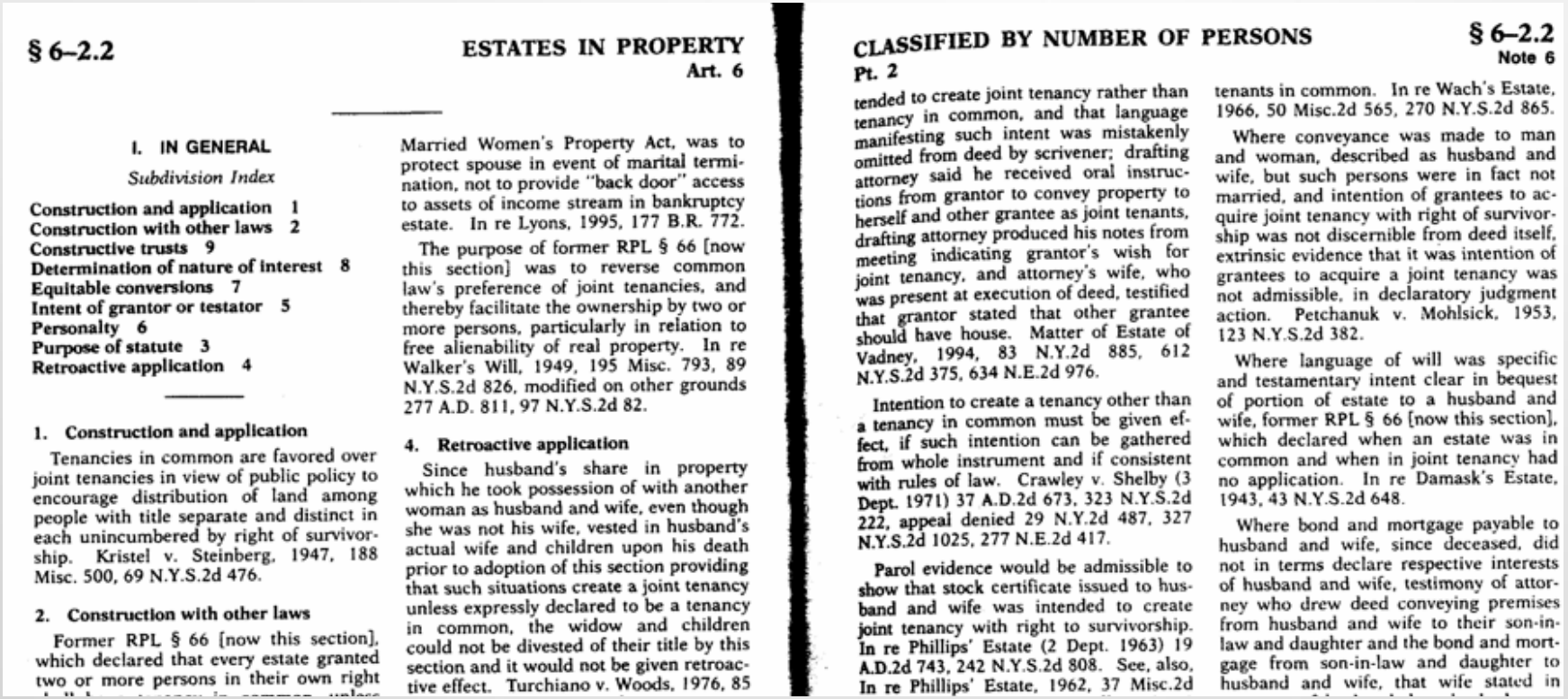
Where bond and mortgage payable to husband and wife, since deceased, did not in terms declare respective interests of husband and wife, testimony of attorney who drew deed conveying premises from husband and wife to their son-in-law and daughter and the bond and mortgage from son-in-law and daughter to husband and wife, that wife stated in presence of husband that she had some money invested in the property and wanted her interest protected by having a bond and mortgage made payable to both her and her husband, was admissible to show respective interests of husband and wife. Hinman v. Couse, 1941, 30 N.Y.S.2d 388.

6. Personalty

The provisions of former RPL § 66 [now this section], which declared that every estate granted or devised to two or more persons in their own right should be a tenancy in common, unless expressly declared to be a joint tenancy, applied to personalty as well as realty. In re Kimberly's Estate, 1896, 150 N.Y. 90, 44 N.E. 945. See, also, Page v. Hoxie, C.C.A.R.I. 1939, 104 F.2d 918; Mills v. Husson, 1893, 140 N.Y. 99, 35 N.E. 422; Van Brunt v. Van Brunt, 1888, 111 N.Y. 178, 19 N.E. 60; Bliven v. Seymour, 1882, 88 N.Y. 469; Everitt v. Everitt, 1864, 29 N.Y. 39; In re Phillips' Estate, 1963, 19 A.D.2d 743, 242 N.Y.S.2d 808; In re Jacobsen's Estate, 1960, 24 Misc.2d 24, 203

CLASSIFIED BY NUMBER OF PERSONS Pt. 2 § 6–2.2 Note 6

Statute – Case Notes (cont.)



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Attorney General Opinions