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# Marketable Title on a Place in Space

D. ORVILLE LAHY

Space, it's wonderful! This modification of an oft-repeated cliché is intended in no way to diminish the significance of mankind's yearning for peace since the beginning of time. It is, however, designed to focus attention on the conquest of space, mankind's twentieth-century contribution to what has come to be known as "progress". Contemporary writers characterize the era in which we live as the "space age" and there is every reason to believe that historians of the future will similarly record the twentieth century as the epoch of man's mastery not only of transportation in space, but also of his dominion over space.

The early decades of our era initiated the "space age". From the Wright brothers' early experiments with propelled transportation in space above a North Carolina beach, to the mid-century worldwide jet-propelled aircraft of today, the conquest of travel through *inner* space has been successfully concluded for all practical purposes. The frontiers of *outer* space, however, have presented the new mid-century challenge. From the aeronauts of inner space to the astronauts of outer space, mankind's answer to the new challenge has been sputniks, space capsules and telstars in orbit. Just over the scientific horizon and currently thought to be within man's accomplishments are "space platforms" and visits to the planets of the universe. "Destination—the Moon" is the present-day clamor of science, and the major nations of the world are engaged in a costly scientific race to be the first to reach that destination.

In the midst of all this scientific conquest of space, what is the status of space in the context of property law? Is space property, and if so, what is the mid-twentieth-century concept of property ownership in space? In the two-dimensional sense, space is usually considered as an unoccupied

area set apart or available for a particular purpose. This is the plane concept, as distinguished from the cubical concept of three-dimensional space. The modern legal concept of real property must necessarily apply to three-dimensional areas or objects within the limitations of shaped volume defined by architectural forms; yet, the three-dimensional concept of space may be considered as an entity that extends without bounds in all directions. Ownership of real property in space without boundaries? Impossible—perhaps so, but is it truly impossible? What has been the law, and what is the “space age” law, on property ownership in space? If one considers “space” to be an unoccupied cubic intangible, a concept of nothingness that is everywhere about us, the subject of our consideration narrows down by a quaint syllogism to an examination of the law about nothing! Charles Dickens had the answer to that: “If the law supposes that,” said Mr. Bumble, “the law . . . is a(n) idiot; . . . and the worst I wish the law is, that his eye may be opened by experience.” *Oliver Twist*, Chap. 51. The reader is entitled to his own conclusions about the idiotic aspects of this inquiry, but let us now open the eye to experience, to the background of property ownership of space.

Lord Coke undertook to set forth the earliest known concept of property ownership in space. In Book II of his First Institute of the Laws of England dealing with tenures and real property, Coke wrote: “And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of air and all other things even up to heaven; for *cujus est solum ejus est usque ad coelum et ad inferos*.” *Co. Litt.* 4a. Coke’s exposition of this concept came to be known in the law as the *ad coelum* and the *ad inferos* doctrines, and Blackstone later commented: “And therefore no man may erect any building or the like, to overhang another’s land; and downwards whatever is in a direct line between the surface of any land and the centre of the earth, such as mines of metal and other profits, belongs to the owner of the surface. So that the word ‘land’ includes not only the face of the earth, but everything under it, or over it.” 2 *Bl. Com.* 18. With this

pronouncement, Blackstone established the theory of vertical ownership applicable to real property in the Anglo-American law, a theory that can be paraphrased by the statement that common law land ownership carried with it ownership from the center of the earth to the heavens (through space) above, measured perpendicular to the surface on any particular tract of land. Blackstone's influence on the development of the common law is well-recognized by legal historians, and Virginia was the one American colony in which occurred the earliest and most complete reception of the common law as moulded by Blackstone. See 1 *Powell on Real Property* 102-116.

Since ownership of land at common law, according to the *ad coelum* and *ad inferos maxims*, included corporeal ownership of both the space above and the earth beneath, trespass for the invasion of (the space above and the subsurface below) one's property was properly actionable in tort. Similarly, the common law applicable to certain easements and profits was founded on these antiquated aphorisms, and has so continued to the present day. The earliest judicial application of the *ad coelum* doctrine appears in *Bury v. Pope*, Cr. Eliz. 1582-1603, 78 Eng. Rep. 375 (circa 1586) and was there applied to an overhanging roof, an encroachment on the plaintiff's property ownership of the space above his land. More than two centuries later Lord Ellenborough gazed into his judicial crystal ball and wrote: "Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable in an action for trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes on the course of his voyage." *Pickering v. Rudd*, 4 Camp. 219, 220-221, 171 Eng. Rep. 70, 71 (1815). Although no contemporary accused Lord Ellenborough of talking through his balloon, it is obvious that he had anticipated the weakness of the *ad coelum* doctrine far ahead of his time.

The "space age" of today, confirming Lord Ellenborough's augury, has required some extensive modifications of the old *ad coelum* doctrine by way of fixing altitudinal limitations on the extent of real property rights in space, limitations that

were essential if space was destined, as it was and is, to become the new thoroughfare for the world's public transportation. So far in the law of the "space age" it has been established that not only is *outer* space in the public domain, but also that the *upper portion* of *inner* space is similarly a public thoroughfare. Here, then, there has developed coincident with the amputation of the upper portion of inner space from real property rights in the land below, a new concept of horizontal property rights, rights in space which extend upward from the earth's surface to a horizontal plane parallel thereto, a concept which bobtails the upper extremities of property rights in space, shearing off the endless and topmost fringe of the *ad coelum* principle. This new approach by way of horizontal layers of space has developed during the first half of the current century, first by judicial decision in the so-called "airport cases," and more recently by legislative enactment.

Modern altitudinal limitations of private property rights in space have been founded on one or more of several theories. The first such theory attempted to preserve the *ad coelum* concept of absolute space ownership by the subjacent landowner, but made such ownership subject to a permanent flight easement for the benefit of the public. This approach sought to preserve the traditional vertical property concept and was incorporated into the Uniform Aeronautics Act which by 1943 had been adopted by twenty-two states. 11 U.L.A. 157-167. It also enjoyed the full support of the American Law Institute. Restatement *Torts*, § 194 (1934). However while this theory was gaining legislative and judicial favor in a number of states, a judicial pronouncement undertook for the first time to draw a horizontal property boundary line in space within the limitations of *actual use* of the space (as distinguished from potential use) by the subjacent landowner. This "actual use" theory was founded on actual dominion over certain space above the surface, and obviously established just above that strata an upper space strata that not only disregarded but also destroyed future potential ownership and use by extension upward from the appropriated space below. *Hinman v. Pacific Air Transport*, 84 F. 2d

755 (9th Cir. 1936), *cert. denied* 300 U. S. 654, 57 S. Ct. 431 (1937). In its opinion, the court struck a fatal blow at the *ad coelum* doctrine. "We reject that doctrine," the court said, and continued: "We think it is not the law and that it never was the law." Then attempting to rationalize its vicious assault on the ancient maxim, the court concluded: "When it is said that man owns, or may own, to the heavens, that merely means that no one can acquire a right in space above him that will limit him in whatever use he can make of it as a part of his enjoyment of the land. To this extent his title to the air is paramount. No other person can acquire any title or exclusive right to any space above him."

The complete and final demise of the *ad coelum* doctrine, along with both previous theories which had hastened its dissolution, can be said to have taken place as a result of the controlling opinion in *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062 (1946). The *Causby* case has been the subject of much learned writing in the law and there is no need to present here a further critique. It is enough merely to suggest that the *Causby* case introduced the third and now the prevailing theory: That rights in land extend upward into space to an elevation within which the subjacent owner has *potential* use and enjoyment, which elevation extends no higher into space than the minimum safe altitude of flight as propounded in the interests of safety in aerial navigation as well as safety in the use of the private property below. Thus, as recently as 1946, there has been drawn an imaginary horizontal property boundary line, establishing with some finality an upper boundary to private property rights in space. However, in the entire development of the prevailing current law applicable to space navigation, the emphasis has been on use and enjoyment of space in terms of rights incident to subjacent property rather than on absolute ownership of space itself on a horizontal property base.

With its roots deep in the English common law of Blackstone, the jurisprudence of Virginia maintained a firm grasp on both the *ad coelum* and *ad inferos* doctrines. Indeed, even in the early years of the twentieth century, President Judge

Keith wrote: "In legal contemplation it may be that any unauthorized entry upon the premises of another whose title extends to the centre of the earth, downward, and without limit upward, by putting one's hand through or over a boundary fence, is a trespass." *Lynchburg Telephone Co. v. Booker*, 103 Va. 595 608, 50 S.E. 148 152 (1905). That the grasp might have been slipping is evidenced by the learned court's use of the phrase "it may be," indicating some doubt as to the exact status of the Virginia space law at that time.

The development of horizontal property ownership downward into the earth's subsurface, in conflict with the *ad inferos* doctrine, far antedates the evolution of horizontal property in space. Mankind's efforts to extract and make beneficial use of the minerals of the earth was the stimulus for the progressive malady which infected this maxim of the common law and ultimately brought about its legal obituary in most jurisdictions. Under the early feudal system of England, mines of gold and silver were the exclusive property of the crown and by virtue of the royal prerogative did not pass by a grant of private property to a lord. Subsequent English legislative enactments in the seventeenth century undertook to establish private property ownership in subsurface minerals other than gold and silver, and where private land contained no gold or silver at all the English courts held that all other minerals in place (unsevered) belonged to the surface owner. *Case of Mines*, 1 Plowd. 310, 75 Eng. Rep. 472 (1550-1580); *Atty-Gen. v. Morgan*, 1 Ch. 432 (1891). It therefore followed that minerals unsevered from the soil were held to be separate corporeal hereditaments, were property interests capable of possession distinct from the surface, and could be made the subject of fee simple title separate from the surface ownership. *Stoughton v. Leigh*, 1 Taunt. 402, 127 Eng. Rep. 889 (1808). This concept of fee simple ownership of minerals in place as separated from the absolute estate in the superjacent land surface should not be confused with a mineral lease in an estate of less than a freehold where the tenant's possessory rights are established without

impeachment for waste, nor should it be confused with the grant of a *profit a prendre* in the subsurface minerals which creates in the grantee an incorporeal, rather than a corporeal, estate. It would seem, however, that the incorporeal aspect of the *profit a prendre* has had a substantial influence in Virginia in defeating the concept of a corporeal fee simple in subsurface minerals on a foundation of horizontal property ownership. The method of conveyance by which the subsurface mineral interests were separately created, coupled with subsequent severance of the minerals from the soil and their transformation from real property into personal property, probably promoted the conflicting views that ultimately developed.

At early English common law, the requirement of livery of seisin (feoffment) was inconsistent with the creation of a fee simple in subsurface minerals as a separate estate because it was physically impossible to place a feoffee of such minerals in actual possession. Hence a conveyance of the subsurface minerals could only be accomplished by express grant similar to the creation of a profit. Therefore, where created by grant, problems of construction were built into the documentary conveyance with the result that some courts construed the grantee's interest thus created as an incorporeal profit, other courts as a corporeal estate in the subsurface in the form of fee simple horizontal property. Although it was well-settled that the severance of the minerals from the soil transformed them from real into personal property, a construction of a prior fee simple ownership of the minerals in place created new problems of construction as to ownership of the space—the remaining hole—from which the minerals had been extracted. When the minerals were withdrawn, there remained a place in subsurface space—the hole—the cubic content of which was easily determinable because the boundaries of the resulting space (the walls, floors and ceilings of the mine) were still there. Where there was previously a horizontal property fee simple in the minerals, it would seem to follow that the same fee simple ownership of the subsurface space should continue after the extraction, the same as before;



where there was only a *profit a prendre* in the minerals, it was clear that the superjacent surface owner held the unencumbered fee simple in the hole after the extraction.

In a vast majority of the nineteenth and twentieth century American cases, the courts had no difficulty in distinguishing a mineral grant in fee simple from the grant of a *profit a prendre*, thus establishing a concept of fee simple ownership in subsurface horizontal property and thereby eradicating the last vestiges of the ancient *ad inferos* maxim from the jurisprudence of many states. "There may be severance of the estate in surface from the estate in subsurface," said a federal appellate court in a leading case from Illinois. "The authorities seem to recognize the right of severance to extend to as many strata as there may be in the subsurface." *Shell Oil Co. v. Manley Oil Corp.*, 124 F. 2d 714, 715 (1942). This opinion not only reversed the U. S. District Court below (37 F. Supp. 289) which had subscribed to the old *ad inferos* doctrine, but also by its reference to "strata" in the subsurface seemed to clearly support the concept of horizontal property ownership. The earliest Virginia case recognizing separate estates in the surface and subsurface was *Lee v. Bumgardner*, 86 Va. 315, 10 S.E. 3 (1889). There followed a series of cases apparently in accord, but none clearly distinguished between fee simple ownership of minerals in place, and ownership of the place containing the minerals. *Va. Coal and Iron Co. v. Kelly*, 93 Va. 332, 24 S.E. 1020 (1896); *Interstate Co. v. Clintwood*, 105 Va. 574, 54 S.E. 593 (1905); *Morison v. American Assn.*, 110 Va. 91, 65 S.E. 469 (1909); and *Va. Coal and Iron Co. v. Hylton*, 115 Va. 418, 79 S.E. 337 (1913). Of more recent origin, in the construction of a deed which severed the subsurface mineral interests from the surface, Justice Hudgins commented that "the relation of the parties as owners of the mineral rights is not that of coterminous landowners". *Buchanan Coal Co. v. Street*, 175 Va. 531, 540; 9 S.E. 2d 339, 343 (1940). If this distinguished jurist used the term "coterminous" as meaning coextensive in the context of common property boundary lines in the subsurface, as seems probable, it would indicate that Virginia

law clings to the old *ad inferos* doctrine to the extent that a fee simple mineral grant is not such at all, but in substance is the equivalent of a mere *profit a prendre*, an incorporeal hereditament. This strange application of legal magic may have had its origin in an earlier case which thrust the Virginia law off on a curiously oblique tangent.

Whereas the trend of modern law in England and most American states pointed toward the construction that an unqualified grant or reservation of subsurface minerals operated to sever the ownership horizontally, none of the Virginia cases had, as previously suggested, clearly reached that conclusion. In England and most other jurisdictions where the issue arose, it was frequently held that the subsurface mineral owner continued to own, and was entitled to use, the subterranean space created by the extraction of the minerals which were the essence of the original grant. Annot. 15 A.L.R. 946. However, a conclusion just the opposite was reached by a divided court in the curious Virginia case of *Clayborn v. Camilla Red Ash Coal Co.*, 128 Va. 383, 105 S. E. 117, 15 A.L.R. 946 (1920). In the majority opinion of this case, Justice Kelly drew an analogy between separate fee simple ownership in subsurface minerals and fee simple ownership of standing timber on the land surface in superjacent space, holding both, while in an unsevered state, to be corporeal property interests, but after severance, concluding that they were incorporeal interests (in the form of *profits a prendre*) *ab initio* from the time of the grant! This legal magic might have been performed with greater judicial finesse had the court exercised its powers of legal prestidigitation in the finest tradition of the law of future interests. Assuming that the surface owners were the successors in interest of the original grantor of the subsurface, the court might have transformed the absolute fee in the subsurface into a determinable fee simple so long as the minerals remained unsevered; the resulting possibility of reverter, not subject to the rule against perpetuities, would then have matured into a present estate in the surface owners on removal of the minerals and the "hocus-pocus" of corporeal and incorporeal

estates could have been avoided. The dissenting opinion of Justice Prentis pointed with approval to the opposite and widely prevailing doctrine which the majority had extinguished in Virginia, a doctrine of horizontal property ownership in the subsurface, and found no sound reason to upset its application in Virginia as a rule of property law. Nevertheless, the controlling opinion firmly rejected that rule, a rejection which undoubtedly still prevails. Whereas in almost all states, the fee simple owner of the subsurface minerals continues to own the space—the hole—after the minerals are extracted, in Virginia there can be no marketable title on a place in subsurface space—in the hole—in horizontal property below the surface after the minerals have been removed. Therefore, it would seem that Virginia law does not today recognize horizontal subsurface property ownership as separate and distinct from title in the surface of the land above.

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With the *ad coelum* doctrine succinctly modified in the modern law of space navigation, and with the *ad inferos* doctrine practically obsolete in the jurisprudence of subsurface horizontal property ownership everywhere but in Virginia, it becomes necessary to next explore the influence and demise of the former maxim within the context of space habitation. It is an elementary principle of real property law that fee simple ownership of land carries with it the right to either present or ultimate possession and use of the land surface. Unlike the living creatures of the soil (e.g. the earthworm), mankind's very existence from the beginning of time has been as a user and occupier of space immediately above the surface of the earth. Therefore, it naturally followed that one who owned a tract of land had the right to habitate the space above that land; indeed, such use and occupancy is essential to life itself. However, mere fee simple title to the land surface was never considered to be the sole prerequisite to the use and occupancy of the space above. It therefore followed that the right to possession of space above the sur-

face could be entirely separate and distinct from the fee simple ownership of the land beneath the space. Let us consider several factual illustrations.

Where an owner of land makes an excavation thereon and piles the removed earth on the surface of his land alongside, he is creating space in the form of a surface excavation (a hole) and he is at the same time taking physical possession of the space where the removed earth is amassed. Obviously, said owner continues to own the pile of dirt that was (prior to the excavation) a place in space, and it similarly follows that he continues to own, and has the right to use and occupy, the newly created space—the surface hole. Here there is no problem as to the boundaries of ownership. However, let us suppose that the same property ownership consists of a two-family duplex dwelling with an apartment on the second floor, or a modern high-rise apartment building, where the (or an) upper-story apartment is leased to a tenant. Does the lease convey only an estate in the physical floors, walls and ceilings of the apartment, or does the possessory right conveyed to the tenant include a leasehold estate in the space thereby enclosed? If the former, it is reasonable to conclude that the lease of the physical boundaries also creates in the tenant by implication only an easement to use and occupy the space contained within these boundaries, and not an estate in the space; if the latter, the suggestion is obvious: The landlord owned not only the boundaries of the upper apartment but also the enclosed space within those boundaries, and conveyed an estate of horizontal property of less than a freehold in space, to the tenant. From the latter concept, it follows that the floors, walls and ceilings are merely the boundaries of the landlord's freehold estate in space, the possessory rights to which have been conveyed to the tenant by the lease. If the concept of horizontal property ownership could be established by inference from the latter proposition applicable to a leasehold estate, the premise of space ownership on a horizontal base would easily follow, founded on the theory that a right to present or future possession of a horizontal layer of space is equivalent to absolute ownership

thereof. Unfortunately, however, the American case law supports the former theory, and not the latter.

Where there is a lease for a term of years, it has been generally held at common law that the destruction of the building terminates the lease. In other words, where the boundaries of the leased premises in space (the building) are destroyed, the tenant's leasehold estate has evaporated. *McMillan v. Soloman*, 42 Ala. 356 (1868); cf. *Gainer v. Griffith*, 76 W. Va. 426, 85 S.E. 713 (1915). Furthermore, it has been held that where leased premises remained in possession of the tenant after the building containing the premises was moved to a new tract of land, the tenant's estate in the structure continued at the new location for the term of the lease. Here the tenant's right to the use and occupancy of the space originally enclosed by the building has been lost; his estate included only the structural boundaries (the building) with an implied easement for use of the space therein, and with the leased building's boundaries moved to a new location, the easement in space at the first location has vanished and has been replaced by an implied easement in space at the new location. *Leiferman v. Osten*, 167 Ill. 93, 47 N.E. 203 (1897). This obviously supports the former theory and defeats any concept of a horizontal property leasehold, a horizontal estate of less than a freehold, in space.

The next step in this analysis is the application of the two possible theories to the conveyance of a freehold estate in space. Where an upper portion of a building is conveyed separately from the land and its under-structure beneath, by application of the former theory there is created only a freehold estate in the walls, floors and ceilings with which there is an implied easement in the freeholder to use and enjoy the space thereby enclosed. It is clear from this construction that the *ad coelum* doctrine is present, that the lower freeholder's ownership in space extends upward "to the heavens," and that the conveyance of the upper boundaries in space has created only an encumbrance on that space ownership in the form of an easement. However, by application of the latter theory, there has been created by the conveyance a

freehold estate in space by which the walls establish the vertical boundaries, and the floors and ceilings the horizontal boundaries. Therefore, only by means of this second theory can there be established by a conveyance in fee simple of an upper portion of a building, a marketable title on a place in space. Are there any precedents in the law by which application of this latter theory may be sustained?

Many current scholars of real property law allege that horizontal property ownership—a freehold estate in space—has its origin in the Roman law, that it developed in the Civil Law of continental Europe, and that in recent times the Spanish heritage of the Commonwealth of Puerto Rico has brought it to the Western Hemisphere where it has acquired the newly-adopted designation of “condominium”. The derivation of the condominium from the Roman law, however, is open to question, for it appears that the Roman law permitted no ownership in limited stratum of soil or airspace, and allowed only the landowner’s full dominion or ownership in space to be encumbered by certain rights less than ownership. Hazeltine, *Law of the Air* (1911) 74-75. Moreover, in Germany, where the influence of the Roman law was not always predominant, horizontal property ownership seems to have been established as early as the twelfth century. Huebner, *History of Germanic Private Law* (Cont. Leg. Hist. Series, 1918), 174. Later, the enabling act of the German Civil Code expressly recognized improved horizontal property as subject to private ownership, and the influence of the Germanic, rather than the Roman law carried over to Switzerland. German Civil Code (1900) 128; Swiss Civil Code (1907) 675.2. While the early French law codified the *ad coelum* doctrine, it also incorporated a rebuttable presumption implying the possibility of horizontal property ownership in buildings. French Civil Code (1803), arts. 552, 553, 664.

The earliest indication of a freehold estate in space in the English case law seems to definitely discredit the concept of horizontal property ownership. There is reference to a case in the Year Books where, “in answer to a suggestion that a man may have a franktenement (a freehold) in an upper

chamber, it was said that such could not be, for it could not continue, since, if the foundation failed, the chamber would be gone." Y. B. Brooke 5 Hen. 8, f. 213, pl. 20 (1586). A change, curiously enough, later came about because of a custom of the English legal profession whereby its members shared the privileges and fellowship of the Inns of Court. Originally, chambers of the Inner and Middle Temples were leased by the members of the profession; but during the reign of Elizabeth I, new and additional chambers became necessary and the Inns themselves were unable to finance the expansion. An individual member of the Temple then undertook to finance and build his own chamber on the Temple's site and the arrangement was made that he would hold the chamber for life and that he could assign or leave it by will to any fellow or fellows who would hold it similarly. This arrangement, comparable to a freehold estate for life coupled with a special power to appoint a similar estate by deed or will, found great favor among the English legal profession and many such arrangements, supplanting the former lease, are found in the records of the Middle Temple. Williamson, *The History of the Temple* (1924), 227 228, 234-236, 291-292. Therefore, it was not unusual that Lord Coke would observe in the early seventeenth century that "a man may have an inheritance in an upper chamber, though the lower buildings and soile be in another, and seeing it is an inheritance corporeall it shall passe by livery." *Co. Litt.* 42b. Coke had unquestionably announced that there was an estate of inheritance in horizontal property of an upper legal chamber. It was inevitable that this concept would spread among the laity of England, and in a leading English case of 1787, the court remarked: "We know that in London different persons have several freeholds over the same spot . . . That is the case in the Inns of Court." *Freeland v. Burt*, 1 T.R. 701, 99 Eng. Rep. 1330 (1787).

As in England, the American common law has given credence to the concept of freehold estates in improved horizontal real property. An early Iowa case introduced the concept by holding that a homestead exemption statute operated to

separate real property ownership in horizontal layers. In that case the soil plus the second and third stories of a building were exempt as a homestead, but the first floor and basement not within the exemption were separately alienable. *Rhodes, Pegram and Co. v. McCormick*, 4 Iowa (Cole's) 368 (1857). A much later case from a neighboring mid-western state held that "a house, or even the upper chamber of a house, may be held separately from the soil on which it stands, and an action of ejectment will lie to recover it." *Madison v. Madison*, 206 Ill. 534, 537, 69 N.E. 625, 627 (1903). Indeed, several years earlier, another mid-western state had sustained separate freehold ownership of a third story in the attachment of a contractor's lien. *Badger Lumber Co. v. Stepp*, 157 Mo. 366, 57 S.W. 1059 (1900). However, both contrary and confirming judicial pronouncements were made in the American common law to the middle of the twentieth century, with the result that the concept of freehold estates in space was quite unsettled, and the marketability of title to such freehold estates extremely doubtful.

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The twentieth century "space age" in the United States essentially is an urban civilization. No longer is it practical or feasible to "keep 'em down on the farm." Mechanized farming coupled with the automated industrial revolution have brought young and old to the cities of America with the result that urban housing has become a major problem for the average community. The cities of the United States, not unlike the island Commonwealth of Puerto Rico and the isles of our fiftieth state of Hawaii, are limited in land area and in most cases where geographic annexation of surrounding territory is not possible, the only solution to the housing problem lies in the residential use of space. As a result, both "high-rise" and "low-rise" apartment structures have become more and more significant in the effort to fulfill the demand for urban residential housing. However, because of the unsettled common law of horizontal property in space, until



comparatively recent times such housing units in the apartment-type structure were available only to lessees. The working or retired urban dweller who preferred to own his own home was driven to the city suburbs and adjacent areas outside and away from the urban centers, where he was (and presently continues) to be plagued every moment of his daily life by inadequate fire and police protection, and subjected to traffic and transportation monstrosities seemingly without hope of abatement. Private home ownership, one of the major fundamentals of a free society, has slowly and steadily become less probable and less possible within the boundaries of our cities.

The earliest and most successful attempt to solve the problem of urban home ownership disregarded entirely the potentials already available within the legal concept of horizontal property ownership in space. Instead, almost forty years ago, the first solution took the form of the "co-operative apartment," a legal hybrid which still continues in wide use. Its most popular form has been the "stock-lease co-operative" where title to the land and buildings is held by a corporation, and each stockholder of that corporation is entitled to occupy a particular unit or apartment within the project, usually under a long-term lease. The corporation's by-laws, and also each lease, provide for a sharing of the common expenses by the stockholder-lessee and upon the tenant's failure to pay his allocated share of these expenses (which include the taxes) he may be dispossessed, his lease terminated, and his stock in the corporation cancelled. Under this arrangement, the apartment-occupier is both a stockholder and a lessee, but is not a property owner of space. His own unit cannot be separately mortgaged, and in the event of foreclosure of the mortgage on the entire project (land and building) he may lose everything. Therefore, it is obvious that in a "stock-lease co-operative," the owning corporation stands between the stockholder-lessees and title to the land and building. Furthermore, present corporation laws along with modern property law of landlord and tenant have been completely adequate for the "stock-lease co-operative" and

no new statutes have ever been needed or enacted. It is interesting to observe that there are more than five thousand "stock-lease co-operative" apartment buildings in the state of Florida alone, and that this type of housing is on the increase in many cities of our country located in states where no horizontal property statute has been enacted.

Another type, known as the "co-ownership co-operative" has been much less frequently used and needed no new statutory law to exist. This type of co-operative arises where each so-called "buyer" of an individual unit is conveyed an undivided fractional interest in the entire land and building and becomes a tenant in common of the entire project. The deed of such a "buyer," however, excludes the right to possess and occupy any of the property except the one designated unit and by the same deed there is granted the right to use the common areas of the project along with all of the other co-owners. The obligations to share the cost of maintenance, repairs, taxes, mortgage loan payments, etc. of the entire project are incurred by means of covenants in the separate apartment deeds, which covenants purport to bind the grantee's successors and assigns and contain conditions for reversion of title on failure to perform the covenants. It is obvious that such "co-ownership co-operatives" introduce numerous legal problems of concurrent ownership, of covenants running with the land, and of future interests by way of possibilities of reverter and rights of entry for condition broken. Indeed, there are so many legal problems involved in this type of co-operative that individual owners of such units have found it impossible to secure a mortgage loan on an individual unit or apartment.

Therefore, neither the "stock-lease co-operative" nor the "co-ownership co-operative" provides a satisfactory solution to the problem of home ownership in our heavily populated urban areas. What, then, has been the most recent effort to find a solution? The solution seems to have been found in the "condominium"—the newest concept of horizontal ownership in space—a concept that must necessarily have its origin in a statutory horizontal property law because of the unsettled

state of the Anglo-American common law. Although the two existing types of co-operatives are both dependent upon the common law of real property and the corporation statutes of the various states, the condominium rests entirely on statute and has been sometimes referred to as a "statutory co-operative." The label of a "co-operative" is only partially descriptive and would seem to apply only to the common elements of such a project.

The first such statute within the American domain was the Horizontal Property Act of Puerto Rico. P. R. Laws Ann. tit. 31, §§ 1291-93 (Supp. 1959.) Although the current Puerto Rico act did not become law until 1958, certain portions of that law were enacted as far back as 1902. However, it was not until 1955 that Puerto Rican builders first began to construct condominium projects and since then they have multiplied extensively and have been in great demand by the citizens of Puerto Rico. With a limited land area, the island Commonwealth is faced with the same general problems of adequate housing that are present in the urban centers of the American mainland. As in Puerto Rico, the islands of our newest and fiftieth state of Hawaii comprise a limited land area along with an ever-increasing concentration of population in need of adequate housing, and the construction of condominium projects was given statutory encouragement there by enactment of its Horizontal Property Act in 1961. Act 180, Session Laws of Hawaii (1961).

The development of the condominium not only in Puerto Rico and Hawaii but also on the American mainland was given a newly-added incentive by the 1961 Amendment to the National Housing Act which in Section 104 authorizes the Federal Housing Administration to insure mortgages on individual condominium apartments. 75 Stat. 160, 12 U.S.C. § 1715y(a) (Supp. III 1959-61). This new section of the National Housing Act has presented a solution to the problem of financing individual condominium units, a major problem that had impeded the sale of condominium apartments in Puerto Rico for a number of years. Its essential purpose was to increase the supply of privately owned dwelling units

“where, under the laws of the state in which the property is located, real property title and ownership are established with respect to a one-family unit which is part of a multi-family structure.” The reference to the establishment of “real property title and ownership” clearly indicates a marketable title on a unit that is “part of a multifamily structure” and was obviously intended to include upper chambers in such structures—places in space. Inspired by this federal financing medium, the first Horizontal Property Act in a mainland state became Arkansas law in 1961, followed closely by comparable acts in Kentucky and Virginia in 1962. Ark. Stat. Ann. §§ 50-1001-23 (Supp. 1961); Ky Rev. Stat. §§ 381.805-910 (1962); Code of Va. (1950), §§ 55-79.1-79.33 (Supp. 1962). In the very near future it is anticipated that statutes purporting to establish marketable title in horizontal property units in space will be universal throughout the country. However, there has been so far no absolute uniformity in this legislation with the result that the intent to establish marketable title on a place in space may fall short of accomplishment in many state jurisdictions. The Virginia act, since codified as Chapter 4.1 of the Code of Virginia, 1950, is one such effort that seems to have missed its intended objective: to establish a marketable title on a place in space.

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In Virginia, each individual unit of a condominium is defined by the Act as an “apartment” and the definition of an “apartment” is broad enough to include residential, office, commercial and industrial use. The units or “apartments” so defined may be contained in buildings of one or more stories, the only specific requirement being that each unit or “apartment” shall have a direct exit to either a thoroughfare, or to a common space leading to a thoroughfare. The entire condominium project is created by the developer or owner(s) of the project through the recording of a master deed—and once so recorded, the Virginia condominium becomes what the Act defines as a “horizontal property re-

gime". Unlike the comparable statute of Hawaii which requires a minimum of six units for a condominium project, the Virginia Act reduces the minimum number to four, which would indicate that a four-family structure can be erected as a condominium project and ripen into a horizontal property regime by the recording of the master deed. Thus it would seem that there can be no title to a place in Virginia's space unless said space is sub-divided at least into four specific horizontal as well as vertical boundaries.

It is provided that each individual unit or "apartment" of a Virginia horizontal property regime may be separately conveyed or encumbered, and in addition to this separate alienability each unit is made separately devisable and descendable. Furthermore, all documents involving titles in fee simple, titles of less than a fee simple with future interests, deeds of trust, liens, etc. are made separately recordable for each unit. The common areas of the horizontal property regime (the land, foundations, main walls, stairways, halls, lobbies, elevators, utility services, etc.) are defined as the "general common elements," in all of which the individual owner of a unit becomes a tenant in common, referred to as a "co-owner," along with all of the other individual apartment co-owners. The fractional share of the co-ownership in these "general common elements" is established through governing by-laws adopted by a "council of co-owners," the latter comprising *all* of the individual unit or apartment owners of the regime. In addition to its function in the adoption of by-laws which govern the administration of that portion of the regime comprising the "common elements", this "council" is given discretionary power to appoint an administrator, or establish a board of administration to manage these "common elements" of the regime. A substantial portion of the Virginia Act is devoted to regulatory and "full disclosure" features, administered by and through the Virginia Real Estate Commission with its inspections of the regime and its reports pertaining thereto, all of which are typical bureaucratic adjuncts of current public policy but do not in any way contribute to the marketability of the title

which an owner of a Virginia condominium unit receives by his deed.

What is the meaning of "marketable title" to real property in Virginia? The test first applied was that of "such title as a reasonably well informed and intelligent purchaser, acting upon business principles, would be willing to accept." *Sachs v. Owings*, 121 Va. 162, 169, 92 S.E. 997, 999 (1917). This "prudent purchaser" criteria gave way five years later to the remedial "purchase money application" test of *Davis v. Buery*, 134 Va. 322, 329, 114 S.E. 773, 777 (1922) which more recently was supplanted by the "free from valid objection" test, an evaluation that seems to be all-inclusive in its definition of a marketable title as a title "free from liens or encumbrances and dependent for its validity on no doubtful questions of law or fact." *Cogito v. Dart*, 183 Va. 882, 887, 33 S.E. 2d 759, 762 (1945). Applying this definitive pronouncement of the late Chief Justice Hudgins to a title on a place in space as established by the Virginia horizontal property law, it seems clear in the light of earlier Virginia cases that one or more doubtful questions of law or fact can and will be raised within the context of the Horizontal Property Act. A microscopic examination of the Act prompts the following questions of both law and fact (with italics added for emphasis):

- (1) While § 55-79.14 seems to successfully apply the Homestead Exemption provisions of Title 34 to condominium units, the closing sentence of this section provides that real property taxes shall be assessed and collected "on the individual apartments and *not on the building as a whole.*" What about the assessment and collection of real property taxes on the *land* upon which the horizontal regime is located?
- (2) According to § 55-79.13 the expenses of the regime's administration, also for the maintenance and repair of the regime's common elements, *as agreed upon by the council of co-owners* are to be shared pro rata by all co-owners of the regime. Agreement by the council of

co-owners would seem to require unanimous approval pursuant to subsection (f) of § 55-79.2 since the pro rata expense provision fails to use the term "majority of co-owners" as defined in subsection (j) of the latter section. The inability of four or more such co-owners to agree unanimously, a likely probability, could defeat the allocation, collection and payment of these expenses. With such expenses outstanding against the regime, what would then be the marketable status of the individual titles? (Although this section eliminates any exemption through waiver, non-use or total abandonment of a unit, this added provision would seem to be moot in the absence of a unanimous agreement by the council of co-owners).

- (3) The same section referred to in (2) above specifies that "all co-owners are bound to contribute pro rata" to these expenses. How are they bound by way of in personam liability? It would seem that this section could only be effective where each individual deed contained covenants by which the condominium grantee bound himself, his heirs, executors, administrators and assigns to such contributions, such covenants to be phrased in such a way that they run with each horizontal property unit and are made equally binding on both immediate and remote grantees. Even with such covenants, the statute of limitations could run on a breach thereof, which would seem to contradict the unlimited binding clause of this section. Moreover, the Act makes no provision for the inclusion of such covenants (to contribute) in the individual deeds, the only requirement as to content of said deeds being (§ 55-79.8) that the description of the condominium land and individual unit be specified therein, in addition to encumbrances.
- (4) Upon the sale or conveyance of a condominium unit, it is provided in § 55-79.15 that unpaid pro rata assessments for the regime's administration, and for the maintenance and repair of common elements, shall be first

paid out of the purchase money, subject only to a priority for taxes due and unpaid to governmental bodies and unsatisfied liabilities to mortgagees under duly recorded security instruments. However, where title to a horizontal property unit passes by intestate succession, by devise, or by right of survivorship, the Act is silent not only as to the liability of such successors in title for the unpaid assessments, but also makes no provision whatsoever for the establishment of statutory liens on the individual units to secure payment of these outstanding obligations.

- (5) It is provided in § 55-79.11 that the entire administration of the horizontal property regime shall be governed according to by-laws approved and adopted by the *council of co-owners*. In the light of the comments in (2) above, any such approval or adoption of by-laws without a unanimous vote of the co-owners would seem to be a nullity and the administration of the entire regime would be doomed from its inception. The failure of the legislature to provide for approval and adoption of the administration by-laws by a *majority of co-owners* would seem to be a fatal error either in legislative draftsmanship or intent.
- (6) Where a single condominium unit or "apartment" is used by its horizontal property owner as a combination residence and office, or for a combination of any of the uses specified in subsection (a) of § 55-79.2, will that combined use give rise to a cloud on title to the particular unit, along with possible impairment of title to other units in the project? The absence of the phrase "or any combination thereof" in this subsection may establish statutory restrictions for single-purpose use of any unit in the project, an objective perhaps not clearly intended by the otherwise broad scope of this subsection.
- (7) The Horizontal Property Act of Virginia, unlike the recently enacted statutes of Arkansas and Kentucky, makes no provision whatsoever for destruction by fire or



other causes of the entire structure or any part of it, makes no provision for the insurability of such potential loss by the co-owners of their individual units as well as their concurrent ownership interests in the common elements, makes no provision for the allocation of the insurance proceeds in the event that insurance against loss from such disasters is carried and a loss occurs, and finally makes no provision at all for reconstruction of all or a part of the structure with or without insurance indemnity. When it is considered that the structure itself establishes the boundary lines of the property units, the boundary lines of a freehold in space, this glaring emptiness of the Virginia Act portends almost certain valid objections to a marketable title on a place in space.

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As the *ad coelum* doctrine of antiquity has slowly become emaciated by the requirements of space navigation and the necessities of space habitation, and as the ancient *ad inferos maxim* has similarly been extinguished practically everywhere but in Virginia, thereby establishing the concept of horizontal property ownership of a place in subsurface space, the midpoint of the twentieth century as the nucleus of the "space age" has brought to the American property law the condominium, a concept of horizontal property ownership in supersurface space, the latest approach to urban multiple housing. Within this new context of horizontal property ownership in space, there remains only the unsolved problem built into the Horizontal Property Act of Virginia of establishing title to a place in space, a title to such horizontal property free from valid objections and as such marketable within the prevailing meaning of that term. The Virginia Act seems to be urgently in need of some major revisions in that direction. During his entire lifetime, Thomas A. Edison lived by a motto that inspired his inventive genius and drove him onward to the acquisition of more than a thousand patents. The Edison philosophy might well serve as an inspiration to the legal profession of Virginia in the solution

to the existing problem. "There is a better way to do it—find it!" was the Edison proverb, and when a better way is found to establish marketable title on a place in space, Virginia should be in the vanguard, leading the way toward reform of its horizontal property law. Then, and only then, will the urban dwellers of Virginia, comfortably housed in their condominium apartments, be justified in propounding a new cliché—"a place in space, it's wonderful!"