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INSIDE

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IN FUTURE ISSUES

Hedge-to-arrive contracts in the courts—part I

Hedge-to-arrive (HTA) contracts, in their many forms, are visiting trouble on the important grain sector of American agriculture, particularly in the major producing states from Ohio and Michigan and on west through the Great Plains. The resulting litigation explosion is front page news in the agricultural press; and financial losses are mounting for many farmers (producers), certain grain dealers (elevators), and some agricultural lenders.[1] This article seeks to illustrate the wide variation in HTAs and to examine some of the issues now in litigation.[2] The primary focus will be on cases where grain dealers (buyers) are seeking to compel farmers (sellers) to make physical delivery under HTA contracts or to pay damages for breach thereof.

Part I of this article provides background on HTA contracts and examines jurisdictional issues. Part II, which will appear as next month's in-depth piece, will be devoted primarily to a look at substantive legal theories in HTA contract litigation including allegations of misrepresentations, of the absence in certain HTA contracts of delivery terms, of HTAs as illegal off-exchange futures contracts, and of RICO violations. It is unlikely that there will be any quick and general resolution of these matters; rather, they will have to play out on a case-by-case basis over time.

What are HTA contracts?

Perhaps the easiest way to begin is to describe a ***conventional cash forward contract*** and then proceed to HTA contracts. Example. Farmer with crop in field contracts with grain dealer to sell 5,000 bu. at $3.00 per bu. with delivery in 4 months on December 1. The $3.00 is not the current local spot price, but rather a price determined as the dealer checks the near month (to Dec.) futures price for the commodity and subtracts from that price its own locally determined basis. (*E.g.*, near month futures price of $3.40 minus 40 cents basis.) The grain dealer is not acting irrationally, even though by December the terminal elevator price could fall to, say, $2.90. This is because the grain dealer, upon entering into the cash forward contract with the farmer, usually will enter a short hedge by *selling* one December futures contract (near month) for the commodity at $3.40 (this sell is the opposite of the buy physical transaction.)[3] If the dealer suffers a loss in the physical transaction (paying the farmer $3.00 a bu. in Dec. and then selling at about $2.90 in the terminal market

Continued on page 2

Res ipsa in livestock trespass cases

In May of this year, a Custer County, Nebraska, jury returned a verdict in excess of one million dollars against a rancher for the death of a passenger in an automobile that collided with one of the rancher's steers on a state highway. *Landkamer v. Sherbeck*, No. 3528-63-97 (Custer Cty. Dist. Ct., May 2, 1997). The case has received a significant amount of attention throughout the nation's livestock industry and raises serious concerns for livestock owners not only because the automobile driver was legally intoxicated at the time of the accident, but also because the case involved the application of a legal doctrine that could make it more difficult for livestock owners to prevail in civil lawsuits brought by parties injured or damaged by escaped livestock. The case is the result of two recent Nebraska appellate court opinions that discussed the application of the doctrine in similar cases.

In 1995, the Nebraska Supreme Court upheld an $18,000 jury verdict against a livestock owner whose cattle escaped their pen and were struck by a semi-tractor trailer. *Roberts v. Weber & Sons, Co.*, 248 Neb. 243, 533 N.W.2d 664 (1995). In general, Nebraska law requires livestock owners to take ordinary care in confining their livestock. Ordinary care generally includes such acts as constructing a sufficient fence, insuring that the fence is in a state of good repair and that all gates are closed, and diligently taking steps to return the livestock upon being notified of their escape.

Continued on page 2

and recovering no basis), the dealer nevertheless will have profited in the future market by an off-setting *buy* of one December futures contract at $2.90—*buying* at $2.90—and *selling* at $3.40. The resulting 50 cent gain covers both the 10 cent loss in the physical transaction and gives the grain dealer its 40 cent basis.[4] This cash forward contract gave price certainty to the farmer and, coupled with the hedge, assured the grain dealer of its basis.

The ***simple HTA contract*** is described by Judge Robert Bell in *Eby v. Producers Co-op, Inc.*: "In a basic HTA, the farmer and elevator enter a contract for the sale of a fixed number of bushels of grain for delivery at a particular time in the future. The futures reference price, the price per bushel on a contract market for a particular type of grain during certain futures months, is fixed while the basis, a local adjustment to the per bushel price that reflects local variables, floats until it is fixed by the farmer before delivery. If the farmer does not set the basis by a specified time, the basis is automatically set by the terms of the HTA. In order to eliminate the risk of changes in the futures reference price, the elevator hedges its contract with the farmer. The elevator accomplishes this by establishing a short futures position, an equal and opposite position, in the futures market."[5] In all probability, this HTA contract is legally identical to the conventional cash forward contract, assuming the date for physical delivery by the farmer is fixed and within the marketing year for the particular crop. Indeed, when the farmer sets the basis, the HTA becomes a conventional cash forward contract.

Judge Bell goes on to describe a variation on the just-described HTA contract: "Certain HTAs, sometimes called ***flex-HTAs***, allow the farmer to roll the delivery date to sometime in the future. When the HTA is rolled, the elevator buys back the futures hedge and rehedges by selling a new futures contract. The spread between the bought back and sold futures is attached to the price per bushel of the original HTA. This change could be either a debit or a credit. The farmer runs the risk of having this spread run against him.[6]

An elegant corn ***flex-HTA illustration*** appeared in the October 1996 issue of Agricultural Outlook.[7] It is presented here in abbreviated form. On June 1, 1995 farmer establishes an HTA contract price of $2.59 for Dec. delivery. Grain dealer hedges by selling Dec. 1995 futures at $2.80. The basis, for purposes of simplicity of the illustration, is assumed at all times to be 21 cents. By Dec. 1, 1995 the price of Dec. corn futures is $3.31. At that time, farmer asks that delivery on his HTA be rolled forward, selling the current crop in the spot market. Grain dealer buys back its Dec. 1995 futures contract for $3.31 and sells July 1996 futures for $3.35. "Selling the new contract (July 1996) for more than the cost of buying back the initial contract (Dec. 1995) results in a spread gain to the producer of 4 cents per bushel and raises the value of the HTA to $2.61" ($2.59 + $0.04 - $0.02 [contract roll forward charge]).[8] By July 1, 1996, the July futures contract was at $5.39 "implying margin payments by elevators of $2.04 per bu. to maintain a short July 1996 futures contract during that period."[9] On July 1, 1996, the farmer again rolls forward the HTA, and grain dealer buys back the July 1996 futures contract for $5.39 and sells the Dec. 1996 futures for $3.71. "The $1.68 negative spread reduces the HTA value to $0.91" ($2.61 - $1.68 - $0.02 [roll forward charge]).[10] Now, if the farmer is to perform with physical delivery in Dec. 1996, he will receive 91 cents per bu. for his 1996 corn crop. It is under such or similar circumstances that many farmers have refused to deliver or to voluntarily settle breach of contract damages actions brought by grain dealers.

Other variations on HTA contracts exist.[11] And, the conduct of the parties will vary from one contract to the next.[12]

Jurisdiction

If cases reported thus far are any indi-

Continued on page 3

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RES IPSA/*Continued from page 1*

Usually, the mere occurrence of an accident that causes physical injury or property damage does not lead to a presumption that the livestock owner was negligent. However, in the 1995 case, the court determined that the plaintiff was able to show that the livestock would not have been on the highway in the absence of the owner's negligence, that the cattle were under the owner's exclusive control and management, and that the owner had failed to explain adequately why the livestock were on the road. The court held that since the plaintiff was able to establish these three elements, that the legal doctrine of "res ipsa loquitur" applied. As a result, the jury was allowed to presume that the livestock owner was negligent.

In this case, the cattle were confined in a pen constructed of 2 5/8" steel pipe. The pipe was set in concrete with a 2 1/4" top rail, and a "sucker rod" was welded on the inside of the pen. Of the three types of common fences for cattle utilized in Nebraska (barbed wire, electric wire, and steel pipe), steel pipe is the most expensive and most secure. However, the jury did not believe the livestock owner's explanation that the cattle had escaped by pressing against a gate and breaking the top hinge, which caused the gate to pivot outward at enough of an angle to allow the cattle to crawl over the gate. Because the elements for res ipsa were established (cattle in the exclusive control of the defendant, no plausible explanation as to why the cattle escaped, and the cattle would not have been on the road if it were not for defendant's negligence), the court allowed the jury to presume the owner's negligence. This put the burden of proof on the livestock owner to provide sufficient evidence to overcome the presumption of negligence in order to avoid liability. The livestock owner failed to satisfy this burden and was found liable for the plaintiff's injuries.

In a late 1996 case, the Nebraska Court of Appeals held that res ipsa did not apply in a similar case because the plaintiff who struck the defendant's cattle failed to prove facts that were more consistent

Continued on page 3

HTA/Continued from page 2
cation of overall strategy, it would appear that most grain dealers want to litigate in state court and most farmers in federal court. It has been observed that emotions are running high in some localities with farmers caught in HTAs in an uncomfortable position as they decline to perform, drive past their coop and sell in spot markets elsewhere. Whether in church or at the local cafe, such farmers may find it awkward to face non-HTA user neighbors who have substantial exposed equities in the same coop, particularly as that coop suffers huge losses and approaches insolvency.

In a reported case from the Northern District of Iowa, *Farmers Co-op Elevator v. Doden*, a grain dealer sued farmer Doden in state court under HTA corn and soybeans contracts alleging breach and seeking specific performance and money damages.[13] Doden was sued under state contract law, and the complaint did not raise federal questions. Defendant answered, alleging among other defenses that the HTA contracts in question are illegal under the federal Commodity Exchange Act (CEA). Defendant removed to federal court, but the grain dealer was successful on motion to remand.[14] In order to get around the rule that federal issues raised in affirmative defenses cannot support federal jurisdiction, Doden argued that the complaint of the grain dealer involved "artful pleading" to conceal relevant federal questions—here issues of federal commodity law. The court concluded: "[a]lthough the illegality of the contracts upon which Farmers Co-op is suing is an issue in the case, and indeed an issue controlled by federal law, the illegality, voidness, or voidability of a contract is an affirmative defense to enforcement [under state law] of the contracts in question.... The court's conclusion that Doden's federal issue is in fact a defensive issue has fatal consequences for this court's removal jurisdiction over this action, because it completely undermines Doden's assertion of 'artful pleading' and his assertion that the claims in the case 'arise under' federal law."[15] The identical analysis is embraced by the same court in *Farmers Co-op Elevator v. Abels* even though the suit by the elevator sought only damages for margin losses—but as the court points out, such a claim is based on state law breach of contract theory.[16]

In Michigan in the *Eby* case, where farmers initiated in federal court actions for declaratory and other relief against the grain dealer, federal jurisdiction thus far has been sustained.[17] The complaint alleged both RICO and CEA violations by the defendant coop—in addition to certain state law causes of action. While the court granted defendant's Rule 12(b)(6) motion on the RICO claims, the court refused to dismiss the CEA claims, noting the potentially infinite roll-overs under the HTA contracts at issue and the possibility that the evidence at trial would demonstrate such HTA contracts to be illegal off-exchange futures contracts. "Because Plaintiffs' CEA claim still exists, Defendants motion to dismiss the remaining state claims for lack of federal question jurisdiction shall be denied."[18]

The potential for nondiversity based federal court jurisdiction also was established in a third reported case from the Northern District of Iowa, *North Central F.S., Inc. v. Brown*.[19] While the principal complaints were based on state law, compulsory counterclaims raised issues of fraud under the CEA. Damages were requested under CEA along with the remedy of rescission of the HTA contracts under the federal Declaratory Judgment Act—although the latter Act in and of itself cannot be the basis for federal court jurisdiction. Supplemental jurisdiction will be taken over the state based claims. Fraud under the CEA was not adequately pleaded, however, and the parties were given sixty days to amend pleadings.

Next month's *Agricultural Law Update* will have the concluding sections of this article: 4. Legal Theories, 5. CFTC Interpretive Letter, 6. Legal Side-effects of the HTA Crisis, 7 Ag Trade Options, and 8. Conclusion.

—Donald B. Pedersen, Professor of Law, University of Arkansas, Fayetteville, Arkansas.

[1] *Even the stalwart St. Paul Bank for Cooperatives has reportedly sustained some losses. St. Paul Bank Takes Big Hit in HTA Disaster,* Agri. News A1 (S.E. Minn. ed., Apr. 24, 1997)($32 million provision for loan losses for 1996, of which $17.1 million was for net charge-offs).

[2] *See also* Roger A. McEowen, *Marketing agricultural commodities through use of hedge-to-arrive contracts may volate CFTC rules,* 13 Agric. L. Update 4 (May 1996).

[3] *The grain dealer is under no obligation to enter this hedge and could choose to deal with its risk in some other manner.*

[4] *See* Pedersen and Meyer, *Agricultural Law in a Nutshell* 148-51 (West 1995).

[5] *959 F. Supp. 428, 430, n. 1 (W.D. Mich. 1997).*

[6] *Id.*

[7] *HTA Contracts: Risks & Lessons,* Agricultural Outlook 31, 32-33 (ERS/USDA Oct. 1996).

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *For examples, see* David C. Barrett, Jr., *Hedge-to-Arrive Contracts,* 2 Drake J. Agric. L. 153, 156-61 (1997).

[12] *"...even a safely worded contract can become something else if the practices between the buyer and seller are different than the contract's terms." Id.* at 166.

[13] *Farmers Co-op Elevator, Woden, Iowa v. Doden,* 946 F. Supp. 718 (N.D. Iowa 1996).

[14] *Id.*

[15] *Id.* at 729-30.

[16] *Farmers Co-op Elevator of Buffalo Center v. Abels,* 950 F. Supp. 931 (N.D. Iowa 1996)(52 lawsuits).

[17] *Eby v. Producers Co-op, Inc.,* 959 F. Supp. 428 (W.D. Mich. 1997).

[18] *Id.* at 433.

[19] *North Central F.S., Inc. v. Brown,* 951 F. Supp. 1383 (N.D. Iowa 1996).

RES IPSA/Continued from page 2
with negligence on the defendant's part than with a mere accident or acts of a third party. *Coglazier v. Fischer*, No. A-95-858, 1996 WL 637800 (Neb. Ct. App. Nov. 5, 1996). This case involved yearling heifers enclosed in a pasture by a single-strand barbed-wire electric fence located about three feet off the ground. The fence posts were discovered out of the ground and laying flat, they were not bent, none of the insulators were broken, and no wire was torn. The livestock owner theorized that vandals had pulled the posts out of the ground and laid them down. If the cattle had broken through the fence, it was likely that the fence posts would have been bent, insulators would have been broken, or the wire would have been torn. In this case, the trial court determined that the livestock owner's explanation of why the cattle were out was credible and that, as a result, res ipsa did not apply. Thus, the livestock owner was not presumed negligent. Instead, as has historically been the procedure, the burden was on the injured party to establish that the livestock owner failed to act reasonably in restraining his cattle. The plaintiff failed to carry this burden. and the livestock owner was not liable for the plaintiff's injuries.

These cases represent the perverse effect of applying res ipsa in livestock trespass cases. If a livestock owner takes substantial steps to prevent livestock from escaping their confined area (such as with the steel pipe fence in the 1995 case), the owner will likely have a much more difficult time explaining why the livestock were out than in the situation where a less secure fence is utilized to enclose the stock (such as the single-strand electric barbed-wire fence in the 1996 case). Failure to provide a believable explanation as to why the livestock escaped is one of the elements of res ipsa, and assists the plaintiff in establishing the second element—that the livestock would not have been out if the defendant had not been negligent. The third element will almost always be present. The livestock are usually under the owner's exclusive control

Continued on page 7

Uncommon law: the legal doctrine of the far right

By Scott D. Wegner[1]

The last few years have witnessed a movement that repudiates both lawyers and the United States legal system—the so-called Christian patriot or constitutionalist movement and their military arm, the militia.[2] Waco, Ruby Ridge, the Montana Freeman, and the Oklahoma City bombing are household terms.[3] The patriot movement's legal doctrine is based upon the Bible, the Magna Carta, the U.S. Constitution (without amendment), the Bill of Rights, and English Common Law with the 1828 version of Webster's Dictionary as a reference. This legal theory, which is often blended with a racial theology[4], is generally known as the common law movement.

With over eight hundred active patriot groups in the country and with the common law movement spreading into at least forty states, it becomes increasingly likely that those working in the legal system will at some point have contact with these groups and their ideology.[5] Moreover, clients such as farmers and ranchers and others under economic duress are often targets of the far right's message. Accordingly, some knowledge of what has been called "the greatest threat to our civilization since the civil war" is appropriate.[6] The purpose of this article is to briefly outline a few of the common law movement's legal arguments and to direct the reader to additional sources.

Legal doctrine

Patriots, constitutionalists, and many just plain disgruntled citizens seek a return to a perceived simpler time. To recapture a pre-civil war society and a white Christian republic requires rejection of all statutory and administrative law.[7] The common law movement's rationale for their legal theories is accomplished through a few kernels of true historical fact and a very selective interpretation of the Bible and the Constitution. Unfortunately, today a very large market exists for the self-proclaimed experts offering courses on legal theories such as those outlined below.[8]

Fourteenth Amendment citizen

Perhaps the most studied issue within the patriot community is how to challenge a court's jurisdiction. The argument that patriots seem to promote with the greatest fervor in challenging jurisdiction is the idea that two distinct classes of citizenship exist in the United States. The first class of citizenship was God-given at the time the Constitution was adopted and is evidenced by the capitalized use of the word "Citizen" throughout the Constitution. The first class of "Citizen," also referred to as a common law citizen, is limited to white males. Common law "Citizens" are governed only by the common law, the original Consitution, and the Bill of Rights.

The second class of citizenship was created by the federal government in 1868 through the ratification of the Fourteenth Amendment. This second class of "citizen" is referred to without capitalization so as to distinguish the Fourteenth Amendment "citizens," having privileges created by the federal government, from the common law "Citizen," having God-given rights.[9] The implications of categorizing citizenship are far-reaching. Since Fourteenth Amendment "citizens" are purely creatures of Congress, those citizens are subject to the federal government's jurisdiction. In other words, the Fourteenth Amendment is the means by which the federal government imposes all statutory and administrative law. Absent being labeled as a Fourteenth Amendment "citizen," the only people subject to the federal government's jurisdiction are those residing in the District of Columbia, because jurisdiction over the District of Columbia is specifically provided for the in the Constitution.[10] Consequently, patriots without fail maintain that they are not Fourteenth Amendment "citizens" and that they do not reside in the District of Columbia and on that basis move for dismissal.

By establishing and reaffirming that a patriot is not a Fourteenth Amendment "citizen," but instead is a common law "Citizen," the patriot demonstrates that he is free of any federal government jurisdiction or authority. Apparently entering into some type of contract with the government subjects patriots to the jurisdiction of the federal government just as are Fourteenth Amendment "citizens." Accordingly, patriots seek to renounce any type of relationship with the government that could be construed as an implied contract, such as a birth certificate, marriage licence, drivers license, social security number, and zip code.

Declaring a patriot's sovereignty is the method by which patriots renounce any relationship or contract with the federal government that might make them subject to Fourteenth Amendment "citizenship." Through a quiet title procedure (which in this case applies to individuals and not to real estate), patriots free themselves from any implied contracts with the government. Once sovereignty and "freeman" status is reasserted, the federal government's jurisdiction ceases. Based on this legal reasoning, the Montana Freemen, in their manifesto released shortly before their surrender to the FBI, argued that federal jurisdiction cannot extent to those proclaiming their sovereignty or freemen status.[11]

Carrying the logic further, adherents claim protection under the Eleventh Amendment, which prohibits federal court action against one of the United States by citizens of another state. Essentially, as sovereign entities unto themselves, patriots believe they should be accorded the same status and the same protections afforded a state or a foreign country under the Constitution. Patriots asserts that it follows, therefore, in view of the Eleventh Amendment, that any action taken against a freeman "can only be considered to be forcible entry, forcible detainer, unlawful entry, libel and slander, as well as perjury to all involved."[12]

Fringed flag

One recurring argument deals with the seemingly insignificant and occasional use of a yellow or gold fringe on the United States flag. Patriots, citing the United States Code, maintain that a fringed flag is not the flag specified by law but instead signifies a military battle flag.[13] Further, citing a 1925 Attorney General Opinion, patriots extrapolate that the President, as commander-in-chief, places the government's battle flag wherever he wishes to establish military or admiralty jurisdiction.[14]

Consequently, common law movement adherents are quick to survey the courtroom for the flag. If a fringed flag is present, and if the particular offense involved did not occur while in the armed forces or on the high seas, patriots move for dismissal based on lack of jurisdiction.[15] In the few reported cases where this theory was raised, the courts have dismissed the claim as frivolous with little discussion.[16]

Monetary system

A great amount of effort is expended in an attempt to expose and tear down the U.S. monetary system. Patriots contend that U.S. currency is unconstitutional and therefore they cannot be obligated to pay any debt or judgment against them. Courts have rejected the assertion that Federal Reserve Notes are not legal tender in that they violate the constitutional

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provision that a state may only tender gold and silver in payment of debts.[17]

The following excerpts from a pleading filed in U.S. District Court in Missouri regarding the monetary system are found in numerous pleadings across the country by the common law movement.

> That a partial National Bankruptcy was declared on June 5, 1933, under House Joint Resolution (H.J.R.) 192 by the 73rd Congress for the United States of America... by abrogating the Gold Clause and thereby depriving the American Citizens of their Constitutional United States Lawful Money gold coinage.
>
> On or about June 24, 1965 for the U.S. Senate and July 14, 1965 for the U.S. House of Representatives, a Declaration of a Total National Bankruptcy was issued under the "Coinage Act of 1965"...by abrogating the Silver Clause and thereby depriving the American Citizen of their Constitutional United States Lawful Money silver coinage.
>
> Then, in 1968, under H.R. 14743, Public Law 90-269; 82 Statute 50, with the aid and assistance of then President Richard Milhous Nixon, the Congress of the United States of America declared a Total International Bankruptcy, after France took 170 tons of gold out of Fort Knox and placed it under the Seine River in France, by removing all gold reserve backing from the United States Treasury Notes of 1890, and from the Federal Reserve Notes, thereby making them worthless pieces of paper that does not, nor can, qualify under the Legal Tender Acts of 1862 and 1863 as a legal tender for debt either public or private.[18]

War and emergency powers

An argument sure to be recited whenever a common law movement advocate is involved deals with the current state of martial law which has supposedly existed since March 9, 1933. This claim begins with the Trading With the Enemy Act of 1917, which gave the President the power to regulate certain financial transactions. Then, on March 9, 1933, Congress passed the Emergency Banking Act, amending the Trading With the Enemy Act.[19] The Emergency Banking Act gave the President further powers to regulate transactions between American citizens during time of war or national emergency. According to patriots, a national emergency declared by President Roosevelt in 1933 effectively suspended the Constitution. Moreover, as the legislation was never repealed, the state of national emergency continues to this day. Specifically, patriots cite the following codification of the 1933 Act, which they claim unconstitutionally ratifies the continuous arbitrary exercise of war powers against the people and the states.

> The actions, regulations, rules, licenses, orders and proclamations heretofore or hereafter taken, promulgated, made, or issued by the President of the United States or the Secretary of the Treasury since March 4, 1933, pursuant to the authority conferred by subsection (b) or section 5 of the Act of October 6, 1917, as amended [12 U.S.C. § 95a], are hereby approved and confirmed.[20]

Many outside of the common law movement are also concerned with the issue of continuing emergency powers. For example, a 1973 Senate Report declared in the forward that since March 9, 1933, "the United States has been in a state of declared national emergency." And, various Presidential executive orders, "taken together, confer enough authority to rule the country without reference to normal constitutional process."[21] In 1995, the Texas Republican Party adopted a resolution calling for the end to emergency powers and the restoration of the Constitution.[22]

Missing thirteenth amendment

Patriots suggest that the Constitution is missing an original thirteenth amendment. According to patriot research, between 1819 and 1876, some twenty-four states adopted a Title of Nobility amendment. Apparently such an amendment was proposed and ratified by at least a few states. The amendment reads as follows:

> If any citizen of the United States shall accept, claim, receive, or retain any title or nobility or honour, or shall without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever, from any emporer, king, prince, or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them, or either of them.

Patriots maintain that the missing thirteenth amendment was lawfully ratified and is still the law today.

The purpose of the amendment was and is to bar lawyers from holding public office. Essentially, as all lawyers hold the rank of "Esquire" (which is a title of nobility), they are automatically ineligible to hold public office. Supposedly this amendment was proposed because the loyalty of "Esquire" lawyers was suspect. While the Constitution already contains a prohibition against titles of nobility,[23] patriots prefer the missing thirteenth amendment because it contains a penalty—loss of citizenship. The missing thirteenth amendment argument surfaces in motions to dismiss for lack of jurisdiction on the basis that the judge and prosecuting attorney are illegally occupying public offices.

Common law courts

Following the inevitable failure of their legal arguments in state or federal court, patriots have removed the action to their own common law courts operating outside the judicial system.[24] Common law courts or citizen grand juries have their theoretical roots in the Posse Comitatus of the 1970s and 1980s.[25] The earliest common law court operating in modern times was founded in Florida in 1992. Since that time, common law courts, drawing on the Seventh Amendment for legitimacy, have spread nationwide.[26]

Identified by names such as We the People, Our One Supreme Court, and Courts of Justice, these courts regularly convene with juries, conduct trials, hear testimony, issue subpoenas and arrest warrants, and return indictments and judgments. Juries in common law courts determine the law as well as the facts in each case. Any perceived enemy of the patriots is a target for common law court action. Although common law courts and their utterances are often dismissed as little more than legal gibberish, the burden to the judicial system in time and expense is growing. Further, while many common law movement advocates seek change only through some form of legal process, many judges and prosecutors feel the potential for violence is increasing. For example, a national common law grand jury meeting in Kansas issued a show cause order to President Clinton and Attorney General Reno to show why they should not be indicted for treason. Other common law courts have discussed charges of treason against various officials, punishment of which at common law is death.[27]

The Anti-Defamation League has drafted a model common law courts statute criminalizing the conduct of impersonating a public officer or tribunal and of simulating legal process.[28] In addition, several states have passed or are considering legislation criminalizing the filing of nonconsensual common law liens. Some statutes also offer a remedy to those suffering from this "paper terrorism" such as a petition to the trial court to release these liens.[29] In Texas, the Attorney General has opined that county clerks should not accept for filing any documents from common law courts.[30]

Conclusion

Unquestionably, the legitimate debate concerning the federal government's role

Continued on page 6

should and does continue.[31] However, the common law movement rejects not only government and lawyers, but the rule of law itself. Any movement that rejects the rule of law cannot go unanswered or unopposed. As Justice Harlan so eloquently stated, "no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members.... Without such a 'legal system' social organization and cohesion are virtually impossible.... Put more succinctly, it is this injection of the rule of law that allows a society to reap the benefits of rejecting what political theorists call the 'state of nature'."[32]

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[1] *As law clerk to the Hon. Bruce M. Van Sickle, the author participated in hearing the federal habeas corpus petition of Richard Wayne Snell, alleged white supremacist and member of the Covenant, the Sword and the Arm of the Lord. Snell, convicted of murdering a Jewish store owner and a black state trooper, was executed on April 19, 1995, the same day as the Oklahoma City bombing, prompting some to suggest a connection between the two.*

[2] *The terms "patriot" and "constitutionalist" as used herein refer to those individuals and groups advancing the legal theories discussed in this paper.*

[3] *The 1970s and 1980s, groups such as The Order, Posse Comitatus, and the Covenant, the Sword and the Arm of the Lord, were a precursor to today's patriot movement. In 1987, several far right leaders were tried and acquitted on charges of seditious conspiracy. United States v. Miles, No. 87-20008 01-14 (W.D. Ark. 1987). For an excellent discussion of several far right groups, see James Coates, Armed and Dangerous: The Rise of the Survivalist Right (New York: Hill & Wang 1987). See also Mark Jones, Bitter Harvest (Westview Press 1995); Turner & Lowery, There Was a Man: The Saga of Gordon Kahl (Sozo Publishing Company 1985); Kenneth S. Stern, A Force Upon the Plain: The American Militia Movement and the Politics of Hate (New York: Simon & Schuster 1996); Morris Dees and James Corcoran, Gathering Storm: America's Militia Network (New York: HarperCollins Pub. 1996); Jess Walter, Every Knee Shall Bow: The Truth & Tragedy of Ruby Ridge & the Randy Weaver Family (New York: HarperCollins Pub. 1995); Dick Reavis, Ashes of Waco (New York: Simon & Schuster 1995). For more detail on the Covenant, the Sword and the Arm of the Lord, see Snell v. Lockhart, 791 F. Supp. 1367 (E.D. Ark. 1992), aff'd in part, rev'd in part, 14 F.3d 1289 (8th Cir. 1993), cert. denied, 115 S.Ct. 419 (1994); United States v. Ellison, 793 F.2d 937 (8th Cir. 1986).*

[4] *Many in the radical right espouse Christian Identity (also known as British Israelism), which, in sum, holds that white Americans, as the descendants of the ten Lost Tribes of ancient Israel, are God's chosen people. Thus, "We the People" and "our Posterity" as found in the Constitution's Preamble is describing the descendants of Israel who are subject only to the God-given Constitution and the common law. All other individuals are subject to the statutory rule of the federal government.*

[5] *See False Patriots: The Threat of Antigovernment Extremists (Southern Poverty Law Center 1996)(identifying over 800 patriot groups). For example, the North Dakota listing is as follows: Militia - Unspecified location; Common Law Court - Douglas.*

[6] *Ohio Chief Justice Thomas Moyer quoted in Peter Larsen, Common Law Believers Go Their Own Way, The Orange County Register, May 18, 1996.*

[7] *Patriots do not accept the legislative action of replacing the common law with codes. See, e.g., N.D. Cent. Code § 1-01-06 ("In this State there is no common law in any case where the law is declared by the code.").*

[8] *See generally AntiShyster (Alfred Adask, Dallas, Texas). The bi-monthly magazine has been called the common law movement's academic nerve center. Several additional far right legal theories are discussed in publications like AntiShyster, but are beyond the scope of this article. Additional legal theories involve: the Sixteenth Amendment and federal income taxation, the Federal Emergency Management Agency, the role of Presidential Executive Orders, the use of certain provisions of the Uniform Commercial Code, and various common law writs and liens such as Quo Warranto, Oui Tai, and Abatement (for an example of common law liens, see United States v. Hart, 545 F. Supp. 470 (D. N.D. 1982), aff'd, 701 F.2d 749 (8th Cir.)).*

[9] *A side argument is the claim that the Fourteenth Amendment was never validly ratified. The common law movement likes to cite State v. Phillips, 540 P.2d 941 (Utah 1975) and Dyett v. Turner, 439 P.2d 266 (Utah 1968) wherein the Utah Supreme Court questioned whether the Fourteenth Amendment was properly approved and adopted.*

[10] *U.S. Const. art. I, § 8, cl. 17 (Congress shall "exercise exclusive Legislation in all Cases whatsoever, over such District"). According to one common law court brief, "the United States has jurisdiction in Washington, D.C., in the territories and possessions, and on the high seas."*

[11] *See Freeman Manifesto (on file with the author). The Freeman Manifesto is a twenty-six page document containing the Freemen's legal arguments, which they sent out during their standoff with the FBI. At the time, the Freemen pledged to walk out if the government could disprove the legality of their claims. Such claims have been dismissed as frivolous. See United States v. Masat, 948 F.2d 923, 934 (5th Cir. 1991). See also The Freemen Network: An Assault on the Rule of Law (Anti-Defamation League 1996).*

[12] *Finding of Fact, Our One Supreme Court, Clay County, Missouri, March 12, 1995.*

[13] *4 U.S.C. § 1 ("The flag of the United States shall be thirteen horizontal stripes, alternative red and white' and the union of the flag shall be 48 stars, white in a blue field."). Section 2 provides for additional stars on the admission of a new state into the union. As a gold fringe is not provided for any flag with such a fringe is of special, i.e. military or admiralty, jurisdiction.*

[14] *34 Op. Att'y Gen. 483 (1925)(Placing of fringe on national flag is within the discretion of the President as Commander-in-Chief).*

[15] *See, e.g., Notice of Removal to Common Law, Nigro v. Laws, No. 95-0197-CV-WZ (W.D. Mo. May 4, 1995)("Plaintiffs are not subject to non-Constitutional statutory law administered by an administrative court which operates in admiralty venue to enforce private international maritime law.").*

[16] *See United States v. Greenstreet, 912 F. Supp. 224, 229 (N.D. Tex. 1996)("Unfortunately for Defendant Greenstreet, decor is not a determinant for jurisdiction."). See also Commonwealth v. Appel, 652 A.2d 341 (Pa. 1994); Vella v. McCammon, 671 F. Supp. 1128 (S.D. Tex. 1987).*

[17] *U.S. Const. art. I, § 10, cl. 1. See also Dorgan v. Kouba, 274 N.W. 2d 167, 172 (N.D. 1978)(rejecting a challenge to the use of Federal Reserve Notes).*

[18] *Affidavit of Complaint, Nigro v. Laws, No. 95-0197-CV-W-2 (W.D. Mo. Mar. 3, 1995).*

[19] *Act of March 9, 1933, 48 Stat. 1. Others have traced the imposition of martial law in the United States to the Enrollment Act of March 3, 1868, 12 Stat. 731, which created military districts and has never been repealed.*

[20] *12 U.S.C. § 95b.*

[21] *S. Rep. No. 93-549, 93rd Cong., 1st Sess. (1973).*

[22] *Republican Party of Texas, Executive Committee, Resolution #5: Restoration of the United States Constitution (June 17, 1995).*

[23] *U.S. Cont. art. 1, § 10, cl. 1 ("No State shall...grant any Title of Nobility.").*

[24] *For an example of a notice of removal to common law, see Kimmell v. Burnet County Appraisal Dist., 835 S.W.2d 108 (Tex. App.-Austin 1992)(holding that the Common Law Court for the Republic of Texas does not exist).*

[25] *For an example of an early Posse Comitatus document, see Sheriff's Posse Comitatus Common Law Great Charter, Cass County, North Dakota, May 6, 1982 (on file with the author. See generally, Devin Burghart & Robert Crawford, Guns & Gavels: Common Law Courts, Militias & White Supremacy (Coalition for Human Dignity, Portland, Oregon 1996). See also Hope Sambom, Courting Trouble, ABA Journal, Nov. 1995, at 33.*

[25] *U.S. Const. amend. VII. ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....")*

[27] *See Stephen Braun, Their Own Kind of Justice, L.A. times, Sept. 5, 1995, at 1 (Michael Hill, who served as "chief justice" of Ohio's Our One Supreme Court, was killed in a confrontation with police in 1995).*

[28] *The ADL Model Common Law Court Statute reads as follows:*

A.(1) Any person who deliberately impersonates or falsely acts as a public officer or tribunal, public employee or utility employee, including but not limited to marshals, judges, prosecutors, sheriffs, deputies, court personnel, or any law enforcement authority in connection with or relating to any legal process affecting person(s) and property, or otherwise takes any action under color of law against person(s) property; or

(2) Any person who simulates legal process including, but not limited to, actions affecting title to real estate or personal property; indictments, subpoenas, warrants, injunctions, liens, orders, judgments, or any legal documents or proceedings; knowing or having reason to know that the contents of any such documents or proceedings or the basis for any action to be fraudulent; or

(3) Any person who falsely under color of law attempts in any way to influence, intimidate, or hinder a public official or law enforcement officer in the discharge of his or her official duties by means of, but not limited to, threats of actual physical abuse, harassment, or through the use of simulated legal process—

Shall be guilty of...and fined not more than $___ or imprisoned not more than ___ years, or both.

B.(1) Nothing in this section shall make unlawful any act of any law enforcement officer or legal tribunal which is performed under lawful authority; and

(2) Nothing in this section shall prohibit individuals from assembling freely to express opinions or designate

Continued on page 7

Res ipsa/Cont. from p. 3

(or the control of the owner's agents). Once res ipsa applies, the jury is allowed to presume the livestock owner's negligence, and the livestock owner must then present enough evidence to overcome the presumption. This is a difficult, if not impossible, task.

In the Custer County case, the rancher involved was well known and successful in the ranching business. The plaintiff initially brought the case on ordinary negligence principles, but upon discovering that the fences were well maintained and none were down and that all gates were closed, changed the pleading to a res ipsa theory. The rancher was unable to provide an explanation for the livestock's presence on the highway, and because the other two elements of res ipsa were present (exclusive control and livestock would not be on roadway if owner were not negligent), the rancher was presumed negligent and had the burden of overcoming that presumption to the jury's satisfaction. The rancher was unable to overcome the presumption and was found liable. [The court later entered a satisfaction of judgment for $600,000.]

Across the country, the states are split on whether res ipsa should apply in livestock trespass cases. States that disallow the doctrine include Colorado, Florida, Indiana, Kansas, Mississippi, Ohio, and Utah. Indeed, the Florida Supreme Court in 1995, refused to apply the doctrine for fear of the damage such a rule would inflict upon that state's livestock industry. *Fisel v. Wynns,* 667 So. 2d 761 (Fla. 1995). Other states, including Idaho, Louisiana, New York, and Oregon, apply the doctrine in livestock trespass cases. The state of Washington has gone both ways. The remainder of the states have yet to address the issue.

In a recent Kansas case, *Harmon v. Koch*, 667 So.2d 761 (Fla. 1995), the driver of an automobile collided with three of the defendant's calves on a public roadway in Mitchell County. The calves had wandered over seven miles from the defendant's corral. Three sides of the corral and the corral gate were made of continuous inline fencing panels supported by steel posts set in concrete. Concrete feedbunks and a gate were located on the other side of the corral. About a week before the collision, the calves had been shipped to the defendant from Kentucky. Inspecting the corral after the collision, the defendant discovered that about one half of the calves were missing and apparently had escaped by knocking down a post on one side of the corral. The post served as a lock for the gate and support for the adjoining fence. The defendant's explanation as to how the calves escaped was that they were spooked by a coyote or bobcat, which caused them to hit and break the fencing.

The Mitchell County District Court refused to allow the plaintiff to bring the case on a res ipsa theory. Instead, the trial court cited previous Kansas case law for the proposition that res ipsa does not apply in livestock trespass cases. The court opined that the proximate cause of the plaintiff's damages was the spooking of the cattle, which made any of the defendant's actions the remote rather than the proximate cause of the plaintiff's injuries. The Kansas Court of Appeals upheld the lower court's decision to refuse application of res ipsa in livestock trespass cases.

It is highly questionable whether res ipsa should be applied in livestock trespass cases. Livestock do not always function in a predictable mauner such as machines. When a machine malfunctions, resulting in personal injury or property damage, it is generally because of either the operator's or manufacturer's negligence. However, livestock commonly escape a fence enclosure without any negligence on the part of the livestock owner. Accordingly, livestock present on a roadway should afford no res ipsa case against the owner unless, perhaps, the livestock have been shown to have been present on the road long enough so that the owner should have discovered and removed them before the accident.

Perhaps an even more significant problem with applying res ipsa in livestock trespass cases is that in those instances where the animal owner takes extreme precautions to ensure the livestock will not escape (perhaps by routinely checking fences and gates or constructing a fence of highest quality), the owner will have great difficulty in explaining how the livestock escaped. This actually fosters the application of the doctrine against the rancher and makes the rancher *more* likely to be found liable for any resulting injuries. Essentially, application of the rule results in a livestock owner being held strictly liable regardless of the amount of care exercised to keep the livestock enclosed. Such a policy seems appropriate in only certain limited classes of cases where the defendant is conducting activities that are extremely dangerous or have limited benefit to society. Cattle ranching in Nebraska and most other parts of the country falls in neither of these categories.

If the application of res ipsa to livestock trespass cases becomes more prevalent, it may be wise for livestock owners to have nothing beyond the statutorily minimum prescribed fence rather than expending the time and the money to build a more secure enclosure. It may also be wise for livestock owners to check their liability insurance policies for coverage against claims arising from escaped livestock. At least a million dollars of coverage is recommended. In any event, the state legislatures may want to consider corrective legislation.

—Roger A. McEowen, Assistant Professor of Agricultural Economics and Extension Specialist, Agricultural Law and Policy, Kansas State University, Manhattan, KS

Federal Register *in brief*

The following is a selection of matters that were published in the *Federal Register* from June 9 to July 23, 1997.

1. APHIS; Viruses, serums, toxins and analogous products; definition of biological products and guidelines; final rule; effective date 7/9/97. 62 Fed. Reg. 31326.

2. APHIS; International sanitary and phytosanitary standard-setting activities; notice and solicitation of comments. 62 Fed. Reg. 31781.

3. CCC; Livestock Indemnity Program; interim rule with request for comments. 62 Fed. Reg. 33982.

4. Farm Credit Administration; short- and intermediate-term credit; system and non-system lenders; proposed rule; comments due 9/15/97. 62 Fed. Reg. 38223.

—Linda Grim McCormick, Alvin, TX

Uncommon law/Cont. from p. 6

group affiliation or association; and

(3) Nothing in this section shall prohibit or in any way limit a person's lawful and legitimate access to the courts or prevent a person from instituting or responding to legitimate and lawful legal process.

C. As used in this section:

(1) The term "legal process" means a document or order issued by a court or filed or recorded for the purpose of exercising jurisdiction or representing a claim against a person or property, or for the purpose of directing a person to appear before a court or tribunal, or to perform or refrain from performing a specified act. "Legal process" includes, but is not limited to, a summons, lien, complaint, warrant, injunction, writ, notice, pleading, subpoena, or order.

(2) The term "person" means an individual, public or private group incorporated or otherwise, legitimate or illegitimate legal tribunal or entity, informal organization, official or unofficial agency or body, or any assemblage of individuals.

[29] See Idaho Code ch. 17; Ind. Code § 32-8-39-6 (1996); Wash. Rev. Code ch. 60-70 (1996); Mo. Rev. Stat. § 575.130 (1996).

[30] Op. Tex. Att'y Gen. No. DM-389 (May 2, 1996).

[31] See generally Philip K. Howard, The Death of Common Sense (Random House 1994).

[32] Boddie v. Connecticut, 91 S.Ct. 780, 784 (1971).

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agricultural law update

AMERICAN AGRICULTURAL LAW ASSOCIATION NEWS

San Joaquin Agricultural Law Review call for papers

The Editorial Board of *San Joaquin Agricultural Law Review* invites you to submit articles for consideration for the eighth edition of the *San Joaquin Agricultural Law Review* published by the students of San Joaquin College of Law, Fresno, California. The *San Joaquin Agricultural Law Review* welcomes novel and diverse points of view from all parts of the country. For more information, contact The Editorial Board, San Joaquin Agricultural Law Review, 901 Fifth Street, Clovis, California 93612. Telephone inquiries should be directed to Tracy Sagle, Executive Editor at (209) 261-2544.