

FRIEDMAN ON LEASES. By Milton R. Friedman. New York: Practising Law Institute, 1974. Two volumes plus softcover Indices. Pp. 955. \$75.

*Reviewed by Elmer M. Million**

This reviewer will first identify the author and mention some of his previous publications, especially those in the field of the treatise under review, before describing the organization, content, special features, utility, and prospects for supplementation, of the treatise itself. Although the author is widely known, circumstances make it appropriate to identify him clearly. Milton R. Friedman, according to the 1974 *Martindale-Hubbell Law Directory* listing of attorneys in New York City (where it also lists a Milton Friedman and a Milton H. Friedman), was born in 1904, received his B.A. ('25) and LL.B. ('28) from Yale, was admitted to the Connecticut Bar in 1928 and the New York Bar in 1929, served as law clerk to Judges Learned Hand and Thomas S. Swan, and is a member of the Manhattan law firm of Parker, Duryee, Zunino, Malone & Carter. He is not to be confused with the economist, Professor Milton Friedman of the University of Chicago.¹ Understandably, the author index in *Index to Legal Periodicals* sometimes avoids this confusion,² and sometimes succumbs to it.³

It is always appropriate to consider the previous publications of the author. In 1946 Mr. Friedman wrote *Preparation of Leases*, a Practising Law Institute (PLI) monograph of sixty-seven pages, of which eleven comprised a form of a commercial lease. Successive larger editions⁴ culminated in the tenth edition in 1962, and a 1965 printing

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1. For whom, consult 1 *WHO'S WHO IN AMERICA* 1081-82 (37th ed. 1972-73). Compare the photograph of the University of Chicago Milton Friedman in 51 *CHI. B. RECORD* 434 (1970) with that of Milton R. Friedman, in 47 *A.B.A.J.* 598 (1961).

HEREAFTER THE FOLLOWING CITATION WILL BE USED IN THIS BOOK REVIEW:

M. FRIEDMAN, *FRIEDMAN ON LEASES* (1974) [hereinafter cited as *FRIEDMAN*].

2. See, e.g., 16 *INDEX TO LEGAL PERIODICALS* 384 (1970-73); 14 *INDEX TO LEGAL PERIODICALS* 328 (1964-67); 13 *INDEX TO LEGAL PERIODICALS* 328 (1961-64).

3. 15 *INDEX TO LEGAL PERIODICALS* 329 (1967-70) lumps both together in its author index as "Milton R. Friedman"; 8 *INDEX TO LEGAL PERIODICALS* 910 (1946-49) lumps both together as "Milton Friedman."

4. The 1960 edition prompted one reviewer to say: "Here is a book [which] . . .

of that edition. He noted in his foreward to the treatise now under review: "This new work has made little change in the organization of material [that existed] in *Preparation of Leases*, despite [a great] expansion The general order of *Preparation of Leases* has been followed here."⁵ He also wrote *Contracts and Conveyances of Real Property* in 1954, which was widely and favorably reviewed,⁶ followed by a second edition in 1963. The latter's 1972 cumulative supplement is a separate paperbound volume of 337 pages, and the publisher has announced a third edition for fall 1974. It is a distinct service to the reader that the treatise under review provides citations to the second edition of *Contracts and Conveyances of Real Property* at various points where it deals with an analogous rule or a parallel situation. If the section numbering in the forthcoming third edition differs from that in the second edition, users of this new treatise on leases might do well to keep that second edition available for a quick means of access to the cited material in both such second and third editions of *Contracts and Conveyances of Real Property*.

Mr. Friedman has been listed as chairman of some PLI handbooks, including *Commercial Real Estate Leases—5th*⁷ and its superseded earlier editions. It should be noted that this handbook contains reprints of four articles by Mr. Friedman: (1) "Appurtenances: What a Lease Does Not State";⁸ (2) "Store Leases";⁹ (3) "Selected (Lease) Clauses";¹⁰ and (4) "Leases—A Bibliography."¹¹ Mr. Friedman has published a number of additional law review articles on conveyancing, mortgages, and leases. We need note but five:

the author calls a monograph To this reader [it] is a treatise." Isaacs, Book Review, 15 RECORD OF N.Y.C.B.A. 412 (1960).

5. 1 FRIEDMAN ix.

6. This reviewer counted over nineteen published reviews in legal periodicals, including Dunham, Book Review, 41 A.B.A.J. 351 (1955) (very favorable), and Mosburg, Book Review, 11 OKLA. L. REV. 243 (1958) ("printed on a very poor grade of paper," *id.* at 243).

7. PRACTISING LAW INSTITUTE, *COMMERCIAL REAL ESTATE LEASES—5TH* (1974).

8. *Id.* at 249-57, reprinted from 72 A.B.A.J. 151 (1966).

9. PRACTISING LAW INSTITUTE, *supra* note 7, at 261-72, reprinted from 37 N.Y. ST. B.J. 126 (1965). See also Friedman, *Selected Problems in Store Leasing*, 15 PRAC. LAW. 41 (1969).

10. PRACTISING LAW INSTITUTE, *supra* note 7, at 379-417, reprinted in part from PRACTISING LAW INSTITUTE, *COMMERCIAL REAL ESTATE LEASES—3D* (1971).

11. PRACTISING LAW INSTITUTE, *supra* note 7, at 479-505. This bibliography is an updated version of the bibliography appearing in *Commercial Real Estate Leases—4th*. Although not written by Mr. Friedman, another feature of the 1974 edition of the above course handbook is that it contains *Developments in Contemporary Landlord-Tenant Law: An Annotated Bibliography*, in PRACTISING LAW INSTITUTE, *supra* note 7, at 509-608, reprinted from 26 VAND. L. REV. 689 (1973).

(1) "The Nature of a Lease in New York," 33 *Cornell Law Quarterly* 165 (1947); (2) "Subleases: Protecting Subtenant's Possession by Agreement with the Prime Landlord," 3 *Practical Lawyer* 59 (1957); (3) "Landlord, Tenants and Fires—Insurer's Right of Subrogation," 43 *Cornell Law Quarterly* 225 (1957); (4) "Assignment of Lease by Tenant's Executor," 9 *Kansas Law Review* 425 (1961); and (5) "Leases—A Last Outpost of Feudalism," 26 *Record of N.Y.C.B.A.* 638-56 (1971).¹²

The text proper of *Friedman on Leases* consists presently of only two volumes, which are paginated consecutively. A third text volume is projected, and from occasional topical citations to it in the footnotes,¹³ it seems that its coverage will include discussion of such matters as: contracts to lease, lease security, covenants of quiet enjoyment, covenants against competing uses, fixtures, liquidated damages, conditional limitations, waiver of default, tenant's alterations and mechanics' liens arising therefrom, landlord's right to cure tenant's defaults; shopping center leases, use of premises, signs, and rights and obligations regarding electricity.

The two volumes' 770 pages contain nineteen chapters, the first nine being in Volume I. A preview of the work's scope may be sensed from this listing (in descending order of number of pages) of its five longest chapters: "Damage and Destruction of Leased Property" (85 pages); "Repairs" (79); "Renewals" (69); "Condemnation" (60); and "Percentage Leases" (54).¹⁴

The author's footnotes thriftily combine brevity with a richness of citations to pertinent sources. In addition to some 2,920 cases, the volumes cite numerous specific statutes (not merely from New York, but also from California and other states, including at least one modern English statute); a wide range of law review articles and notes;¹⁵ A.L.R. annotations;¹⁶ leading treatises on real property, damages, torts,

12. Friedman also reviewed RASCH, *THE NEW YORK LAW OF LANDLORD & TENANT AND SUMMARY PROCEEDINGS* (2 vols. 1950). Friedman, Book Review, 37 *CORNELL L.Q.* 135 (1951).

13. The third volume was apparently not far enough along to permit citing to its sections or pages, thus the citations are to topic title.

14. Similarly, it contains four chapters of medium length: "Default by Tenant" (51 pages); "Purchase Options" (43); "Surrender of Possession by Tenant on Termination of Lease" (42); and "Rent" (41).

15. Wide enough in subject matter to find Folb, *A Lessor Acceptance of Rents Accruing Subsequent to Known Breach of Condition as Waiver of Forfeiture*, 10 *N.Y.U. INTRA. L. REV.* 223 (1955). 1 *FRIEDMAN* 201 n.1.

16. All three series of A.L.R. are included. Occasionally a much earlier annotation is cited—e.g., 22 *L.R.A.* 613 (1894). 1 *FRIEDMAN* 308 n.11.

contracts, and insurance; various landlord and tenant treatises (for example, *Tiffany*, *McAdam*, *American Law of Property*, and *Underhill*); plus frequent citations to *American Jurisprudence, Second Edition* and *Corpus Juris Secundum*.

The apparently temporary paperbound book containing indices and tables excellently directs the researcher into the two bound volumes. It starts with a five-page Index of Forms. Except for cross-reference entries, each entry cites the precise subsection in which the form is printed (for example, "7.303e3"), with "n" added wherever the form cited appears in a footnote. Failure to state the page or the exact number of the footnote is rarely inconvenient, since there is a limited number of pages and footnotes in a given subsection.¹⁷ Although agreeing that slavish copying of "standard" forms can be disastrous, the author nonetheless stresses the importance of referring to forms in preparing complicated commercial leases. He adds that

[s]ome form books cite the cases from which their forms were taken, as if involvement in litigation gives them a cachet. The forms included here have, with rare exception, *not* been the subject of litigation. Whenever any of these forms needs construction by a court, it will be stricken from any future edition.¹⁸

This reviewer suggests that emphasis should be placed on the word "needs," for no construction is too far-fetched and unthinkable to be asserted before some court, occasionally by an attorney who has an additional ground which is much more plausible. Where the trial court's rejection of a claimed construction (or an asserted ambiguity, vagueness, or solecism) was later unanimously upheld in the intermediate and final appellate court decisions, neither the fact that the contention was made nor its having been mentioned in the opinions unqualifyingly rejecting it, need cast any shadow on the word, clause, or form involved.

17. For example, the eighth form cited is listed as "7.304e, n.". Although section 7.3's subdivisions cover over thirty-seven pages, and section 7.304's subdivisions cover 18 pages, the precise subdivision "7.304e" covers only four pages, which include its twenty footnotes, so the form referred to is readily found in note 18.

The treatise calls each subdivision a section, but the arrangement of numerals below the decimal, and the indentation used in the Table of Contents and at the beginning of a given chapter, clearly indicate that in substance the progression is to subsection, subsection, etc. The Index of Forms states that its references are to sections, hence it wisely omits section symbols from its references. Two exceptions occur. See FRIEDMAN, INDICES AND TABLE 2, 3. In both instances the first reference is "16.4," followed (in the first instance) by "Sec. 19.05*" with an asterisk note explaining, "Refers to Section within text." This means the reader should consult 16.4, which contains a specimen lease form having nine consecutively numbered clauses, each called a section in the form itself. As these clauses occupy over eight pages, this exceptional reference directs the reader to the exact page and paragraph he wants.

18. 1 FRIEDMAN x.

Next is the 146-page Table of Cases, containing in the neighborhood of 2,920 cases.¹⁹ Its single alphabetical sequence includes not only state and federal cases, but also English and any other foreign cases cited. Where a case had passed through several courts at the time the text was written, the Table usually carries citations to each reported decision.²⁰ Entries for cases from the lower or intermediate federal courts indicate the circuit or the specific district involved. Because the author practices in New York City, some may wonder if this treatise relies too heavily on New York cases. In view of the great, if not currently preeminent, importance of New York law in the commercial lease field, how heavily would be "too heavily" is not clear, but a random check of ten pages of the Table indicated that about one fourth of the cases were from New York courts.²¹

The paperbound volume concludes with a thirty-three page topical Index, which cites to subsection (or lesser subdivision) and again adds "n" when citing to any footnote in a given subdivision.²²

A law text may well lose many potential readers if its reviews label it with either the epithet "practical" or "scholarly," since many readers regard these words' connotations as mutually exclusive. This

19. This reviewer's estimate.

20. Thus the New York case of *Estate Property Corp. v. Hudson Coal Co.* appears twice in the Table, the first listing giving two parallel citations each for the trial court report, the Appellate Division report, and the Court of Appeals report. FRIEDMAN, INDICES AND TABLE 45. The Table next lists the same case name but with citations only to the appellate reports, *id.* at 46, yet both entries cite the same three text pages, two of which cite all three courts and one of which cites only the appellate courts.

The Table of Cases cites Supreme Court reports only to the official ("U.S.") report, but with the year of decision added. State cases are cited to both the official and National Reporter System reports, plus the year of decision and, where needed, the trial, intermediate, or highest court is indicated.

The Table cites to page numbers (not to sections) without indicating which volume of the treatise is meant, but as the two volumes are paginated continuously, all references to pages 1 through 389 are in Volume I, with Volume II being intended in all references to pages 391 through 770. The paperback volume is independently paginated, so the reader need remember only that "390" is the dividing line between the two volumes. The first page of the Table might well have covered this point, but it did not. Nor did it recite that citations were to page numbers, but this quickly becomes obvious to the reader, since all sections in the text are decimal numbers.

21. A preliminary examination of the 112 cases cited on six randomly picked pages of the Table showed twenty-seven New York decisions. The remaining eighty-five cases included ten from California, seven from New Jersey, six each from Pennsylvania and Iowa, five each from Minnesota and Missouri, four each from two other states, three from each of four other states, two each from four other states and from the Supreme Court of the United States, one each from fourteen additional states, and two from England.

22. The cross-references, in footnotes, to the projected third volume are, not improperly, ignored in the index itself.

treatise is, however, properly termed both "practical" and "scholarly," using both words denotatively and neither word epithetically. An example, and a noteworthy feature, is the way in which the numerous lease clauses are scattered throughout Volumes I and II, so that each appears within or immediately following the part of the text which involves the question (or adverse rule) it is designed to answer (or avoid). Thus, in the chapter on repairs, nine forms of a repair clause are successively set forth.²³ The condemnation chapter ends with twelve different condemnation clause forms, with a terse explanation of the type of premises or lease for which each one is intended, including the troublesome problem of partial takings in condemnation proceedings.²⁴ Nor is the form always a single clause. The chapter on default by tenant ends with a tenant default form containing nine sections, and two of its footnotes suggest objections to or possible variations from a given section.²⁵ After discussing rent and tax escalations, and various bases for the former, the author presents a lengthy escalation clause based on increases in taxes and operating expenses, another one based on increases in the cost of living index, and a footnote suggesting how the content of the two different clauses may be combined.²⁶ After discussing prohibitions against a tenant assigning or subleasing, the author sets out a general nonassignment clause,²⁷ and then, after further discussion, a modified nonassignment clause.²⁸ Following a textual discussion of the tenant's assignment of a lease and assumption thereof by the assignee, and the consent thereto by the landlord, the author presents a complete form covering these items,²⁹ followed by comments on some of its provisions.³⁰

Another form seeks to avoid the Rule in *Dumpor's Case*³¹ and to prevent any waiver arising by a landlord's acceptance of rent after learning of a breach.³² The landlord's exculpatory clause, upheld in New York by a decision later overruled by statute, appears near the beginning of a scholarly examination of both the common law qualifi-

23. 2 FRIEDMAN § 10.9. Included is a repair clause for an apartment lease, two for an office lease, three different ones for store leases, one for undeveloped property, etc.

24. *Id.* at 529-48.

25. *Id.* at 695-703, 696 n.2, 697 n.3.

26. 1 *id.* at 94-99 & 99 n.2.

27. *Id.* at 182-83.

28. *Id.* at 185-87.

29. *Id.* at 232-34.

30. *Id.* at 234.

31. 76 Eng. Rep. 1110 (K.B. 1578). Succinctly stated, the Rule in *Dumpor's Case* is that if a landlord consents to an assignment, the prohibition against assignment is completely extinguished. 1 FRIEDMAN 202-03.

32. 1 FRIEDMAN 205 n.18.

cations on the effectiveness of such clauses and their statutory invalidation in a number of named states.³³ A special exculpatory clause to protect a landlord who is a trustee (or acting in some other representative capacity) from personal liability to the tenant is presented in a discussion of the need for and effect of such a clause.³⁴ The final form is a two-page clause for lease take-over, which immediately follows a discussion of the reasons for the device and of two measures adversely affected landlords have attempted.³⁵

Having noticed only a few typographical or other obvious errors,³⁶ this reviewer surmises that this treatise has substantially fewer such errors than the average law book. The enormous Table of Cases, however, understandably has several errors which the reader may wish to correct in his own copy.³⁷

A few comments are needed concerning the shorter chapters, their importance being greater than their few pages might seem to indicate:

Chapter 1. "Introduction—The Nature of a Lease." This ten-page chapter, though having a single section, ably summarizes the

33. 2 *id.* at 705-18; *cf. id.* at 720-22.

34. *Id.* at 718-20.

35. *Id.* at 765-70. Note that the "take-over lease" is the earlier lease the desirable tenant made with the first landlord. It is this lease which the second landlord "takes over." In other words, the first lease is really the taken-over lease.

36. A case cited as "21 Cal. 2d 411, 132 P.2d 457 (Dist. Ct. App. 1942)," 1 FRIEDMAN 3 n.9; *id.* at 7 n.21; and *id.*, INDICES AND TABLE 93, should be cited as "Medico-Dental Bldg. Co. v. Horton & Converse, 124 P.2d 56 (Dist. Ct. App. 1942), dissenting opinion in 125 P.2d 610, *superseded*, 21 Cal. 2d 411, 132 P.2d 457 (1942)." On page 721, the section heading correctly says "§ 17.3," but on page 722 it unaccountably reads "§ 17.2." The meaning of the last text sentence on page 580 is obscured by a misplaced comma, and could better read: "This opinion, and several others it relied on, merit quotation at some length."

37. The Table misplaces the *Messall* case between citations of two successive decisions in *Meserole*. FRIEDMAN, INDICES AND TABLE 94. Page 95 of the Table of Cases lists all but one of the *Miller* cases then ends with a *Mitchell*, and atop the next page is listed another *Miller*, plus a half page of other listings before *Mitchell* is again reached. This last error could mislead, so should be cured by inserting the misplaced *Mitchell* in its proper place and obliterating its premature listing. Similarly, *Nassau* improperly precedes *Nash*, and *New Atlantic* improperly precedes *New Amsterdam*. The table (on page 94) inserts next to *Meyers* the citation "Myers v. Burns, 35 N.Y. 269," and this error is not entirely cured by inserting in its proper place (on page 99) "Myers v. Burns, 33 Barb. 401, *aff'd*, 35 N.Y. 269," because the latter shows the case as being cited only on page 426, while the misplaced entry showed it as cited on pages 439 and 440 only. The Table lists as being cited on page 45 of the text, "Morgan v. Smith, 5 Hun. 220 (N.Y. 1875)" and in the next line lists "Morgan v. Smith, 70 N.Y. 537 (1877)" as being cited on page 232. The period after "Hun" is incorrect, but the citation on page 45 is not inaccurate in failing to mention a later history for the case—70 N.Y. 537 is an affirmance, not of the 5 Hun 220 decision, but of 7 Hun 244, another general term decision by the same department of the supreme court.

common law rules as to the rights, duties, and remedies between landlord and tenant, with footnote references to sections in later chapters where the individual rules are elaborated. In most instances these latter sections precede the exposition of statutory and decisional encroachments upon the common law rule. Also listed are a number of law review articles attempting to show (usually for a single jurisdiction) the extent to which the modern lease is a contract rather than a conveyance. The author here criticizes Professor Dale Bennett's suggestion that "[t]he task of modern courts has been to divorce the law of leases from its medieval setting of real property law, and adapt it to present-day conditions and necessities by means of contract principles"³⁸

*Chapter 2. "The Parties."*³⁹ In stressing that the landlord, before leasing, should make sure of the legal capacity of the tenant, the author cites the example of a "candidate's committee" that seeks a short-term lease of a vacant store as a headquarters for its candidate. The landlord may not realize that if the "committee" is not a recognized legal entity, it cannot be held liable for the rent.⁴⁰ He also stresses the importance, in cases of long-term leases, of the tenant making sure that the landlord has title and, if holding in a representative capacity, authority to make the lease, and that neither the landlord's deed nor applicable statutes or zoning laws prevent the use the tenant contemplates. He explains that his treatise uses "landlord" and "tenant," instead of "lessor" and "lessee," to avoid the drafting errors frequently arising from inadvertent use of one of the latter terms when the other is intended.

Chapter 3. "The Premises." The author considers whether listing the apartment number, plus the street address, city, and state in which the apartment building is located, is a sufficient description of the leased premises, and whether a lease of a "house" or "building" carries with it the "yard," *i.e.*, the rest of the same lot or even an-

38. 1 FRIEDMAN 8-9 (emphasis added), citing Bennett, *The Modern Lease—An Estate in Land or a Contract (Damages for Anticipatory Breach and Independency of Covenants)*, 16 TEXAS L. REV. 47, 48 (1937).

39. Chapter 2 has barely more than four full pages.

40. 1 FRIEDMAN 11-12. The landlord must also consider: (1) the risk that the interior will seem a shambles after the winner's victory party or after the loser's supporters melt away; (2) suggestions that he might let the space rent free as his contribution; (3) adding enough to the rental figure that the landlord can have the place cleaned up, in lieu of a deposit for securing the cleaning; (4) such tenancies are usually of short duration and may be for a factually uncertain length (if the candidate runs out of money, is defeated in the primary, or loses in the first primary so badly that he does not make the run-off); and (4) a long campaign obviously increases the risk of losing a prospective desirable tenant for a substantial term who needed prompt occupancy.

other contiguous lot owned by the lessor. He gives substantial coverage to appurtenances, and carefully presents some atypical situations in which the tenant does *not* acquire a right of access by a particular entrance or to adjacent areas which the tenant owns or holds under a different lease.

Chapter 4. "The Term—Possession." Into eight pages is crammed a discussion of the requirement that the commencement and end of the lease term be indicated in the lease with reasonable certainty,⁴¹ and a discussion of the lessee's remedies against the lessor for failing to deliver possession (including the evolution of the present "New York" rule) and against a holdover tenant who failed to vacate.

Special mention might also be made of the detailed tables showing various percentage rents, in various large cities, for about sixty-four different categories of types of stores;⁴² a lucid discussion of the normal inapplicability to transfers by operation of law of a lease covenant against assignments by the lessee;⁴³ the fifteen-page chapter, "Mortgages," into which a discussion of the tenant's rights against the landlord and the foreclosing mortgagee of the fee is deftly compressed;⁴⁴ and the five-page chapter on services the landlord might be expected to render to an office tenant, which chapter includes an elaborate catalogue of cleaning services.⁴⁵

From its first publication, *Lesar on Landlord and Tenant*⁴⁶ has seemed to this reviewer the best modern general work on American landlord and tenant law. Even before the third volume appears, the work here reviewed must be accorded first rank. It is already over

41. Although citing *Stanmeyer v. Davis*, 321 Ill. App. 227, 53 N.E.2d 22 (1944), cited in 1 FRIEDMAN 52 n.6, the treatise does not directly comment on the effect of a wartime lease "for the duration of the war," a matter which arose both here and in England. A 1944 English decision thereon was speedily overturned by the statute of 7 & 8 Geo. VI, c.34 (1944).

42. 1 FRIEDMAN 109-14.

43. *Id.* at 180-81. Although citing the leading New York Case (*Francis v. Ferguson*, 246 N.Y. 516, 159 N.E. 416 (1927), cited in 1 FRIEDMAN at 181 n.2), the author fails to note a 1965 statutory amendment which renders that decision inapplicable in part as to post-amendment leases either wholly for residential use or for residential and professional use. See N.Y. REAL PROPERTY LAW § 236 (McKinney 1968).

44. 1 FRIEDMAN 289-303. Mortgages of the leasehold had been amply discussed in the immediately preceding chapter, and a seven page form had been provided for insertion in leases in which the mortgaging of the leasehold is envisaged. *Id.* at 261-87.

45. *Id.* ch. 12.

46. H. LESAR, LANDLORD AND TENANT (1957). Originally appearing as Part Three of Volume One of *American Law of Property*, *Lesar* was separately reprinted in 1957 under its independent title, having added a chapter on federal taxation, a selection of lease forms, and a bound-in supplement. The chapter on federal taxation appears also in the later pocket parts of Volume One of *American Law of Property*.

twice as extensive in content as is *Lesar*, is twelve years later than the latest annotation (supplement) to *Lesar*, and in addition it is to be kept up to date by supplements (corroboration: each of the hardbound volumes has a pocket in its inside rear cover). Although it could be argued that this new treatise should be titled "Commercial Leases"—indeed, it is primarily concerned with that class of leases—it nonetheless also applies to residential leases, including apartment leases. It is, of course, not intended to govern so-called "equipment leases," and a young lawyer would want to consult additional sources before advising a client on a crop-rent lease of a farm. But when should a lawyer ever confine himself to looking at a single source?