

## PROPERTY OUTLINE

Be concerned with *facts, holding, and policy*. Note, procedure is *not* important here.

Outlining: Topic, Rule of Law, Elements, Arguments, Case as an Example, Policy. Then take 35 page outline and turn it into a 4 page outline.

Know the 5 types of easements. What's important is the hypos and what we do in class.

Restrictive Convenants, Equitable Servitude, NRE, There will be one one-hour exam question on this.

Tests elements of rules, stretch the rules in different ways, policy.

Say there are "x" doctrines that apply, go through each one and argue back and forth.

Final exam: 2 long questions, 1-2 short questions. 3 – 3 ½ hours.

## **LAW OF FINDERS**

Concepts in considering who gets property:

- I. Labor Theory
  - a. Reward person who brings item to life, punish inactivity (t.o. must make some effort to get it back)
- II. Law and Order
  - a. Deter theft and criminal activity, prevent people from going on others' land to take stuff
- III. Economic Theory
  - a. Put items back in stream of commerce, do this quickly (within 5-10 years)
  - b. Clear property rule, minimize transaction costs
- IV. First in Time
  - a. Priority to first finder, neutral rule to prove priority (Ex. Patent, First Inventor)
- V. Proximity
  - a. Finder is closest to true owner
  - b. Finder knows how, when, and where he/she found the item
- VI. Bailments
  - a. Possession, 3<sup>rd</sup> person, lost

First finder has property rights over world except the true owner. Exception: Mislaid property goes to owner of property.

RULE: An owner of property does not lose title by losing the property. The owner's rights persist even though the article has been lost or mislaid. As a general rule, the finder has rights superior to everyone but the true owner. Losing the article does not make one lose rights. (watch example)

One who finds lost property does not become its owner. A finder does, however, obtain a sufficient interest in the lost chattel so as to be entitled to the possession of it against all the world but the true owner. The finder can bring an action for conversion, trespass, or replevin to enforce the right to possession against other third persons.

RULE: Prior possessor wins: A prior possessor wins over a subsequent possessor is an important and fundamental rule. It applies to both personal property and real property. Reasons:

1. Prior possession protects an owner who has no sign of ownership. Possession is not the same as ownership. Ownership is title to the property. It's usually proved by showing documents by the previous owner transferring title to the present title holder. Possession is proved by showing physical control and the intent to exclude others. Possession is easier to prove than ownership. An owner always wins against a mere possessor.
2. Entrusting goods to another is an efficient practice, facilitating all kinds of purposes that ought to be encouraged. For example, in *Armorie*, the jeweler is a bailee who must surrender the goods to a prior possessor. Same in dry cleaning or loaning a friend something.

3. Prior possessors expect to prevail over subsequent possessors. By giving them their expectations, the law reinforces the popular belief that the law is just.
4. The protection of peaceable possession is an ancient policy in law, aimed at deterring disruptions in the public order.
5. Protecting a finder who reports the find rewards honesty.
6. Protecting a finder rewards labor in returning a useful item back to society.

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Armorie v. Delamirie-

The finder does not acquire absolute legal title, but has property rights against all but true owner. Based on Law and Order.

“Doctrine of Unclean Hands” – Leave it where it is – court doesn’t want to get involved. And, don’t encourage more thefts – try to preserve law and order. You should also consider where it was found (street, mall, private home, etc..)

RULE: The prior possessor wins rule applies to objects acquired through theft or trespass. If A steals, gives to B, and B won’t give back, B is liable to A. Rationale: To rule in favor of B would not likely deter crime, but it would likely immerse owners and prior possessors in costly litigation to prove they are not thieves.

**FINDER v. OWNER OF PREMISES**

Hannah v. Peel-Owner not in possession: If the owner of the house has not made it his personal space, the owner of the house is not in constructive possession of articles inside that he may not know about.

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Landlord	---	Tenant	---	Finder
(Attic, Underground)		(Possessor of Real Property)		

Policy Implications of Hannah v. Peel:

Finders arguments based heavily on rewarding labor; PO on law and order and ownership

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If finder is **trespasser**, the owner of the premises where the object is found always prevails over the finder. (Ex: “finding” something behind a cash register in a store.)

If finder is an **employee** of the owner of the premises, some cases hold that an employee cannot keep the object because the employee is acting for an employer in the course of his duties. But, rewarding honesty is a social good, and rewarding the report of the find may encourage a report, which is the 1<sup>st</sup> step in getting an object back to its owner.

South Staffordshire Water v. Sharman- If finder **is on the premises for a limited purpose** (ex: cleaning a stopped up drain), it may be said that the owner gave permission to enter only for a limited purpose of cleaning, under the direction of the owner, and the owner of the premises is entitled to objects found.

In **Pollock and Wright’s essay on Possession in the Common Law:** “The possession of land carries with it...possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also.”

Likewise, items found under or **embedded in the soil** are awarded to the owner of the premises, not the finder. Rationale: Owners of land expect that objects found underneath the soil belong to them, they think of these objects as part of the land itself.

Exception: **Treasure Trove**. Treasure trove is found gold, silver, or money intentionally buried or concealed in the soil w/intent of returning to claim it. Under English law, treasure trove belongs to the state. Americans generally reject this. Some give it to finder, others to land owner. Must determine if the trove is lost or mislaid.

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RULE: Object **found in a private home** are usually awarded to owner of home. Rationale: The homeowner has an intent to exclude everyone and to admit persons only for specific limited purposes (dinner, deliver laundry) that do not include finding property. Also, the homeowner has strong expectations that all objects inside the home inc. those of which he is unaware, are his.

RULE: Object found in public place: Use lost-mislaid distinction.

### LOST V. MISLAID

RULE: Lost property is property that the owner accidentally and casually lost, ex. Stuff on ground. Lost property goes to finder. Mislaid property is property intentionally placed somewhere and then forgotten. Mislaid property goes to owner of the premises. Rationale: Facilitate return of object to true owner. Since it is assumed the object was intentionally placed where it is found, it's likely the true owner will remember where she placed it and return to claim it. BUT, after time, a mislaid item may become lost property. Also consider how item ended up in the place it was found.

PROBLEM: It is assumed that only people who mislay items will retrace their steps in an effort to find the items. However, in reality, many people, whether they lose or mislay items, will retrace steps to find the missing object.

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**Bridges v. Hawkesworth** - (Banknotes on ground) Rule: If something is **lost in the public part of a private place**, and the owner of the private place is unaware of the item, the **finder has title** superior to owner of private place. The finder's right to possession must be protected to preserve law and order. If it weren't, then it would encourage theft and violence.

**MCAVOY v. MEDINA**- (Wallet on store counter.) Property that's placed and accidentally left isn't lost property, and finder has no right to own. The owner of the premises where item was mislaid becomes a bailee of the property and must use reasonable care for its safekeeping until its return to owner.

CONSIDER: If person just took the wallet did they steal it? \*Depends on their intent. Mislaid rule applies to a big purse left on the ground, put that raises competing policy issues.

RULE: Abandoned property is awarded to the finder – you want to reward the finder and bring item back into commerce. Also, the shopkeeper has the best chance of getting it back to its rightful owner.

### ADVERSE POSSESSION

Theory: If, within the # of yrs specified in the statute of limitations, the owner of land doesn't take legal action to eject a possessor who claims adversely to the owner, the owner is barred from bringing an action in ejectment. Once the owner is barred from suing in ejectment, the adverse possessor has title to the land.

Policy Implications:

AP – Reward for labor (they've been more productive, actively using the land)

TO – Punish inactivity/non-use, or not checking on their property

Lost Grant Theory – It is plain, clear trespassing, but some courts say, “if they've lived on the land for 50 yrs, surely they bought it at some point and lost the grant.”

Title Clearing Function- Society benefits from having clear owners. When someone gains adverse possession, they gain new title to the property, and their right to possession is good against all else, including the original owner. However, the title cannot be recorded in the courthouse unless AP files a quiet title action.

**\*\*\*\*\*Elements of Adverse Possession:**

1. **Actual entry giving exclusive possession (if going for full ownership, must have typical, normal activity as well)**
2. **Open and Notorious use (mistake v. intentionally)**
3. **Adverse and under a claim of right (as opposed to with consent from the true owner)**
4. **Continuous under statutory period**

Protect land by: 1. Survey          2. Title Insurance, or          3. Fence

Full ownership v. easements (passageways, rights of way)

Crossing is usually just sufficient for easement, easements are comparatively easy to get.

If have 10,000 acres, and someone tries to adverse possess by having home on one acre, true owner may argue they have been on land, but did not see that one acre was being adversely possessed. Lawyer may go for the whole thing, but it may be difficult. May try for whole, but offer separate claim to just the one acre.

**Claim of Right/Claim of Title-** The possessor's actions must look like they are claims of ownership of someone else's land and under a claim of right, meaning the AP is occupying the land without the permission of the owner. The person is claiming adversity, saying I have rights, it's mine now!

**Color of Title-** Written document intended to give ownership but for some reason it doesn't. Having a color of title helps tremendously for someone trying to AP land. Supports Title Clearing Function and Expectation of What Bought.

**NOTE:** First argue and push policy, then push color of title.

**Three Views:**

1. State of mind is not relevant – Actions count more than words. (Majority View)
2. Good faith claim – Potential AP'er must have a good faith belief that he has title, no AP for squatters
3. Aggressive trespasser.

**Ewing v. Burnet-** The sort of entry and exclusive possession that will ripen into title by AP is use of the property in the manner that an average true owner would use it under the circumstances, such that neighbors and other observers would regard the occupant as a person exercising exclusive dominion.

**Van Valkenburgh v. Lutz-** Many states require acts on the land by AP to get AP. Unless person has color of title, they may need to demonstrate that in the course of their AP, they "cultivated or improved the land."

Example: If someone's been parking on neighbor's gravel for 20 yrs, that's enough for adverse possession. Neighbor's best argument would be that he let it happen, the parking was with his permission. Would have been better if A wrote a letter to B letting him know that he may revoke the deal at any time or set up a cheap rent deal, maybe \$1/month or so.

**Mannillo v. Gorski-** When the **encroachment of an adjoining owner is of a small area**, and the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure, the encroachment is **NOT open and notorious**. In such case, the statute of limitations will not run against owner unless owner has actual knowledge of the encroachment.

**Howard v. Kunto-**

1. Prior to statute of limitations, AP'er has rights like a possessor, which she can transfer to another, called tacking. [But, to tack, there must be privity of estate between the 2 possessors. Where the transfer is not voluntary, no privity. Privity is required because title by AP is viewed as something to be gained by meritorious conduct, and an involuntary transfer is not regarded as meritorious.]
2. Use of a summer home only during the summer for statutory period is continuous use.

**Three Doctrines for Resolving Boundary Disputes**

1. Agreed Boundaries – If there’s uncertainty between neighbors as to the true boundary line, an oral agreement to settle the matter is enforceable if the neighbors subsequently accept the line for a long period of time.
2. Acquiescence – Long acquiescence, even though it may be less than stat of limitations, is evidence of an agreement between the parties fixing the boundary line.
3. Estoppel – One neighbor makes representations about or indicates the location of a common boundary and the other neighbor changes her position in reliance on the representations or conduct.

**Innocent Mistake Issue**- If you intentionally take some of your neighbor’s property, you do it at your own risk. The adverse possessor usually gets the lesser of the 2 values – fair market value or \$ spent on improvement. It’s a rare case when the court orders the building to be moved out of the ground.

**Disabilities Law** – Disabilities law has come under assault because those with disabilities usually have a guardian looking over their affairs. Only 3 disabilities, minority, unsound mind, or imprisoned. Disabilities are hard to find out about. NOTE: Disability must exist at the time adverse possession starts.

**O’Keefe v. Snyder**- When an item is stolen, and there is a true owner, and the item reappears, should AP or SOL be applied to ban true owner from recovering property? When does SOL start? Compare the two:

Adverse Possession

- To get *open and notorious*, one should display the art in well-known museums.
- Register with the Stolen Art Registry
- **DZ says:** AP doesn’t work as well with movable objects, because it doesn’t have the title-clearing function.
- Why argue AP if you are in similar situation as O’Keefe?  
Issue of Proof, because theft would have to prove he has had it for a continued period of time, and usually art is sold. For example, when it is taken in to be framed, was the gap long enough as to restart the clock on AP? Maybe! O’Keefe could win based on not enough proof for AP. Thief may have to have someone testify.  
**DZ says:** O’Keefe could win on open and hostile. That must be very open, and with sales, you have the tacking issue.

SOL

- Burden of proof is on O’Keefe. She must show she acted as a reasonable person would in discovering the loss.
  1. Notify police and do it fairly quickly.
  2. Notify Stolen Art Registry.
    - Satisfies Burden of searching
    - Takes away anyone’s right to be a good-faith purchaser.
- Strongest Claims: She lost goods in a wrongful way. Applying SOL helps thieves and hurts innocent people.
- Also, Strong Claim: She couldn’t have known who stole it. Regardless of what she did, she wouldn’t find it. (A quick sale by the thief would hurt this argument.

ON TEST: First examine AP, then SOL, and determine which doctrine fits better. For art, SOL fits better.

**LANDLORD-TENANT LAW**

Background: Property law sets up the default rules, but contract law may amend. Most leases now have a contract clause. LL is the TO, transfers interest in real property to the T who gets present possession. The longer the lease, the greater the interest and the greater the rights.

Types of Leases:

1. Term for Years – Most common. The lease is for a specific period of time with start and end dates.
2. Periodic Tenancy – Could be week to week, month to month, year to year. LL and T have periods that could be renewed continuously until someone terminates the lease.
  - a. Express Lease
  - b. Implied Lease – By actions of parties (paying every month, assume month to month lease)
3. Tenancy at Will – Often turns into a PT due to actions. Either party has right to terminate. May also have Tenancy at Sufferance. Courts almost always convert this to a periodic tenancy through actions.

## I. LEASEHOLD ESTATES

**Garner v. Gerrish** – If the agreement does not create a term of years or periodic tenancy, but the tenancy is to continue so long as the T wills, the T has a life estate determinable. L leased land to T “so long as T should wish.” This creates a life estate in T, determinable on his death or prior relinquishment of possession.

Common law stopped allowing one-way terminations. (No category allows a 1-sided T at will.) Policy Problems include:

1. Takes land off the market.
2. The person may pass away and pass it on to their kids who want to stay. Real problem for LL.

**Crechale & Polles, Inc. v. Smith** – In most jurisdictions, holding over gives rise (at the LLs election) to a periodic T. The courts usually hold the term is the way rent is reserved in the lease or the length of the original term, but in either case, the maximum length is one year.

Once a LL elects to treat a T as a trespasser, and refuses to extend the lease on a month-to-month basis, but fails to pursue his remedy of ejecting the T and accepts monthly checks for rent, the LL in effect agrees to an extension of the lease on a month-to month basis. The LL should say “I accept this check as one of 12 payments on a holdover.”

Double Rent Doctrine – If you’re supposed to move out on a certain date but for some reason you can’t (sick child, storm, etc..) then you may not be responsible for a holdover on the lease but you may be charged double until you’ve moved out.

## II. THE LEASE

Lease – Conveyance of property from LL to T for a length of time. The conveyance gives the T increased responsibilities. The lease may include both property and contract law.

To have a LL-T relationship, the LL must transfer the right to possession of the premises to the T. It is the right to possession that distinguishes the lessee’s interest from an easement, license, or profit.

The *intention of the parties* is most important in determining if it is a lease or something else. (contract, easement, etc.)

Lease distinguished from other relationships: Transfer of possession is the key. Also intent of parties. Further consider:

1. Uses permitted: Since possession of a space implies that the space can be used for a wide variety of uses, the more the use of the space is limited, the more likely it is that a lease has NOT been created.
2. Defined area: Since possession implies possession of a defined area and not a right to wander at large, the more specific the description of boundaries the more likely it is that a lease has been created.
3. Rent reserved: A lease usually calls for periodic payment of rent, whereas an easement is usually purchased with a lump sum payment. The reservation of a periodic rent indicates a lease.
4. Duration: A lease is usually limited in time, whereas an easement is not. A grant of a property right for a specific duration, not unlimited in time, indicates a lease.

Hotel Guest – License/contract, not lease. Why? B/c the guest’s interest is very limited, and the hotel has great control.

Billboards- Even if say “lease,” a vast majority are contracts.

Weekly or Monthly furnished apartment – May become LL-T lease, even if have maid service. Stronger w/o service.

## III. SELECTION OF TENANTS

The FHA makes it unlawful to refuse to sell or rent a dwelling to any person b/c of race, color, religion, or national origin. In 1974 it was amended to prohibit discrimination on the basis of sex. In 1988, to prohibit discrimination against persons with children except in senior citizen housing, and against handicapped persons.

- A. Advertising: The FHA prohibits advertising or making *any public statement* that indicates any discriminatory preference.
- B. Exemptions:

1. Single Family Dwelling – A person is exempt if she (a) doesn't own more than three such dwellings, (b) does not use a broker, and (c) does not advertise in a manner that indicates her intent to discriminate.
  2. Small owner-occupied multiple unit – A person is exempt if she is offering to lease a room or an apartment in her building of four units or less, one of which she occupies, and she does not advertise in a discriminatory manner.
- C. Compare with Civil Rights Act – The CRA has no exemptions. Thus, the person discriminated against may be able to sue someone exempted by FHA if denied on basis of ancestry or ethnic characteristics under CRA.
- Example: O inserts an advertisement offering to rent a room in her home to a white person. O is in violation of the FHA prohibition against discriminatory advertising. If O doesn't advertise, she is not in violation of the FHA if she refuses to rent to blacks. However, if O refuses to rent to blacks, O is in violation of the CRA, which contains no exemptions for owner-occupied dwellings.
- D. Enforcement – An aggrieved person may sue the seller or LL in federal court w/o regard to the usual jurisdictional requirements as to diversity of citizenship and dollar amount in controversy, and w/ the right to a court-appointed attorney. The court may give the P an injunction, actual damages, and punitive damages.

§ 3604 of Federal Fair Housing Act (FHA): Discrimination in Sale or Rental of Housing..... (p. 436-437)

- a. You can discriminate on any basis not listed, according to federal rules, but some states have said this is just illustrative and they allow more classes that they can NOT discriminate against. (Ex: In CA, they could not keep kids out of neighborhood without good reason, such as safety concerns.)
- b. Cannot have different standards (varying price) for different potential tenants, or cut off services (garbage or water) for certain people.
- c. NO discrimination in advertising, and there are NO exceptions to this.
- d. Prevents sellers from saying a place is “off the market” so they don't have to sell to a certain person, when the place is, in fact, still for sale.
- e. If you induce realtors to bring certain types of people into the community, you violate the FHA.
- f. Requirement to not discriminate against handicapped people. It's a blending of FHA and ADA. This is at the expense of the owner of the dwelling, so courts are more reluctant to push this.

§ 3603 (FHA)

- a. They are NOT attempting to wipe out retirement communities, religious groups, or private clubs.
- Limited exceptions to §3604: people who have a max of 3 homes. You can't use a broker or agent if you want to discriminate. You can discriminate w/ a room in a private home, but you can't in advertising. You can also discriminate if you live in part of (up to a) 4-plex, in renting other dwellings.

Civil Rights Act of 1866 (42 USC §1982) – “All citizens of the US shall have the same right in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.”

- Bars racial or ethnic discrimination only. Meaning “identifiable... b/c of their ancestry or ethnic characteristics.” A person denied a lease b/c of their religion cannot sue under §1982.
- Applies to all property transfers, not just housing. Commercial leases, too.
- Remedies: Injunction against the LL or seller, or damages.

**Soules v. Dept. of HUD** – To prove a violation of the FHA or §1982, the P must *first* establish a prima facie case. To make a prima facie case, the P must show:

1. She is a member of a statutorily protected class;
2. She applied for and was qualified to rent the designated dwelling
3. She was denied the opportunity to inspect or rent the dwelling, and
4. The housing opportunity remained available for others.

*Second*, if the P makes a prima facie case, the burden shifts to the D to produce evidence that the refusal to rent was motivated by legitimate considerations having nothing to do with Ps race, religion, ethnic origin, disability, or family status. If the protected status is even one of several motivating factors, the statute is violated.

*Third*, once D introduces evidence of alleged legitimate reasons, the burden shifts back to the P to show that the alleged legitimate reasons are pretextual.

Ps are not required to prove motive, b/c it would be difficult to get into Ds head to truly “find” Ds reasoning.

LLs may be able to limit number of people in a home due to fire code, building code, or zoning statute.

#### IV. DELIVERY OF POSSESSION

English Rule – LL has a duty to remove any trespassers from the premises. Policy: It’s LL’s duty to deliver. LL has more options to try to resolve the problems. Also, LL is in the business of renting. When LL goes to sue T1, he likely still has the security deposit, and he can use that to help with costs. Consider the policy argument of expectation – tenant expects to get apartment. You know only 2 people in court, T1 v. LL **Dz says**: Better rule, it’s dominant about 60/40.

American Rule – LL only conveys the legal right to possession of the premises, it’s new tenant’s duty to have person kicked out. Policy behind this: Don’t blame a 3<sup>rd</sup> party for acts of someone else. But, problem with this is that usually the person who doesn’t move is a deadbeat. He won’t have the money, but T2 is still liable for rent. A final problem is that T1 may have a defense, such as thinking they have permission to stay, when they don’t. You may end up with 3 people in court, T1, T2, and LL.

In theory, both rules should lead you to the same position; however, practically, the American Rule doesn’t work as well as it should. Courts are split!!

HYPOS:

1. What if T has a 3 yr lease, and after 1 yr, subleases and assigns to T1 for a year. Thereafter, no rent is paid to L. L probably can claim rent against T, as the year lease comes in the middle of T’s three-year lease. That agreement with T1 would likely be considered a sublease, and thus, T would still be responsible for fulfilling his rent obligations. As it stands, L probably won’t be successful in suing T1. If T1 “had agreed to pay the rents” in the agreement between T and T1, then L may be more successful in getting payment from T1.

2. T leases a large piece of open land to be used for hunting. After T pays a year in advance, T discovers there is no public access to the land. Neighbors refuse to give T access. What happens under English rule?

Under English Rule, LL has a duty to get the person on the land. Look at the concept of implied duty. The LL should have an implied duty to get tenant on there. In theory, you could also say it’s a third party problem, as the people keeping you off are the surrounding neighbors.

3. L and T execute a lease for a specified term. T takes possession and pays rent for several months. T then learns that L had earlier leased the premises to another T for the same term. T stops paying rent. L sues T for unpaid rent. T counterclaims for rent already paid. What result?

New T doesn’t have legal possession so L could not win his claim. However, T was actually in premises. Policy argument: Possession means something special. LL is clearly in the wrong. Look at lease – did LL promise physical and legal title? Did he fail to deliver that? LL should be forced to provide what he promised. Under English rule, LL should have to keep other T off property. English rule puts a little more importance on possession. First lease signed is the one that’s valid, “first in time rule.” The second lease is the one that is infringing. The signer would have to sue the landlord.

4. T leases from L a bldg under construction; the term of the lease is 3 years and possession is to be delivered on a specified date. Eight months after that date the building is still under construction and not ready for occupancy.

There are not a lot of strict public policy arguments in this area. T would probably still be liable, since LL had a provision for that in the lease.

#### V. SUBLEASE AND ASSIGNMENT

Sublease Distinguished from Assignment- If a T sublets the premises and does not assign them, the T becomes the LL of the sublessee. The sublessee is not in privity of estate with the LL and cannot sue or be sued by the LL. Since the sublessee has made no contract w/ the LL, he cannot sue or be sued on a contract either. The law treats subleases and assignments differently. The LL and sublessee are not in privity of estate, but the LL and assignee are in privity of estate. Often, the LL must be notified of the Ts intent to sublease or assign. To determine if sublease or assignment, consider:

A. Period of Term – If the T retains a reversion in the property, then it is a sublease. For example, a three month lease, and after one month, T transfers place to T2 for one month. This is a sublease because T will retake premises. However, if T transferred to T2 for the remaining 2 months, it would be an assignment.

B. Label – What does the transfer say? Problem with this is lay people (lawyers excluded) may not know the meanings of these terms, and the form may be of the other. Yet, it is still a factor.

- C. Right of Entry Retained – Suppose a T transfers the entire remainder of the term to another T and doesn't retain a reversion but retains a right of entry if a covenant is breached. (Ex: The new T pays a higher rent and has a right to reenter if the lease is not paid.) Common law says assignment, but modern cases say it is a sublease because it is a "contingent reversionary interest." If T2 fails to pay, L cannot sue him directly.

**Ernst v. Conditt** – Intention controls. A few recent cases have rejected both the common law rule that retention of reversion is necessary for a sublease and the rule that retention of a right of entry is sufficient to create a sublease. These cases hold that **the intent of the parties determines whether a transfer is an assignment or a sublease, and that reservation of an additional rent by itself is an indication that the parties intended a sublease. On the other hand, the transfer of the lease for a lump sum, even if payment is to be made in deferred installments, indicates an assignment.**

**Kendall v. Ernest Pestana, Inc. - Minority view.** In a growing number of jurisdictions, **the LLs denial of consent in commercial setting must be reasonable.** This is the position taken by the Restatement. Courts apply an objective test to determine if the LL is reasonable. He may consider: financial responsibility of T and suitability for the building, but LL cannot consider general economic advantage. Kendall is aimed at the small tenant and the very large LL only interested in financial gains.

Minority Rule: Where a lease provides for assignment only with the prior consent of the lessor, such consent may be withheld only where the lessor has a commercially reasonable objection to the assignment, even in the absence of a provision in the lease stating that consent to assignment will not be unreasonably withheld. WHY?

1. Must give a rule so as to not deny Due Process.
2. Burdensome to T to have to come up with the rent if their business has gone down.
3. The increases and decreases of rent could present a problem.
4. Policy against restraints on alienation
5. Implied contractual duty of good faith and fair dealing

If reasonableness only focuses on finances, then you may have a problem, however, if reasonableness focuses on numerous items, then you may have more of a chance.

**Majority Rule (DZ Prefers):**

1. Lease is a conveyance of real property interest, so if a LL chooses first tenant, the LL is under no obligation to look to anyone else but T for rent.
2. An approval clause is an unambiguous reservation of absolute discretion in the lessor over assignments of the lease.
3. Stare decisis – it's been law forever that LL has the right to prevent a sublease.

Considerations for majority rule: Does new person have ability to pay, Does new lessor fit with a mall's layout, Type of Business. At heart, this is a commercial transaction. If you cannot justify a denial on economic grounds, then you should not be able to give the denial.

Argument for LL: LL should reap increases in value or also have to deal if the rent goes down. Also, freedom of contract. Legal meddling in this law and economic decision is wrong, they ought to be able to figure this out.

Why can't one say, "Since LL can get higher rent, thus, that is justifiable to allow him to deny the sublease." California said it could not do that, but another state might say that is okay.

\*\*\*Ultimately, this case is about who should be able to profit from fluctuations in the value of the lease.

Kendall has been solidly criticized - it rocked the commercial industry. You want to include commercial reasonableness in your lease. LLs who do not want to get involved should say no subleases or assignments, period. States say this is okay. Kendall just applies where the lease says "must get permission to sublease or reassign." Lawyers can also get around Kendall w/ a termination and capture clause.

Notes and Questions, p. 481

1. Applying Kendall to an Old Lease: When the court makes such a dramatic change, is it fair to apply it to a 1950 lease? They usually apply it retrospectively. They will set a date that transactions before that date do not apply, transactions following that date do apply.

### Termination and Recapture Clause

This is a way to get around Kendall, for sophisticated commercial Ts assisted by competent counsel. The clause provides:

1. The T, before entering into any sublease/assignment, is to give LL written notice identifying the intended successor, and specifying the terms of the intended transfer
2. The LL could then terminate the lease w/ the T and if LL decides, enter into a new lease w/ intended successor
3. The T was not entitled to any profit realized by the LL in consequence of the termination and reletting.

LL must take reasonable steps to mitigate if T ends lease early. So, what happens in a cold market when you bring a great tenant and LL refuses to sign? Maybe a LL cannot do this, but if you bring in the T, that may affect mitigation. It's an open question.

### Cases Kendall should Apply to:

**DZ Says:** Most residential leases are one year, but short-term commercial leases are 1-5 years. Conceptually and policy wise, Kendall shouldn't apply to these. However, in long term leases of 15-30 years, Kendall makes more sense with a broader view of reasonableness.

### Problems, p. 483 – How should these cases be resolved after Kendall?

1. (a) L leases to T for a term of 5 years. After 2 years, T wishes to transfer the lease to T1. L refuses b/c T1 is a tenant in another of Ls buildings under a lease that is about to expire. L and T1 have been actively negotiating a new lease, and L wants to avoid losing T1 as a tenant in the other building.

T's position that you should grant approval: LL must have a commercially reasonable ground to deny, otherwise T1 must be able to sublease. That may be the likely answer under Kendall. LL would say he has right to deny b/c it is a commercially reasonable ground. He would be losing a probable Tenant if T1 who he's been negotiating with as well as Tenant. Policy reason for LL/LLs strongest argument: You can't go after people I'm actively negotiating with.

What if LL owns convenience store, and he has T across the street. T finds another convenience store to sublease, but that convenience store would compete with LL's. Must LL allow T1 in? Strict Kendall probably would have to let T1 in. However you could argue that if the LL wants to keep out convenience stores, he should say that in the original lease. Or, say absolutely no subleases or assignments of lease.

- (b) L, a Christian organization, owns a building that it uses as its headquarters. No religious services are held in the building. L leases space to T for a term of three years. After 1 year, T wishes to transfer the lease to T1, an organization that proposes to use the leased space as a counseling center that provides information on birth control and abortion. L refuses consent on the sole ground that it is fundamentally opposed to the aims and activities of T1.

T says if I'm bound by Kendall, the only test is that the organization I have found to sublease has good credit and financial standing. LL could say I'm in the business of religion, and your business of abortion hurts our business of religion. It helps the potential T that it's just an office building. The LL could argue that it would attract crazies who try to bomb abortion counseling centers. The hope is that the activity creates violence. The argument that they oppose morally is a loser. Every sophisticated LL will provide what specific type of store can go in the area. Most LLs just want much more control.

2. What if, in a jurisdiction following majority rule, there is a lease providing L may terminate if T transfers w/o necessary consent, but the lease prohibits only assignment w/o consent of the LL. T wishes to assign to T1, but LL refuses b/c she wants to rent to T1 for a higher rent. T then transfers to T1 for the remainder of the original term, minus one day. L brings suit to terminate the head lease w/T, arguing that the form of the transaction should be disregarded and that the parties clearly intended the transfer to be an assignment, and that was made w/o Ls consent?

Under a strict interpretation, it would be okay. LLs argument could be that T just wanted to get around the provision. In most jurisdictions, this would go against LL. This is because courts construe the lease most harshly against those who drafted the lease.

The Dumpor's Rule: LL and T have a contract. T gets permission for T1, but T1 does not expressly assume obligations of the lease. Can T1 send to T2 without LLs consent? Yes. T2 can give to T3, etc... There are 2 ways around the rule: Get T1 to assume the obligations of the lease. Then, T1 has agreed he must get consent. In any Dumpor's Rule state, tell the LL to Never give permission to sublease or assign. Otherwise, LL can only have control over the first T. Sometimes, LL now include "can admit or deny your potential sublessors or assignees on any basis." Totally business driven based on markets.

## **VI. DEFAULTING TENANTS**

**Berg v. Wiley**- Law used to allow LL to peaceably retake the premises. Courts got away from that. Just b/c it's peaceful at the time doesn't mean it will stay peaceful when the T comes back. A growing # of states **prohibit LL self help in recovering possession** and require the LL to resort to a statutory remedy. If not, LL is liable in damages.

In all states, for residential leases, you have summary eviction proceedings. They are designed to:

1. Be Cheap
2. Quickly Get LL before a Court
3. Only Issue – Payment of Rent

T has 2 choices: "I paid," or, "Here's your money now," or they're evicted. Some courts allow defenses, such as rats, etc..

#### Notes and Questions, p. 491

##### LL Remedies – T Default

1. Self-Help. Old view: was allowed, and it included a peaceful retaking of premises, when the place was not occupied, and the locks were changed. LL faced no civil liability. But, if LL violated (peacefulness, when occupied), then LL may face both civil and criminal liability. Now, self-help is basically forbidden. Courts have been set up to streamline a process that deals just with "summary eviction." Majority view, but not universal. Under both views, if there's sufficient evidence of abandonment, then LL has right to go in.

Old view: Covenants are all separate, so if rats, and T didn't pay, then LL would sue T, and T would have to bring another claim against L.

2. Residential v. Commercial – Different reasons, but in both, self-help is equally bad.

Residential:

Commercial: Lost profits, perhaps spoiling of perishable food, seasonable merchandise, etc...

3. Decision is the same in either case. Do LLs owe Ts due process? Courts hate to go that route, because due process is something the government owes the people. But, LLs due owe residents a habitable place, and commercial Ts a place fit for business.

YWCA – A battered women's shelter provides apartments and social services in return for women working or attending school. When women are unhappy w/ their cases, they refuse to attend required services and don't leave, so the YWCA changes locks on their apartments. Does a statute forbidding a lessor or LL to forcibly take a place w/o judicial proceeding apply?

This is a service package that's very narrow in purpose. Not a traditional LL/T relationship because we only accept battered women. Ts best argument is that they just want due process, they want their time in court. The court will probably find that there is no LL/T relationship, this is non-profit, and a service.

##### BREACH BY T – Failure to Pay Rent

Under old view, the LL had no duty to mitigate if a tenant defaulted. The policy behind that is that the lease is a conveyance of property, and if the T defaults in payment, it isn't the LLs fault. LL really has no duty to mitigate damages. (With this, the Ts had more responsibility for fixing things and were much more free to sublease and assign.) Even if T abandoned, LL could sue T every month, and T is still responsible for all obligations. Many leases now modify this view.

**Sommer v. Kridel** – New view of lease. **LL has duty to mitigate damages.** A lease is treated as any other kind of contract and is not viewed through property glasses. Mitigation is very well established in contract law, and we want it to apply to property. Nature of leasing makes us want to have the LL mitigate to reduce damages. (With this, Ts have fewer responsibilities but are less free to sublease or assign.) Mitigation includes, at the very least, putting the apartment on the market, with the stock of the other apartments. Must rent it under the same terms as other apartments. Best way to invoke mitigation is for T to find someone who is willing to rent and bring them to LL. LL can't leave the premises vacant and sue for rent as it comes due.

Say there's a one year lease, and with three months to go, T breaches. Way LLs protect themselves is with deposits. Sometimes for rent, sometimes for damages, or sometimes both.

Breach by T: If T won't leave, you go to eviction court. That doesn't lessen the remedies. Just b/c you're evicted doesn't mean it's over. LL has discretion to mitigate. No duty to change condition or lessen rent. Best way for T to start mitigation is to bring LL credit-worthy T. LLs best way of approaching these problems is through high security deposits.

### Deposits

With damage deposit, you are only responsible for damage, not normal wear and tear. In most states, LL have the duty to mitigate, but expenses of mitigation lessens the rent. (T is responsible for unrented time, plus commission to real estate broker, newspaper ad.)

B/c security deposits are so popular, legislatures have gotten involved. MA forces LLs to give interest on security deposits. (Forced interest.) FL says LL don't have to put deposits in an interest bearing account, but if LL does, LL must share that interest with the T.

### Abandonment of Property by T:

AGAINST: Restatement 2: "Abandonment of property is an invitation to vandalism, and the law should not encourage such conduct by putting a duty to mitigate on LL." Another reason against is that it constitutes an unwilling acceptance by the LL of the surrender by the defaulting T.

FOR: The above rule encourages both economic and physical waste. A mitigation requirement returns the property to productive use rather than allowing it to remain idle.

What if LL fails to mitigate? T has burden of proof, a difficult burden to bear, especially if the apartment advertises.

Damage may be difference between agreed rent and

LL gets 0, and T gets all - Policy is to punish LL for not mitigating.

If LL mitigated would apt be rented? (Or, what would mitigation really have done?)

NO- T pays full 3000 ????

YES - T gets \$2000

What happens if LL rents for more? That's an interesting Test Question.

Say LL rents to T: 15 year commercial lease, at 1000/month

T is there for 5 years, and then breaches. He brings in a new T, who pays \$500 a month. The old T makes up the difference. Then he brings in the third five year T and gets \$2000 a month. Who gets that money? (Assume rent was fixed.)

Argue T gets it: If you force liability if apartment is not rented, the former T should also receive some benefit if LL gets more. LL is actually being helped by this situation, so the T should receive some of this benefit.

Argue LL gets it: The LL would almost be making the former T a partner. Further, if you force LL to share, LL will have very little incentive to rent for more than in original lease. It is almost as if the T is being awarded for causing the LL headaches and hassles of breaching the contract.

Look at intent of the parties. If the 2<sup>nd</sup> period is the period of high rent, courts have tended to give the money to the T. The courts have been much more reluctant to force the LLs to give money back to the T if it's the third T.

In 99% of all cases, you get a settlement between LL and T. Many LLs will settle just because chasing someone in court is expensive, and if the person is broke, the LL won't get much anyway. Consider the inflation factor as well.

We give LLs much discretion in mitigation. LLs may not want to reduce the rent because it "devalues" his other property. Causes problems among tenants. Also, the LL should have the right to set the price on his property.

If T is the rightful possessor, then he breaches lease, he has lost physical possession. You may want to retake it if it's not leased out. Best way to do this is contractually. Allow you to move out, but move back in?

Acceleration of Rent:

1. You can't get money from someone who doesn't have it. Theoretically it's great, but practically, it doesn't work that well.
2. Once they pay you that, it is the person's place for remainder of term. What may happen is the bankruptcy court will pay the person, then sublease or try to bring someone in. (But, LL gets only 50% of rent from bankruptcy court.) It would be Ts duty to mitigate. Presents problem, especially if "no sublease" clause in the lease.

After T moves out, LL has 30 or sometimes 60 days to give you a list of what is wrong with apartment and return the rest of Ts deposits. So, many times LLs may not give the deposit back. They hope you don't ask for it.

## VII. CONDITION OF THE PREMISES

Covenant of Quiet Enjoyment – Under the old view, "caveat lease," the lease governs, and the T has a duty to keep up the premises. Now, **constructive eviction results when T moves out because LL has *substantially interfered***.

Constructive Eviction – RULE: Where, through the fault of the LL, there occurs a substantial interference w/ the Ts use and enjoyment of the leased premises, so the T can no longer enjoy the premises as the parties contemplated, the T may terminate the lease, vacate the premises and be excused from further rent liability.

C.E. is a defense that terminates the lease. BUT, you can also get some damages. You can get money for damages to *goods* if problem is recurring. May also get cost of *moving*. Perhaps, also, *increased costs of rent* at another place, but LL may say, you got a better place, location, etc..

- Elements of C.E.
1. Control of condition by LL and some sort of causation (action or inaction)
  2. Serious condition that causes premise to be unusable.
  3. T must move out. [Real problem w/ constructive eviction.]
    - Shows how serious it is.
    - Premise of whole doctrine is that it ends the lease.
    - [Some courts have relaxed this and allow T to go to court and ask for declaratory judgment.]
  4. Notice to LL – opportunity to fix.

Key to winning a constructive eviction case? \*\*\*Can you put the cause on the LL? Is condition in LLs control?

What about LLs claim that T has lived with it for a long time? Not good, b/c LL had been attempting to fix.

Constructive eviction applies to commercial and residential leases equally.

**Reste Realty Co. v. Cooper** – To have CE, the T's use and enjoyment must be substantially interfered with. Substantial interference is objective; what a reasonable person would regard as fundamentally incompatible w/ the use and enjoyment for which the parties bargained. Courts usually consider the *purposes* for which the premises were leased, the *foreseeability* of this type of interference, the potential *duration* of the interference, the *nature and degree of harm caused*, and the availability of *means to abate* the interference.

<u>Constructive Eviction</u>	v.	<u>Habitability</u>
Control of LL		Essence of Deal is Minimum Standards
-Action (Coming in)		-May include crime, noise
-Inaction (Failure to Waterproof)		

LL physically takes 1/3 of parking lot may be CE, but not habitability

Standards: Health and Safety Code  
Focus on Purpose of Lease

Covers more inconveniences

Differences are between remedies!

ILLEGAL LEASE:

*If a lease, at time of renting, violates the housing or health and safety code and puts at risk the health and safety of the T, it is an illegal lease. Prevents LL from eviction and from collecting rent. POLICY: to force LLs to comply with codes.*

Illegal Lease – Addressed particular problem in the DC area. Requires:

1. Condition be present at time of leasing.
2. Serious violation
3. Known by LL

Consider vacancies, income level, cost of available housing. LL may offer a place, and won't give any services. Most are Tenancy at will, but when it is based on an illegal lease, it's a Tenancy at Sufferance.

May not apply if one LL owns most spaces in a town or building and a minor violation was found at time of those leases.

LL must know about it. Once LL corrects, he may be able to collect reasonable rent and possibly back rent. After problem is corrected, it usually becomes periodic tenancy, and T must pay reasonable rent, which may be reduced.

**Hilder v. St. Peter** – A method by the courts is to give the T what he bargained for. This is achieved by measuring damages by the difference b/t the fair market rental value of the premises *if they had been as warranted* and the *FMV as warranted*. This measure of damages appears to be winning judicial approval. A few cases have given damages for emotional distress unaccompanied by physical injury (tort damages).

LL were mad, they said this opened them up for tort liability. If the housing is so bad, people should not be allowed to stay. Law and economics people said housing on the edge of poverty is bad. You are forcing LLs to take it off the market.

<u>T</u>	<u>LL</u>
Right to stay	No eviction allowed until prob fixed (or someone else may move in and still unsafe)
Right to be free from retaliation	No rent collected
No payment of Rent;	Must fix the condition
Maybe FMV later	Cannot retaliate (must wait to evict until taint goes away, 6-12 months)

(NOTE: Illegal lease came before the Doctrine of Habitability. Now, Doctrine of Habitability may be preferred.)

Should illegal leases be applied to commercial leasers as well?

Could argue no, because commercial Ts are more sophisticated and have a right to alter, right to change.

Overall, most jurisdictions would take that view.

May argue yes b/c often, like in malls, LL is responsible for electricity.

Doctrine of Suitability has a 50% chance of applying in commercial leases.

Illegal leases were hard to prove, so people have moved to warranty of habitability.

CONDITION OF PREMISES

<u>Old View</u>	<u>New View</u>
-Constructive Possession	-Illegal Lease (Ts have more rights, LL has no ability to collect rent or evict.)
-Misrepresentation	Forced LL to correct the condition, then may collect back rent. Lease goes from Tenancy at Sufferance T at Will and usually is a Periodic T.
-Tort Liability-baseline set up	-Retaliatory eviction - LL can't retaliate; must wait for the taint to go away.
-Caveat Lessee (Duty on T to investigate)	-Implied warranty of habitability (residential) or suitability (commercial)

Fixer Upper –Say LL has a house that is in code violation. LL usually rents for \$1500, but offers to rent this one at \$500 and calls it a fixer-upper. Would this be allowed? Probably not. Too risky, and you may run into problems if LLs are in a

business of doing this. How could this be allowed? Set up a 2-part lease, where the first part says the person must fix before moving in. Then, upon completion of the work, person gets the place for \$500/month.

Current apartments have a sort of *Contract Lease* –it is service based

Implied warranty of habitability – LL owes T some minimum standard of habitability,

Ways to do this:

1. Linked to Health, Safety, and Housing codes.
2. Common law definition of health and safety – may be narrow, and what about crime?
3. “Reasonable Tenant” standard focused on the purpose of the lease (esp. for commercial)

If implied warranty of habitability is violated you may get damages. Also a remedy of self help, if T withholds partial rent, or if T has problem fixed and deducts it from the rent. Depending on what standard you set, you may or may not be able to break the lease. What jurisdiction are you in?

If you get into apartment and find you are allergic to the carpet, you will likely still be liable for the full rent, and the LL won't be responsible to do anything. (Unless, you made it very clear prior to moving in.)

### DOCTRINE OF HABITABILITY

Doctrine of Habitability/Suitability

- I. Breach
  - a. Housing Code
  - b. Health and Safety (Used in TX)
  - c. Purpose of the Lease (Commercial)
- II. Notice to Landlord – Opportunity to Fix
- III. Remedies
  - a. Reduced Rent
  - b. Withhold Rent
  - c. Self-Fixing and Deduction
  - d. End the Lease
- IV. Minimum Standards  
-Free from rodents, windows, locks, sewage working, properly working electricity
- V. Play Off On
  - a. Short-Term Leases – LL of 20 years better position than T of one year
  - b. LL better to accommodate financially (could go either way, acc to financial analysts)
  - c. LL has access to the area
  - d. More of a contract for services than a conveyance of property
  - e. Does T have right to modify?
  - f. Basic Function of the Lease

McDs v. Trammel Crow:

-Control of LL v. Control of T

-Freedom of Contract to Waive rights (But if its allowed, all LLs may waive rights in all contracts)

May jurisdictions may say not waivable in residences but waivable in some commercial.

Say you have a restaurant in a strip shopping center with limited parking, and you have the lease for 10 years. The surrounding businesses are rented to “day businesses,” beauty salon, gift store, etc. Those stores go out after 5 years and a 7-11 and Pizza Hut come in. Can you sue on a suitability doctrine?

-Look at original lease

-How does it affect purpose in lease?

Court in TX held that a parking lot is external to the physical lease. Suitability was limited to premises of internal building itself.

What if office tower, and a radio station was going to put up a large tower, then same LL wanted to build a larger building that would cut off 25-30% of audience. LL wins. Why? Under TX law, it only applies to that building and your internal premises.

Anyone could have built building – just because it's the same LL, he shouldn't be punished.

Withholding rent is a step to force LL to fix the problem. Another remedy is self-help, where you fix it yourself, or get a licensed professional. This is only after notice that you are going to fix it yourself. This is limited. You can't do \$10,000 in repairs and not pay rent for a year. For the period of time you had a place with a defect. Give LL a reasonable amount of time to fix this. You still have to pay the rent because it may be hard to get someone in.

Disagreements on how to come up with value. You pay 500/month for 3/2. Problem and you have a 3/1. If a 3/1 rents for 350. But say you have a long lease, and 3/2 now go for 750. You would get 400. (750-350). (Policy: If you had to go somewhere else, you would have to pay 750.) OR, under 2<sup>nd</sup> standard, you would get 150. (500-350). Under 3<sup>rd</sup> standard, you get a hassle factor in addition to raw figures. Consider individual tenants' hassles.

Percentage diminution of value: Works well in commercial building, not nearly as good in residential settings. You reduce rent by percentage of building that you cannot use.

LL moves to evict T. T can sue for habitability to try and force LL to fix. T may get specific performance, but that's not as common. T can put in a claim for damages to physical goods. The factor that distinguishes commercial is seasonal goods.

The doctrine of habitability doesn't let you get out of your lease. Under illegal lease, you can walk away.

#### Damages for Breaching Implied Warranty of Habitability

The implied warranty of habitability is based largely on contractual principles, and as in Hilder, the T may avail himself on all the basic contractual remedies – damages, rescission (cancellation), and reformation (improving).

A T who has paid rent and remained in possession may later sue for reimbursement and damages. It's more typical for a T to withhold rent and have the LL sue for rent, then assert breach of warranty as a defense. If the T is successful, rent is reduced partially or totally depending on the breach, and the T may retain possession if he pays whatever reduced amount is determined. Ultimately, the T may withhold rent, retain possession, and have the agreed rent reduced by virtue of the LL's breach. The agreed rent is the "fair rental value as warranted." The T may also terminate the lease and sue for damages. If the breach is substantial, the T may leave on the theory of CE.

Q. L owns a highrise apartment bldg. L's entire maintenance and janitorial staff go on strike. Ts must take their garbage to the curb where it piles up. City sanitation refuses to cross the strikers' lines, and trash piles up to the first floor. The garbage exudes odors and results in a declaration of health emergency by the city. Rats and vermin become a problem. Has L breached the implied warranty of habitability?

A. Probably. Code violations, health and safety violations. LL's defense could say it's out of his control. Also, he needs a longer period to correct the situation. Strikes are not in my control. He needs full rent for a reasonable period of time. However, he could also negotiate with the strikers. After time, he has breached, and Ts may not have to pay the rent.

Q. What if highrise in Manhattan with pool, gym, and full amenities, for which T pays a ton extra? Does the implied warranty of habitability encompass the amenities?

A. Depends on the jurisdiction. Probably not going to be habitability. But you may get more in purpose of lease. In almost all jurisdictions, amenities would not affect habitability. It's very difficult to bring high-end apartments into habitability.

Q. What if L offers a small run-down house for \$100/month. T finds defects and offers \$50/month b/c that's all it's worth. L agrees and T possesses but T fails to pay any rent. May T assert breach of implied warranty?

A. T would argue that he made a cursory inspection, but it's much more serious. Ultimately, T could say I don't look like I could fix it. This is the bargain of the devil. Court may apply habitability, but if it's a real handyman then court may say T didn't hold up his end of the bargain. Again, should be a 2-part contract, where person doesn't move in until place is fixed. That is safe in all jurisdictions. LL's position is: Habitability should not apply to this circumstance, T agreed to fix, this isn't standard lease. From Ts perspective, there may be a lot of facts we don't know about. Ts life may be in danger, we don't want to allow it. Depends on how minor and major defects are. Also depends on setting – acreage or 1000 apartment

building. LL may say, "I gave you apartment for \$50. Even if it is a breach of habitability, he gave the FMV, so damages would be nothing.

Retaliatory Eviction – If a T exercises a legal right (habitability, illegal lease), then the L cannot evict the T under circumstances of a T at will or a periodic T, even though a LL normally can under those. There is presumption of taint. This does not apply to cause. (Rent, damage to premises.) Can you close the apartment house? If you really are closing that's okay, but you can't reopen right away.

## SERVITUDES

- I. Easements – Giving someone limited use over your land. An enforceable right that can be passed from PO to PO.
  - A. How are they created?
    1. Expressly, through *intent* and *writing*. Focus on what use is permitted and how limited it is. Making it in writing allows the easement to be recorded, and it is in the chain of title. An express easement always is governed by the terms and it lasts forever.
    2. Scope – metes and bounds.
    3. Defined by use!!!! Very important in drafting. Is it access – what type, drainage, etc.
    4. If your easement is affiliated with a property transaction, you have a Grantor and Grantee.  
Ex: Grantor A reserves an easement over Grantee Bs land.  
B grants an easement along with land that is transferred.  
Today, you can grant easements apart from property transactions. Can be done for 3<sup>rd</sup> parties.
    5. Almost all easements are in fee simple.
    6. Implied (SEE p. 19)
      - a. By Prior Use
      - b. By Strict Necessity
    7. By Prescription
      - a. Open and notorious
      - b. Continuous Time (7-10 years)
      - c. Hostile
      - d. Distinguished from AP by type of use. Usually someone crosses property, uses it as an access road. Some turn into AP, some do not. Always tied to the specific use you gave.
  - B. What are the different types?
    1. Appurtenant-attached to the land. Anyone can use it for the length of POs lifetime.
    2. In Gross – personal. (Argue this if you want to end an easement.)  
Distinction b/t an easement and a license - b/c a license is a contract, it can have an end.
      - a. License may be *oral*, may be a *contract* having terms and rent, and it may be *revocable at will*.
      - b. Examples: plumber coming in to fix a drain, caterer to serve a dinner party.
  - C. Termination
- II. Restrictive Covenants – Private zoning. Like when you move into a subdivision and it is residential only. Or, what type of roof you must have on your home or if you must have a brick fence, etc...
- III. Equitable Servitudes – Developed to act as a gap-filler when someone fails to put in a Restrictive Covenant.
- IV. Negative Reciprocal Easements - Developed to act as a gap-filler when someone fails to put in a Restrictive Covenant. Since all around you follow, you must too.

**Willard** - When you have a grantor and a grantee of property you can reserve an **easement in favor of a third party**.

- Under the common law, a reservation could not be created in favor of a third party. A reservation exists where the grantor passes his entire interest, but the grantee regrants an easement to the grantor. The courts held that there could be **no regrant to a third party**. **Most modern courts retain this rule**, although feudal considerations are no longer relevant. *Since the rule is archaic and can't be justified on policy grounds, it is no longer the rule in CA*. However, the courts should apply a balancing test to the grants made prior to this decision. The factors to consider are the grantor's intent and reliance on the old rule by the parties. Here the *grantor's intent* should prevail and they should

have *the freedom to contract*. Also, consider economics and the best use of the land. Although the clause granting the easement was not specific, the intent was clear.

- If the easement is invalidated, the grantee is unjustly enriched by getting more than she bargained for, price-wise.
- What happens if the grantee wins? There is no easement. Often in these cases there is no in between.

**Holbrook v. Taylor** – A license may become irrevocable under the rules of estoppel. If the licensee has constructed substantial improvements on either the licensor’s land or the licensee’s land, relying on the license, in many states the licensor is estopped from revoking the license. The theory is that it would be unfair to the licensee to permit revocation after he spends money in reliance.

- *Restatement of Property §519(4): The licensee may continue the use “to the extent necessary to realize upon his expenditures.” The comment explains that the license is irrevocable “to the extent necessary to prevent the licensee from being unfairly deprived of the fruits of expenditures made by him.”*

#### Lost Grant Theory

1. 98% of the cases are factual disputes.
2. You’ve been using it so long that you presume 20-30 years ago someone gave you a grant but over time it has been lost.

Always watch for In Gross arguments. The neighbor may say, “I let that neighbor cross, and even if he lost grant, I am not letting you cross or the world cross.”

What does the fact that the person who owned the land asked the neighbor to buy it for \$500 do?

- On one hand it cuts for the true owner because it showed he wanted to notify neighbor the land was his.
- On the other hand, the neighbor thinks it’s all about money. May not do much.

Cure for this: TO must take action.

1. Preventive action (scope put into the license, can end it at any time)
2. Turn it into a lease (ask neighbor for \$1/month or so.)
3. If you see action to improve the land you must stop it!

Shepard v. Purvine –Problem with neighbor cases, if we don’t have a good rule, both properties are lessened in value.

#### Notes and Questions, p. 795

1. R3 of Property provides that a servitude may be created by estoppel. Comment E says, “Normally the change in position that triggers application of the rule stated in this subsection is an investment in improvements either to the servient estate or to other land of the investor.”

3. Where facts justify an application of estoppel, the court normally doesn’t give payments to the servient landowner.

#### Implied Easements –

1. Prior Use
  - a. Prior to transaction – there is existing use
  - b. Before and after use.
  - c. Prior use is based on the theory that there is no document but the actions of the party are consistent as would be if an easement existed.
  - d. Some jurisdictions say there is reasonable necessity.
  - e. We imply them a little more generously in favor of someone else. So, if A sells to B, we are more generous to B having an easement. We interpret harsher against the grantor. If seller needs easement, the court will construe easement against seller b/c he could have put it in the document of conveyance.
  - f. Prior use is known as a quasi-easement. It is not an actual easement. Based on intent of parties. It’s a quasi-easement until one party sues. A can sue to have an enforceable court order that says there is an easement over Bs ground. Or, B can sue to get A off his land, where B will argue that he has a quasi-easement.
  - g. Scope – Completely defined by prior use. (Residential, commercial, walking, motor vehicles, bounds, type of access, etc...)

## 2. Strict Necessity

- a. Landlocked land – Court will give an easement over the person's land who landlocked the other. Based on economic policy. Since we don't want unusable land, we punish the person who landlocked the person.
- b. Scope – Undefined, to be defined by use. Completely unpredictable.

**Van Sandt v. Royster** – Really an implied easement by prior conduct. If court relied on implied by strict necessity, it would be ended. However, if court relied on implied easement by prior conduct it wouldn't be ended. Courts hate to have people spend money, that is economic waste.

- At the time a tract is divided into two or more lots, a use of one part of the tract must exist from which it can be inferred that an easement permitting its continuation was intended. This existing use is often called a quasi-easement. It is not a legal easement, b/c O cannot have an easement on his own land. It can arise as an easement only when O divides the land into 2 lots. However, a quasi-easement is a use of the land that would resemble an easement if the tract were divided into two lots.
- To have a quasi-easement, the previous use must be *apparent*. It is apparent if a grantee could, by a reasonable inspection of the premises, discover the existence of the use (e.g., a beaten path). "Apparent" does not mean visible. A non-visible use may be apparent. Thus, underground drains may be apparent even though not visible, if the surface connections would put a reasonable person on notice of their presence.
- Here, P could have discovered the sewer drain serviced more than one home by calling in a plumber for an inspection. It has been held that an implied sewer easement has been reserved to D b/c the sewer is apparent.

### NOTES:

DZ says this was not a strict necessity case. B/c it's not based on ingress and egress. It "cannot be used w/o disproportionate effort and expense." That is what the court is really focusing on. The court says strict necessity, but it's really reasonable necessity.

Constructive notice is given by way of simply knowing that modern plumbing existed in the home. Further, the court says notice, but it was actual constructive notice.

**Othen v. Rosier** – RULE: **Easement implied only over landlocking parcel.** An easement by necessity is implied only when land is divided. The necessity must exist when the tract is severed. The easement is implied only over that portion of the divided tract that blocks access to a public road from the landlocked parcel. An easement by necessity cannot be implied over land that was never owned by the common grantor of the dominant and servient tenements.

### NOTES:

Strict necessity really means strict necessity – must not be any other way out. Not a matter of convenience!

It is likely the dominant road did not always exist – back in the day, people likely used another way out. Lack of proof that this road was the only way out.

W/o proof, prescriptive is the best way to go. The problem is that it must be hostile, and often courts are reluctant to determine that hostility existed between neighbors.

Consider if 18-wheelers go on adjoining property to get to mall stores. You could argue before and after the sale, you used that. Also, strict necessity only applies to ingress and egress.

### Notes and Questions, p. 808

1. Is an easement by necessity implied b/c it effectuates the intent of parties or b/c of public policy? The first depends on prior use, the second on public policy. There is some conflict in cases over the degree of necessity required for an easement by necessity.
2. You have five pieces of property. 1-4 landlock 5 through transaction to fourth buyer. Then that person, 4, must give the easement. You reconstruct sales to find the one that landlocked the last property. 5 must apply for an easement by strict necessity to the owner of 4. What if it was inherited, through the same will, all at the same time? Each ought to bear a common cost, since all received the land at the same time.  
Say there was a private road owned by 2, 2 says 5 can use the private road at any time, but it Courts say this is not good, it renders the strict necessity dormant, and all must have access to public road.

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Elements of implied easement by strict necessity:

1. Strict necessity must access to a public road.
2. Must be strict, not just more convenient regardless of how much more convenient it would be.
3. Must be for ingress and egress.
4. Punitive – Go back to find the original owner (and their successors) who landlocked the property. Theory is that successive owners could have gone back themselves.
5. POLICY – all land must have ingress and egress. Based on marketability of land, on concept that if property isn't accessible the value dives tremendously. Forced transaction, and it's free (except you may have court costs.)
6. It may be dormant. (Court held it couldn't be dormant seasonally, in river-ranch case.)
7. The land for the easement is free or paid for by O, the grantor.
8. However, the cost to pave is usually paid for by the person who is landlocked.

Implied by strict necessity is enforced by public policy, and it is narrowly construed.

An easement by necessity endures only so long as it is necessary. If the dominant owner secures another way out from the landlocked parcel, the easement by necessity ceases. Thus, if A, an owner of a landlocked parcel, with an easement by necessity over B's land, acquires an easement over C's land enabling A to reach a public road, the easement by necessity disappears.

Squatters rights, it's a relaxed way of prescription. You must show who landlocked that land. You get to pick which direction you want your path to be. Gives you the highest value for your property. It would be impossible to show strict necessity when you have squatters rights.

\*Keep the doctrines of Implied by Prior Conduct and Implied by Strict Necessity separate.

Prior Conduct often requires some degree of necessity, but not strict necessity. Obviously it requires use before and use after a transaction.

Strict Necessity – Ingress and Egress to a public road.

Prescription presumes:

- Hostile Use
- Open and Notorious for a continuous period of time
- 7-10 years

Do you have to know that the person is adversely possessing?

If theory is title clearing, you don't have to know.

If theory is labor, then you need to know.

Some courts will say if you have 2 neighbors, no prescriptive easement if you are mistaken about the property line. Other jurisdictions, say it's yours after 7-10 years.

Express – sometimes compensation, because it is a deal!

Implied – No compensation

Prescription – No compensation

Note 3, p. 813

You walk across tract for 7-10 years, you get a prescriptive easement, then neighbor fences you out. If you say you don't want to go to court, and 7-10 years pass, you may easily lose the land you got. Really go to court and get it recorded.

Note 4 – Home Next to Golf Course

If it's a ball flying over, then put up a fence and say no trespassing. What if you allow people to come in and get their balls. If it's hostile, you'd need to make a strong attempt to keep people out. A no-trespassing sign w/o strict enforcement hurts you. If you let people in for 7-10 years, there may be a prescriptive easement to get the golf balls. Prescriptive easement would be for golf club and its members.

IF person has home there first, the golf course may be required to put up a net.  
Theory, golf courses increase value of whole neighborhood, give and take. Person coming across is trespassing. Golf balls coming across are not trespassing.

Note 5:

Public prescriptive easements – an extension of the private one. In most states they can be obtained by long continuous use by the public under a claim of right. The landowner must be put on notice by the kind and extent of use that an adverse right is being claimed by the general public. You get co-use if it is on your land. Once it becomes public, then you cannot get it back. Implied dedication is the lost grant theory.

Beach cases aren't always explained carefully but generally, the public doesn't like being denied access to the beach. Be careful with these cases.

Common Heritage of Mankind - Allows people of all nations to use the world's waters and space.

Arguments:

1. Public prescriptive easement
2. Implied dedication, lost grant
3. Public trust
4. Customary easement, b/c for memory of man, we don't remember when it wasn't used by public

People get off prescriptive easement and on to other theories b/c P must show they used every inch of land and that may be a checkerboard of property. Dilemma – Municipality would love to have all these areas accessible to the public, but often the metes and bounds have been sold to various people.

**Matthews v. Bay Head Improvement Association** – The public may use the privately owned dry sand area to the extent needed in the exercise of the public's right under the **public trust doctrine** to use the wet sand area and the water.

TAKINGS:

1. Prescriptive Easement – Preferred method of taking, Based on Hostility, But it must be:
  - a. Hostile
  - b. Continuous for the requisite period of time
  - c. Burden of proof is on the possessor.
  - d. Often leads to checkerboard of possession.
2. Public Easements – Based on Hostility
3. Implied Dedication – Similar to lost grant theory, Based on Intent
  - a. Somewhere, sometime, beach owners dedicated the land to the public
  - b. Based on Intent
  - c. Most all are appurtenant
4. Customary Easement
  - a. Customary use has led to easement
5. Public Trust Doctrine
  - a. An ancient principle that air, space, and tidal waters belong to people, not to any specific person.

1 and 2 are likely to be used for access; 3, 4, and 5 are likely to be used for beach and waters. For 2-5, it is implied over a time of 50-100 years.

ASSIGNABILITY OF EASEMENTS

**Miller v. Lutheran Conference & Camp Association** - RULE: A **commercial easement in gross is assignable, and a noncommercial easement in gross is assignable if the parties so intend**. Commercial easements in gross are those that have primarily economic benefit rather than personal satisfaction. The large majority of easements in gross include railroad rights-of-way, gas pipe lines, and utility easements. POLICY: It would be unacceptable public policy for a transportation or utility company to lose its easements when it merged w/ another company. Moreover, the problem of locating multiple unknown owners does not arise w/ most commercial easements in gross, which are held by utility companies or railroads.

Finally, if commercial easements in gross are not assignable, utility companies will buy a fee simple for their lines, rather than an easement; this is undesirable b/c a fee simple, unlike an easement, cannot be terminated by abandonment or by acts of the owner.

One stock rule: When 2 or more persons own a profit in gross they must use the profit as one stock. Neither can operate independently of the other. One owner can veto use by the other b/c consent of all is required.

Notes, p. 830

Recreational easements are not assignable b/c the intent is that it's done out of friendships, not necessarily for the world.

### SCOPE OF EASEMENTS

General Rule: The scope of an easement depends on the intention of the parties. In ascertaining this intent, a court may examine whether the easement was created expressly or by prescription, what changes in use might reasonably be foreseeable by the parties, and what changes in use are required to achieve the purpose of the easement under modern conditions and preserve the usefulness of the easement to the dominant tenement. The court will also look at whether the increase in the burden is unreasonable.

**Brown v. Voss**— Went w/ minority rule, allowed easement for 1 to be used for connected land 2. DZ not happy w/ this. Courts are usually scared to increase scope, b/c it may lead to more expansive responsibilities of easement beyond intent.

Majority rule: You can't expand scope in an express easement. An easement granted for the benefit of lot 1 cannot be used for the benefit of lot 2, even though the same person owns lots 1 and 2. The dominant owner cannot increase the scope of the easement by using it to benefit a non-dominant tenement.

#### 1. Express Easements

Express grant in writing, express scope and express termination. Most that are express state the metes and bounds, give the four corners in writing. Always issues on type of use. If writing, you want to discuss that.

Scope on metes and bounds, scope on type of use. Only for single family residence, access to Lake X, etc..

Express- oral license, irrevocable, - original grant, one stock rule probably applies.

#### 2. Implied Easements

Prior use – look at intent of parties and original use.

Implied by necessity – in DZs view this is very changeable. Size of the tract that is landlocked will make a large determination of the use. Gives servient tenement the most leeway.

#### 3. Prescriptive Easement

Determined by the use that gave you the adverse prescriptive easement. Probably cannot change frequency and type of use.

Problems, p. 840

2. One farm, operated by one farmer who has an easement, then he sets up 100 gardens and rents 99 out. How does that change the burden on the servient tenement? It increases 100 fold! The farmer must go back and negotiate.

R3: "The beneficiary of an easement or profit is entitled to make any use of the servient estate that is reasonably necessary for the convenient enjoyment of the servitude for its intended purpose. The manner, frequency, and intensity of the beneficiary's use of the servient estate may change over time to accommodate normal development of the dominant estate."

3. Most courts view the purpose of an easement of way as entrance and exit of people and vehicles. Should utilities be included? Utilities would have to be negotiated in a separate agreement.

4. Restatement is not the law, but it says that if servient tenement wants to improve land and move location of the easement, then it should be able to do so. We are better off as a society, as long as servient tenement is not harmed. Not the law, and DZ doesn't think it will be.

### TERMINATION OF EASEMENTS

**Preseault v. US** – Although neither oral release or nonuse alone is sufficient to terminate an easement, if the owner of an easement acts in such a way as to indicate an unequivocal intent to abandon the easement, the easement is abandoned. Such acts include an oral release or nonuse coupled w/ failure to maintain the easement or permitting the easement to be blocked by others, or establishing a substitute easement elsewhere.

#### Ways to Terminate Easements:

1. Prescriptive easement is a fundamental way to change or terminate an easement, versus private parties. After allotted time, it's yours. However, usually courts don't allow it against government land.

2. Abandonment – non-use, and overt acts (here pulling up tracks)

So, overt act, coupled with non-use, allows for termination.

A letter saying "I'm not rebuilding tracts now, but I am not abandoning," would keep the easement alive.

3. Merger of ownership. It doesn't make any sense for the owner of the land to have an easement on his own land. But, if owner sells one segment, then the easement is revived.

4. Agreement – Most common. Owner of the servient tenement buys back the easement. Record that in the deed.

DZ doesn't test the governmental examples; he may test the private property issues.

What if the use is wholly inconsistent with that stated in the easement? Is that termination or abandonment? Possibly termination. Also get cases where dominant tenement tries to expand the easement. That may terminate.

#### Negative Easements

An attempt to say someone cannot do something. For example, if you have had a view of the capitol, someone cannot come in and block that view. American courts like express negative easement. Solar easements. If you have solar panels on your roof, and you are selling the property, and you want the solar panels working. Those have been recognized in negative easement.

Conservation Easements – Must stay completely natural. Communities have encouraged these. DZ says the big thing with these is that non-use is not punished.

### RESTRICTIVE COVENANTS

\*\*\*\*\*TESTED EXTENSIVELY!!!!!!

Restricted land generally costs less. Removing that restriction will unjustly enrich the buyer and harm someone else.

Restrictive Covenants:

1. Private agreements to control use of land. (Essentially, private zoning.)
2. Rural land has no zoning. Then private owners came up with their own zoning.
3. City zoning sets a minimum standard of permissible use, but restrictive covenants lift that standard.
4. Extensively used by developers to predict the look and feel of the neighborhood.
5. Essentially a sort of contract among all landowners that gives *each landowner the right to enforce*.

#### Traditional Restrictive Covenants (Old Style)-

1. *Must be in writing and recorded in the chain of title*. The policy is that everyone has notice!
2. Every homeowner has the right to enforce.
3. The types of things in the restrictive covenants must *touch and concern the land!*
  - a. Problems w/ personal promises. (Cat lady – 95% of time, it won't work.)
  - b. Maintaining a personal garden would not work.
4. Intent to run with the land. So, not just the person immediately, but all successors to the land.
5. Privity Requirements
  - a. Traditional Restrictive Covenants had to be in privity.
  - b. Vertical Privity: Two people created the covenant, though constant and direct sale. See paper.
  - c. Horizontal Privity:

1. Must be a transaction w/ a transaction and a transfer of land. If there is no sale, exchange or transaction, there is no horizontal privity.
2. Burden and Benefit
3. Same Time.
4. (It's a problem. Many restrictive covenants violate this. You really have trouble selling all 100 homes at the same time.) You get around this by straw transactions, selling to lawyers for one second. Reason for straw transaction is to force people to mean it.

Modern Style – Tend to vest power in homeowner committees and architectural committees. Dues are paid, and it's operated in a more centralized manner. Each person still has right to enforce, but it's easier w/ committee b/c they can pay for the lawyer. Somewhat more relaxed view.

RCs are best ways to have control over a neighborhood. Equitable Servitudes and NREs are gap fillers.

Equitable Servitudes – Equity and fairness allow it to still be enforced.

Negative Reciprocal Easements – Sometimes let valid reciprocal easements to apply to the whole area, even if the easement doesn't apply to that lot specifically.

Exam question on touch and concern: **Anti-competitive restriction** on use of land. Grocer builds a store, and for many years it will lose money. Nobody else who builds can have a grocery store. Did this touch and concern the land?

Yes, it does touch and concern, but are anti-competitive restrictions allowed? Anyone who buys in the entire subdivision may not open a grocery store anywhere in the county. DZ says he doesn't think it works. Its not all land that is part of touch and concern.

In RCs, a major issue is dividing the land. Meet horizontal privity by straw transaction with a lawyer, then recorded it.

### EQUITABLE SERVITUDES

American courts much more acceptive of parties making agreements. Typically, they fail a restrictive covenant on one of the elements. A court, b/c of equity, will enforce something even though it fails one of the elements of RCs.

Most often, the missing element in equitable servitudes is writing, and thus, the recording. Or, you could have horizontal privity missing. This would happen if developer forgets to do a straw transaction. Equitable servitudes are most effective when the lawsuit is brought w/in 5 years of the sale. Vertical privity always required.

**Tulk v. Moxhay** – RULE: A D, not being in privity of estate w/P, **may not disregard a previous covenant** restricting use of land even though he had notice of said covenant.

- Generally, a covenant that doesn't run w/ the land will not be enforced against a subsequent vendee.
- Where a vendee purchases property w/ notice of a covenant restricting use, it may be enforced against him.
- This was the first case to hold that a written covenant was enforceable against a subsequent purchaser who acquired title to the burdened land *with notice* of the covenant.
- Says equitable servitudes will fill the gap. Enforcing against you what you agreed to be bound by and what you had actual notice of, even though there is a defect! Still need the intent to run w/ the land, and touch and concern the land.
- Actual notice was given, but constructive notice may be given, too. Constructive notice doctrine says you are bound to everything in your chain of title. (Not in horizontal privity??) Even if person doesn't know it was residential only, that person is held to residential only if it is recorded somewhere in the chain of title.

Notes p. 865

1. When you are told you cannot build, you get the land for a lower price. It is inequitable to allow you to build b/c you are getting more than bargained for. Also, RCs can be negative (what you can't do) or affirmative (must pay money or cut grass every month). DZ thinks the affirmative-negative distinction has collapsed in modern cases, b/c you can easily flip from affirmative to negative, or vice versa.
2. We don't allow a neighbor who buys a piece of property knowing it has no covenant to enforce the other neighbor's RCs. Vertical privity is always necessary. Exception to that in negative reciprocal easement. Major difference is that the developer must own all the land.

3. Equitable servitudes still come out of transactions. You pay less b/c you are burdened. Could you enforce it in contract as well as in property? Many times, you may be able to, but the ES of property law is preferred.
4. In the old days, there was a severe distinction. Lawsuit would be if you wanted an injunction. Now all courts have blended the remedies. There is no distinction, injunction and damages can be sought for each RCs and ESs.

### Burden and Benefit

Billboard not enforceable in contract law. Should we let the doctrine of ES allow a one-sided promise? *DZ says never draft that as a lawyer*. Always have a reciprocal promise. Many jurisdictions would say it's against public policy to have one-sided promises, and they may not enforce those equitable servitude. Arguing on the other side, cite *Tulk v. Moxhay*.

### CREATION of EQUITABLE SERVITUDES

ES is an interest in land, so most courts hold the SoF requires a writing signed by the promisor. As w/ RCs, acceptance of a deed signed only by the grantor binds the grantee as promisor. THE EXCEPTION: NREs may be implied from a general plan for development of a residential subdivision.

NRE Implied from General Plan: In case of a restricted residential subdivision, many courts will imply a NRE on a lot even though there is no writing creating the servitude on that lot. This is usually done on the theory of equitable stoppel: Where a purchaser, buying a lot restricted to residential use, relies on the promise of the subdivider to restrict the other lots and makes a substantial investment, the subdivider and any assignee of the other lots are estopped to plead SoF.

**Sanborn v. McLean** – DZ says this is an important case. It wasn't a RC b/c the restriction wasn't in the deed. It's NRE.

Example: Suppose a developer is marketing a tract of 50 lots. The developer sells off 30 lots by deeds containing RCs by the respective grantees that each will use his lot for residential purposes only. The developer orally assures all 30 grantees that this will be an exclusively residential development and that similar restrictions will be inserted in subsequent deeds. Then the developer sells off two corner lots to gasoline companies containing no RCs. The gas companies want to erect service stations. If (i) the developer had a *general plan* of an exclusively residential subdivision *and* (ii) the court will imply a covenant in the deeds to the gas companies restricting their lots to residential purposes only.

Elements for a negative reciprocal easement:

1. Common owner
2. Scheme of development, restrictions on the use, intent for all.
3. The lot was left out for recording process.
  - Mistake by Lawyer (correction)
  - Mistake by the construction or marketing people (needs more study)
  - Purchaser has no actual notice.
4. Policy behind binding the one left out is that the buyer should be on notice from look of surroundings. Purchaser is put on *inquiry notice!!!*
5. Policy behind putting someone on inquiry notice is that you are getting the benefit of the surrounding community with restrictions. You are benefitting from the restrictions, so you should be burdened by them, too.

### Questions to ask:

1. Is there a gate and a sign?
2. Are there commercial businesses nearby/very close?
3. How many homes are built? If 90% of homes are built, that's more difficult than if only 5% of homes are done.
4. How many mistakes are there? 50% or more, courts will be less likely to enforce.

A developer is going to have 4 phases of the community. Has a sign that says '120 lots, restricted community, in the deeds.' But, he only owns phase 1 and has options on phases 2-4. The seller, with knowledge, lets the developer market in this way. So the people buying think all 120 lots are bound. If the market goes down and the seller wants to take phases 3-4 out, there's going to be a lawsuit. One theory will be misrepresentation, but property is actually stronger than a contract theory. Contract theory you must prove damages, damages is the remedy. By using NRE, you can get an injunction and stop the building of the townhomes or gas stations going up. One homeowner can sue the developer through the NRE theory, may be able to bind backwards 3-4. NRE theory.

Notes and Questions, p. 871

1. McQuade v. Wilcox – Wilcox, owner of a large tract of land, divided it into lots for residential subdivision. By each deed, except her own land, she restricted the lot to residential dwelling. Then Wilcox sold her lot of 4 acres to a purchaser who wanted to open a restaurant. The court held that the recording of the deeds to other lots gave purchaser constructive notice, and they wouldn't be able to build the restaurant. NRE theory. The better language is inquiry notice. DZ is troubled by the Wilcox case b/c of the acreage size. 4 acres is big. You have issue of where restaurant is built, traffic in the community, but this is easier to argue when the lots are smaller and you can see the homes.
2. What constitutes a scheme from which restrictions will be implied in equity?  
A sign, name of the community, if they have promotional brochures saying restrictions all help show a common scheme. Watch the marketers, they may get sellers/developers in trouble.
3. About **45 states believe in the NRE, but other states take the Statute of Frauds more seriously**. CA looks for maps. Restrictive covenants discussed, plus a map, will suffice in CA. Dirt lawyers can be sideblinded by the NRE. Use it!! TX Sct allows it – very clear!!
4. Suppose that in the conveyance of a lot, the **developer retains a right to modify the RCs** on subsequently owned lots? This is pushing to a new kind of restrictive covenant. Some developers will have a ton of RCs. The first thing that happens is that an architectural control committee will be given wide latitude in variances. Also, the developer has the unilateral right to change the RCs. These cases haven't gone through the courts yet. **DZ says** he thinks a developer of 10000 acres probably has the right to develop in phases and get away with different RCs for each phase. **DZ is** more troubled in a 100 lot community. If 1-15 are all bound, then the developer wants to sell 16-20 to be non-bound. If everyone who had bought previously believes they have purchased a restricted community, they should be entitled to it. **DZ says it must be within the range of the scheme the developer has stated**. This question is full of uncertainties. Also, developer assigns votes. People get 1/lot, developer gets 7/ lot owned.

Neponsit POs Association, Inc. v. Emigrant Industrial Savings Bank – Shift from requiring 100% vertical privity

- I. Condos and multi-dwelling units always have common areas.
- II. In a gated private community, the streets must be privately owned.
  - a. If you put the homeowners in a Homeowner's Association, you give them vertical privity.
  - b. If You have common areas, you can have common areas.
- III. Homeowners Associations need money for insurance (\$1-2 million liability), for care of common areas.
- IV. Many times, communities end up donating their community to the city b/c they get fed up w/ upkeep.
- V. If you let covenants go, they are unenforceable

A homeowners' association may sue to enforce the benefit of a covenant even though the association itself succeeds to no land owned by the original promisee. The association is regarded as the agent of the parties in interest who own the land.

Under Neponsit, all purchasers in a subdivision can enforce a RC imposed by the developer, b/c they trace title from the developer (vertical privity). But a 3<sup>rd</sup> party who did not buy any land from the person imposing the restriction cannot enforce the restriction.

**Covenants to pay money for some improvement that benefits the promisor by enhancing the value of his property touch and concern even though the improvements are on other land.** If the formula for calculating the sum is reasonably clear, a covenant to pay an annual fee is enforceable against all assigns. On one hand, the benefit of living in condos is using sports club, but you are burdened by dues. On the other hand, is that a personal covenant that should not run with the land.

p. 880, Notes and Problems

1. **Third party beneficiaries.** What if a neighbor wants to burden his land in favor of another neighbor?  
You are trying to set up RC. They are trying to burden one lot for the benefit of a neighbor. The neighbors need to get together with a lawyer and do a straw transaction. Another case says you need vertical privity. Do we let contract law come into play? On an issue like this, states are scared to let third parties have too much input. People out of the benefitted and burdened land cannot enforce covenants. In Koziel, clearly a neighbor wanted to benefit the neighbor. You should make it a back and forth exchange, I won't build w/in 10 feet if you don't. Policy is burden and benefit on your lot and on your neighbor's lot. If you don't enforce, then the buyer gets a windfall. A NY court did accept a third-party beneficiary, which is scary, but then it rejected it.

The fact that an affirmative easement can't be created in favor of a 3<sup>rd</sup> party, but a negative easement in the form of an equitable servitude can be (if the 3<sup>rd</sup> party is in privity w/ the promisee) illustrates the irrational technical distinctions that pervade this subject. Today, much of that has gone away b/c you can turn a negative into an affirmative covenant.

2. What about a case where the developer covenanted to build a golf course, then sold to someone who let it fall into disrepair? The way you attack it is (a) it's a personal covenant, and it shouldn't run to successors. (b) practicality, changed circumstances. Court here found damages, but they didn't set up the affirmative, you have to maintain it, but they set up a lien. Things like this, when you put the affirmative burden on a third person, you could still end up in a situation where you don't get what you want. Only way is to set up a homeowner's committee, and make sure responsible people collect and take money. Best way is to set up a company of homeowners that oversaw the golf course.
4. **Touch and concern.** Criticism: denies parties their contractual freedom, produces high transaction costs. Defenders argue the test helps protect subsequent purchasers who have behaved foolishly and to prevent promisors and other successors from behaving opportunistically. You need to test (i) intent, but there can also be unenforceable ones. In Davidson Bros. V. Katz, rigid adherence to touch and concern may no longer be warranted. The court found an anti-competition covenant to prevent supermarket in poor inner-city was contrary to public policy.
5. Restatement says they are going away from touch and concern, into a law approach. The Restatement imposes: an unreasonable direct restraint on sale; an indirect restraint on sale that lacks rational justification, or is unconscionable.

You have 100 homes in a community, they will say before you can buy in, you must fill out an application. Anyone who want to sell must have approval by the association. By making it a vote of the homeowners, the responsibility is dispersed, b/c they can discriminate for whatever reason. Very hard to attack. It could be attacked under the Restatement theory. Halfway house: a restriction on use, but it is against public policy to use it as a burden.

Southern Union Gas comes in and says, we'll do your gas, but you must have gas heaters, gas dryers, etc.. It's very common for communities to do that.

#### COVENANT W/ A BENEFIT IN GROSS:

When the benefit of a covenant doesn't touch and concern land (i.e., is in gross), the majority rule is that the burden will not run. In other words, the burden will not run unless the benefit is tied to the land.

English Rule: The burden of an equitable servitude will not run if benefit is in gross.

American Rule: Easements in gross are recognized, and burden of easement runs w/ the land. If an ES is like an easement then, w/ ES, the burden should run even if the benefit is in gross. (Minority view.)

#### Caullett v. Stanley Stilwell & Sons, Inc.

Although the analogy to legal easements is not made w/ respect to real covenants, it has been held that the policies underlying the rule in equity are applicable to covenants at law. Thus, **if a covenant will not run in equity b/c the benefit is in gross, neither will a covenant run at law.**

You sell the lot as a package, where construction is included.

Courts will not enforce b/c:

1. It's personal
2. No benefit to lot-owner who is being burdened
3. Restraint on alienation (competition)
4. Doesn't really touch and concern the land.

May be breach of contract, though. Not under property law. Problem comes in under resale. Does it run with the land? You could tell the buyer, you agree to use me, if you sell, you must tell the new buyer they must use me. Gets into complicated public policy. Only way people do this in modern law is by doing 2 things.

Seller/builder sells lot for 65k. You put a lien of 35k on the lot. If you use builder, that is credited to the house, if not buyer has x months to pay back. This is court enforceable. Say if you sell, it goes to the buyer.

Other approach that works: A contract to sell, then some kind of defeasible feature. DF means if you don't use him as a builder, the property automatically reverts back to the builder. Seller must be builder or you have a contract to resell to the builder.

Remember, even though those work, they are still really not running with the land. It really is a restraint on alienation – what if builder does mediterranean, and you don't want mediterranean. A sure malpractice case is if a builder contacts you and you structure it under a restrictive covenant. DO NOT DO THAT!!!!

#### Notes p. 890

2. Restatement is really saying personal servitudes will be considered. If someone agrees to build w/ that builder, they may make it enforceable. Permit more things, but let judges have some say, too.
3. Often you have the issue of benefit and burden. B/c most statutes set up the easements, courts enforce them. Not the same problems as builder/seller.
4. Is that proper under restrictive covenants? Perhaps public policy for allowing them. But, it doesn't really touch and concern the land. DZ says this would not sell in communities. Also, it's one thing to ask for a strip of land for sewer, it's another to mandate the sort of people. Is this a taking? Probably!!!!

#### **SCOPE**

A covenant will be construed so as to carry out the intention of the parties in light of the purpose of the covenant.

**Single Family Dwelling** – Covenants in residential subdivisions usually prohibit use of the property.

Does a group home constitute a single family dwelling or does single-family imply that the occupants must be related by blood, marriage or adoption? The cases disagree, but recently cases take a functional approach and look at how the group home functions. Public policy favors including homes for individuals w/ physical or mental disabilities.

**Hill v. Community of Damien of Molokai** – FHA prohibits discrimination against handicapped persons in the sale or rental of a dwelling. Discrimination also includes a refusal to make reasonable accommodations when necessary to afford handicapped persons equal opportunity to use a dwelling. **Enforcement of a RC against a group home for the disabled, even if the term single-family is construed to exclude group homes, violates the FHA.**

A community that sets up RCs usually doesn't want halfway homes, largely b/c it decreases the value of their property. When someone in the community gives to a private group, a poor neighborhood welcomes, a wealthy neighborhood shuns.

When shunned, the community will cry "restrictive covenant":

1. Residential use
2. Single family (just as targeted for college students, # of people, blood or legal relationship required)  
Many times this is not defined, b/c they are selective.

Ways to fight it:

1. Definition in the RC does not bar halfway homes, b/c people are still living there.
2. Public Policy. Public policy doesn't allow restrictive covenants to go that far. Sometimes communities will negotiate and allow it to be put on the edge of the community.
3. Federal law and the constitution preempts state law. The supremacy clause says that you can't violate a federal law, and the FHA is a federal law.

You must distinguish b/t someone taking a home w/3 bedrooms and having 6 kids and someone building a rehab place for prisoners. Virtually all places that win on RCs look and appear like regular homes, just with a bit more traffic.

Battles also take place with churches. Churches tend to creep. But, if you let a church go, you waive your right. Everyone wants a church, but they only want the church one day a week.

#### Notes, p. 902

1. What constitutes a "single family" for purpose of RCs? Three people to DZ probably constitutes single family use. It may not be residential, it should look residential and activities must be similar to family.
2. Is a group home for recovering drug addicts exempt from a single-family dwelling? If people being brought into the community are dangerous, that hurts the person running the home.
3. When a covenant bars non-residential use of property, what about piano lessons, operating a business out of a bedroom, etc.? Piano lessons being stopped when 4 pianos in 4 different rooms. Look at scope of activities, influence. Hobbies are not commercial until you start doing them for commercial reasons.

Notes p. 907

1. What about an RC prohibiting convicted sex offenders? Not a protected class under FHA, felons do lose some of their rights. How would you fit a felon under the FHA. A felon is not a protected handicap under the FHA. A halfway house for sex offenders would have more protection than a felon looking for his own home.

**Shelley v. Kraemer – Racially Restrictive Covenants are NOT enforceable!**

Doctrines used to try to prevent non-Caucasians from moving in.

2. Restrictive Covenants – They tried to get it to run with the land  
Fight it by saying
  - a. Not a valid use of RCs
  - c. Doesn't touch and concern the land.
  - d. A covenant prohibiting use of the property by a person of a certain race cannot be enforced by the courts. Judicial enforcement of racial covenants is a state action which deprives a person of 14<sup>th</sup> Amendment rights, Equal Protection. Although the covenant isn't void, it cannot be enforced by exec, legsl, or judicial branches.
3. Defeasible fee – If a non-Caucasian buys the property, the property automatically reverts to O. Key difference is that the moment someone is non-white tries to buy, it automatically reverts to O. Knocked down by EP, too.

**TERMINATION OF RESTRICTIVE COVENANTS** – You must be an absolute watchdog regarding your RC.

1. Equal Treatment of Homeowners.
2. Doctrines of Estoppel and Waiver

RCs/Equitable Servitudes/Negative Reciprocal Easements – RCs must be enforced or courts will remove them.

1. Variance - a request to committee/homeowners to relax the covenants. Express exception. (Like having home closer to save a tree or a detached garage b/c of a gorge.) If it's an issue of cost and an issue that applies to everyone, they are setting themselves up to a waiver. If you draft, *be explicit as to why and the unique circumstances that allow*. Also may have to get assent by affected neighbor. The judge will always ask, is there anyone else you have given one to. Public policy wants equal treatment – Courts hate unequal treatment. *Only way to let a church in is with specific variances*. You must put in that no school, two days a week, etc... Variances are the best and cleanest ways.
2. Terminate RCs – Common law rule is that you must have all the homeowners' consent. Sometimes you have a new RC that eliminates the unwanted element. The RCs sometimes have a write-in procedure. If you have a majority, you sometimes hurt the 10-20 people in the community that are affected by the change. For example, if HEB wants to put in a store, the people far away may be okay, but the people up close won't want it. Way to fix this is supermajority, maybe 85%. Also, you may want to add the neighboring homeowners' consent.
3. Changed Circumstances - Can the original purpose still be accomplished? When you look at the change and the use, it is unsuitable for the use. They tend to not look at the value differences in the land. Looks at what's happened inside the subdivision. Has the subdivision changed? DZ says courts are very hesitant to override these, but the more that's changed, the more likely they are to do so. Changed circumstance will want public policy to override the RCs.
4. Waiver and Estoppel – May be the entire RC, or just specific covenant. Very similar to abandonment. If you let one person do something, you may have waived that covenant. Waiver – permitting the prohibited use so you are waiving your right to stop others. Can be narrow or broad. In day care, is that the kind of thing that doesn't really affect commercial activity. During work hours, etc... If you allow one church in, then you waive your right to churches of all denominations. Some time must pass. You can send a letter 6 month after the tailor shop opens. Estoppel. Someone on the corner of a community puts up a sign "Exxon Tiger Mart." You see the cement being poured. The argument the person will make is that they were never estopped from doing it, and courts hate to rip buildings down. Estoppel is reliance to the detriment that the community is not going to do anything about it. You can't have estoppel on things you can't see. Estoppel is open, and a \$200 basketball hoop won't do it. Must be a significant cost.
5. Abandonment – May be the entire RC, or just a specific covenant. The covenant has not been enforced, so they should not be enforced. What if you have a non-committee restrictive covenant, and people are building w/o getting plan approvals? Probably will just be abandoned. DZ likes the theory of committees. Abandonment is a general argument that the RCs have been ignored (I don't care), and waiver is more a non-conforming use comes in, you don't grant a specific variance, and the judge will say you have waived your right. Requires a longer time period.

What about a subdivision letting the row that faces Westheimer have a 7-11? Nope, b/c otherwise it would have a domino effect. That is not good enough for changed circumstances.

**Western Land Co. v. Truskolaski** – The most frequently asserted defense to equitable enforcement of a servitude is that the character of the neighborhood has so changed that it is impossible any longer to secure in substantial degree the benefits of the RCs. If this is shown, equity will refuse to enforce the covenant. However for the defense of changed conditions to succeed, most courts require either 1) the change outside the subdivision must be so pervasive as to make all lots in the subdivision unsuitable for the permitted uses, or 2) substantial change must have occurred within the subdivision itself. **Change outside the subdivision that affects only the border lots in a subdivision isn't sufficient to prevent enforcement of the covenant against the border lots.**

Example: Developer restricts a subdivision to residential use. Subsequently commercial development and traffic increase on the borders of the subdivision. The owner of a border lot w/in the subdivision wants to develop commercially. The courts refuse to permit the border lot owner to develop commercially unless the purposes of the restrictions can no longer be achieved for any owner b/c of changed conditions. Policy: 1) if the purchaser of a border lot has paid a lower price b/c it's a buffer lot, to permit the border owner to develop would give him a benefit he did not bargain for and deprive the owners of inner lots of a benefit paid for. 2) domino effect, new border lots would want to develop then, too.

Zoning doesn't trump RCs. RCs can be more restrictive than zoning.

### CO-TENANCY

Describes the standard default rules when two or more persons jointly own property. Co-tenancy is for undivided ownership, where each person has full rights to all land discussed. Each co-tenant has the right of occupancy. Each person has the burden of standard expenses, normal upkeep. The benefits, apart from the rights of use, are that the profits must be shared in the same proportion of ownership.

#### **Fundamental Rights**

1. Right to **accounting** – how much spent, how much brought in, how divided.
2. Right to **partition** – every co-tenant has the right to break the co-tenancy, JT can destroy the JT
  - A. Can be **in-kind** (you take an undivided ownership and divide it into parts) Easy to do this if you have raw land that is equal in terrain. But not w/ a gold necklace
  - B. By **Sale** (Auction or Real estate)
  - C. Can be modified by the buy/sell.
3. Share in the proceeds

Three types of Co-Tenancy

- I. Tenancy in Common
  - A. Basic, undivided
  - B. A and B own 10k in a bank account, when A dies her 5k goes according to her will, and if A has no will it goes to the state executor.
- II. Joint Tenancy – Also known as Joint Tenancy with Right of Survivorship (JTWROS)
  - A. If A and B have a bank account, and A dies, B gets it all. Taxes still must be paid.
- III. Tenancy by Entirety (Fewer than 1/2 the states have this) DZ DOES NOT TEST ENTIRETY
  - A. It's a husband and wife joint tenancy.
  - B. Terminable by divorce.

PRESUMPTIONS – We presume tenants in common. But, if married person, presumption may be joint tenancy. However, for all practical purposes and for DZs exam, just know the first two.

When you walk into a bank, you will be asked if you want joint tenancy with right of survivorship. The historical approach has been very rigid.

Formalism Approach to Creating a Joint Tenancy, 4 Unities:

1. Time – Similar to the RC, the interest of each joint tenant must be acquired at the same time. Money must be deposited at the same time.

2. Title – Must be acquired by the same instrument.
3. Interest – Must have equal undivided shares
4. Possession – Each must have a right to possess the whole.

If father and daughter are going to get an account, and the father has 90% of the money, then he must give the daughter a gift then and there to make it equal shares

New rule, we don't care about the 4 unities. We JUST care about Intent and Words (magic words)

Modern Approach – Intent and Words (magic words)

Notes and Problems, p. 324

1. O conveys Blackacre to A, B, and C as joint tenants. A conveys his interest to D. What is the state of the title? This gets into right to partition and right to accounting. It would be better if they had right of survivorship in this problem. What happens if B dies? His share goes equally to the remaining co-tenants. If A sells his share to D, that is As right to partition. Three ways to look at the problem. By partitioning, it destroys the joint tenancy. The policy argument is that
  - A. The JT is still intact. Very few take this step, b/c the fundamental relationship is destroyed by a transfer out.
  - B. The joint tenancy is completely destroyed.
  - C. Tenancy in common w/ a joint tenancy feature. Hybrid view. The law tends to be this. Someone's transfer out only destroys that person's JT.

Also consider, what was O's intent? As long as the kids still own it, did he want the interest to go to the survivor. O could say in his transfer what happens when one transfers out.

2. O devises Blackacre to A and B for their joint lives, remainder to the survivor. What interests are created by the devise? This is the first we've seen on future interests. Husband gives to wife life estate, to the kids when she dies. And Wife to Husband, rest to kids when he dies. A mirror relationship.
 

Here, A and B don't have the right to partition.  
This is a future interest called the contingent remainder.

Parents giving stuff to kids often have different intent than partners, who are in it for money. The survivorship feature makes less sense to DZ if people get together for a business venture, b/c their share will go to co-partners after death.

T in common is good for unrelated parties, and JTWROS is good for people who are related. JTWROS, it's all your money when the other person dies, and if you have a tenancy in common bank account, the \$ is often frozen until the estate is finished.

Do we require strict formalism or allow parties intent to control?

Strict formalism sets up a barrier so people must be willing to go to the effort to do it.

1. Make it difficult
  - a. Make sure it is what wife intends.
2. Proof - Allow it to be recorded
3. Problem that she wants to play both sides. If he dies, she rips it up

No lawyer for both of them could ever be doing this, destroying the joint tenancy w/o letting husband know. Further, if this lawyer is wrong, there could be a malpractice suit. (But, in Texas, beneficiaries cannot sue the lawyer after person dies.)

**Reddle v. Harmon** – Each JT has the right to convey her interest, which severs the JT. Under old law, a JT had to convey to a straw person who conveyed back to JT. Common law required that, in order to have a legal transfer, one person must convey to another person, not to herself; hence the JT could not convey to herself. But, here it allows a JT to unilaterally sever the JT by conveying her interest to herself w/o using an intermediary.

**One JT may unilaterally sever the JT w/o the use of an intermediary device.** An indisputable right of each JT is the power to convey his separate estate by gift or otherwise w/o the knowledge or consent of the other JT and thereby terminate the JT. Common sense and legal efficiency dictate that a JT should be able to accomplish what he could otherwise achieve indirectly by use of elaborate legal fictions.

### Notes p. 331

1. Should a deed be effective w/o recordation?
  - a. It's one thing to get rid of straw, another to get recordation. Many states get rid of the straw but still require recordation.
  - b. In some cases, courts may say the husband and wife have fiduciary duties to tell each other when they break the joint tenancy. Some states have come to say that intent is enough.
  - c. What if woman sticks note breaking the JT in her drawer at home, she tells her daughter, and when hubby dies first, woman rips it up. Lawyer who participated in this may be trouble for fraud. It would be his duty to tell the court about this note. If the wife did it on her own, it's really whether or not the daughter comes forward with the info.
2. Simultaneous Death – In many instruments, people stick in a 24 hour clause, it doesn't matter who died first if they died w/in 24 hours of each other. If die the same, ½ appropriated to A's estate, ½ to B's estate.

**Harms v. Sprague** – No one should ever lend money or sign a long-term lease w/o getting all JTs to sign on!!!!!!

This case shows the risks of signing just one T of a JT on a mortgage. The mortgage does not survive if the person who signed the mortgage dies. **ANY mortgagor must get all JTs to sign the mortgage. Otherwise, if the person dies, the mortgagor is out of luck.**

D argues that granting of the mortgage destroys the JT and results in a Tenancy in Common. But no conveyance, nothing done through a straw, no recording. **JT not destroyed b/c it's not the intent of the parties.**

Mortgage:

Title theory – minority of states. Since a mortgage by JT conveys the legal title of the JT, the mortgage destroys the unity of interest and severs the JT.

Lien theory – majority of states, it's simply over when person dies, NO severance of JT

You would have to argue something destroys the JT. The use of a recorded straw and the recording is a big deal so often this isn't the case. If not, then the survivor of the JT takes the property w/ the lien, provided they signed. If not, the bank/mortgagor is out of luck.

### Questions, p. 337

1. Should the lender take the risk of losing its security if all the JTs don't agree to the mortgage? That question is part of the reason why courts don't want to destroy the JT. Often there's a personal guarantee to the mortgage.

If person doesn't pay mortgage, and there's a foreclosure, would the entire land be subject to the mortgage or only half the land? Generally the foreclosure is of the half interest. You go for a partition, but you don't get the whole interest if you are working the foreclosure.

2. **Should a lease destroy a JT?**

A lease should require every joint tenant to sign on to the lease, but that isn't always possible.

Common Law – Lease Severs – B/c a lease destroyed the unity of interest

Modern View – Lease Doesn't Sever – Surviving JT takes the whole, but courts split over whether surviving JT takes ½ subject to the lease or holds the entire property not subject to the lease.

Example: B signs a lease w/ Z, B dies, and A gets all the land held in JT. Then Z would have to sue B's estate to remain living there. If A had been taking money, though, then great – estoppel.

3. Everything you and your spouse acquire is somewhat joined. Even if wife and husband separate, and wife buys big lottery ticket, hubby gets a part. In TX, when you first find out a client wants a divorce, get property severed immediately. A divorce severs the JT, as does murdering the other JT.

JT –

1. Was it created properly?
2. Was it destroyed?
3. What survives upon death?

### 2 types of Joint Tenancy Bank Accounts

1. Convenience account

- a. We may disallow a JT. Most jurisdictions say the surviving JT takes the sum remaining on deposit in a joint account unless there is clear and convincing evidence that a convenience account was intended. Burden of proof is placed on persons challenging the JT. 2 factors affecting the account are: no equal ownership, no equal management.

2. JT With Right to Survivorship – Banks encourage these. It minimizes liability and makes clear who gets \$ after death.

Rest and Residue Clause – everything left in the estate goes to children equally.

#### Problems, p. 339

This language is hopefully in writing. How long was it on the account?

Suppose O also gives A a right of access to O's safe deposit ?

That means you need a little more language about proof of not intending to give it to that person. What does the will say?

2. Does S have any rights to the money?

Creation of that joint account: Just b/c wife has power to take money out doesn't mean son doesn't have rights to it. Really focus on H's intent. Was son added as a convenience? Does the wife have enough money to live? The son can say wife hadn't contributed either.

3. A and B have a joint savings account of 40k. How much can A's creditor reach?

We need more facts here. Ask, how it was created and for what reason. How much money did each party put in? If it's a convenience account, A's creditor can't reach the account if B put all the money in and A is merely on the account for convenience. A gift of 20k w/in 6 months is questionable, but a gift w/in 3-5 years is surely okay? When A dies, B owns the whole thing, and then it is very hard for A's creditors to reach.

Does person have power to withdraw? Was a gift made? What was the intent? How was it created?

#### Absolute Right to Partition

In theory, co-tenancy is undivided ownership. So each co-tenant has the absolute right to every square inch of property. Between co-tenants, A and B, B can give A the power of possession. A can live there for free – A doesn't owe B any rent.

Duty of Accounting and duty to share 50/50.

Waste – Viewed under eyes of a reasonable person. If person living there causes damage.

You can always end a co-tenancy through agreement.

Partition - Any T in common or JT has the right to bring a suit in partition. This is an equitable proceeding in which the court either physically divides or sells the common property, adjusts all claims of the parties, and separates them. When co-tenants are fighting and can't come to an agreement, the judicial remedy of partition terminates the co-tenancy and divides the common property.

Partition in kind: Only used for fungible raw land. The court may order physical partition of the property into separate tracts if that's feasible. Once the land is physically partitioned, each party owns her tract alone in fee simple. If the separate tracts are not equal in value, the court will require one tenant to make a cash payment called owelty to the other T to equalize values.

Delfino v. Vealencis – Ds want it in kind so they can keep their ownership and surround their shares of the land around their business. The viability of their business is at stake.

Traditionally, courts prefer partition in kind. The law starts from the presumption partition in kind is preferred. Partition in kind will never be allowed when a house is involved – duh. The court ultimately concludes that

#### Duty of Presumption

1. Agreement of the parties.
2. Presumption in kind

DZ starts: What was the intent in creating the JT?

To preserve it, we go with a partition

Economists say it wastes, there is economic harm. Houses around the garbage business go for less. DZ says trial court was right, based on economics.

Sentimental Rule – All parties must agree for a partition in sale, even if it doesn't make any economic sense.

Appellate decision is based on intent, history, how will it affect the individuals?

#### Notes and Questions, p. 346

1. There are some statutes that say sale will be authorized if partition in kind cannot be made w/o great prejudice to the co-owners.

Gray v. Crotts - Courts love agreements. DZ hates drawing straws determine land.

2. You can get partition in kind.

3. DZ thinks a lot of the arguments dissolve, and the court just had sentimental value for old garbage .

4. Have one of them get it for month then it goes back and forth. Only way, joint possession divided in time.

5. Can you have an agreement to not partition land? NO! Everyone has a fundamental right to partition. It's better to say, partners can't partition this for the first year, to help get a business off the ground, but clearly not 5 years. Many people put in buy-sell agreements. You have a rich family. Son marries a girl, the families assign shares, like 1/64 each. If girl leaves, she must sell back to the rich family.

#### SHARING THE BENEFITS AND BURDENS OF CO-OWNERSHIP

DZs questions on accountings will not be the same, he's not testing as

Spiller v. Mackereth – Must a co-tenant in possession (A) pay a reasonable rental value to the co-tenant out of possession (B)?

Majority view: If B is not ousted by A, A is entitled to use and occupy every part of the property w/o paying any amount to B. B cannot recover a share of the rental value of the land unless B has been ousted by A, or A agreed to pay B, or A stands in a fiduciary relationship to B. Ouster is truly ouster. You have to test the entry and it must be rejected to constitute an ouster. After someone is ousted, they are owed rent.

Policy: This rule promotes the productive use of the property. It rewards the co-tenant who goes into possession and uses the property. It also follows logically from the premise that each co-tenant has the right to possession of all, and not merely a proportionate share of the property.

Notes: The courts here could have gone toward intent, why didn't they? The courts don't want to take it that far, they would have had to determine the value, etc... Always the absolute right to partition in kind or by sale, this would be by sale. The courts try to stay out of the rent issue and micromanagement.

#### Notes, p. 351

1. This ouster has the same problems that self-help has, it's asking for a fight.

2. DZ says it depends. They set a high threshold b/c proof b/t parties is difficult. This gives proof. It's a very clear line, either you went there or you did not. Set proof that is easy to adjudicate in court. Should refusa to pay amount to an ouster? Often the parents wanted the kids to live there for free. You are forcing a commercial situation. You don't want to set up the idea of someone not knowing if they have a place to stay. The courts don't want to get involved in forcing a transfer of wealth b/t brother and sister. If the cotenants.....Spiller? That's why people need these agreements ahead of time.

3. DZ says the exception is sort of the rule. Under standard partnership law, one of you can't say come to me later and I'll give you 20% off. This note is misleading.

You have A and B in Co-Tenants. They owe 500 in taxes/year. They don't pay taxes in 95 or 96, and in 97 the government forecloses due to no taxes. So, B goes and pays 1500 to get the property. A can buy back in. There are fiduciary duties b/t co-tenants. This isn't fair b/c B bets that the property goes up, and A can buy in if it goes up or not if it goes down. Courts say default rule is one year to buy back in. Co-tenants may want to negotiate fiduciary duties prior to entering an agreement. Fiduciary duties to co-tenants is often greater than to other people.

Adverse possession – A and B are co-tenants. Each one has a 100% right to the proeprty. Only way is through a letter saying on this day, I am beginning open, notorious, and hostile adverse possession against you, and the other person must know about it. Happens when one person does all the upkeep.

Swartzbaugh v. Sampson – One JT has the right to lease her interest in the property, even over the objection of the other JT. Does conveyance of a leasehold sever the JT? This involves the same issues as severance by mortgage.

Common law: A lease severs. This was b/c the conveyance of a leasehold destroyed the unity of interest b/c the lessor JT had only a reversion in the property where as the other JT had a fee simple. Their interests after the lease were different. This parallels the title theory of mortgages.

Modern View: Lease does NOT sever. There is no severance by one JT giving a leasehold, and the surviving JT takes the whole. But cases split over whether the surviving JT takes one half subject to the lease. The split is similar to that over whether the surviving JT takes subject to a mortgage given by the dead T. One view holds that the surviving JT takes subject to the lease on a 1/2 interest. Another view is that the survivor holds the entire property not subject to the lease. Under this view, a lessee can protect himself against the risk of the lessor dying only by having all JTs sign the lease or by requiring the lessor to sever the JT beforehand.

1. Power of the Co-Tenant
  - a. Undivided ownership over 100% property
2. For a Co-T to object, the lease must interfere w/ the co-tenants right to use the property, then you have something akin to an ouster.
  - a. Negate the ouster or lease
  - b. Partition – In kind or by sale? If the wife really wants out, she should partition.
3. She could try to enter into possession w/ the lessee
4. She can sue her husband for an accounting of the rents received by him.

Rough case, b/c the wife didn't want the money, she wanted the trees, but here it was too bad.

RENTS:

Common law rights, you split it 50-50, or whatever percentage you co-owned it in. B cannot annul the lease unless it is so bad that B cannot use the place. Regardless, B gets 50% of the rent. Most of these take place w/ consent, but if not use this rule.

Co-Tenants are liable for the basic costs of the land:

1. Taxes
2. Existing Mortgage that they inherit the property with.
3. Basic maintenance
4. Insurance

If one pays for these expenses, they have the right to reimbursement.

Improvements. It's not a basic expense, so you do it at your own risk. Sole Risk Provision. Say you have an apt house that goes for \$300/month, person must spend \$5000 in repairs, then it increases to \$1500/month. If one person spends the money on improvements, that person can get reimbursed. But you have to continue to pay other person the \$150/month. So if it goes down, person doing improvements is screwed. Bigger problem is if the place is going to be sold. You can never get money for your own labor, though.

You can opt out of fiduciary duties from the beginning of a co-ownership.

You may regard improvements by writing a letter and asking for agreement to split costs from the beginning.

If you spend \$10,000, most courts say if you are entitled to anything, you are only entitled to the increase in value due to the expenditures.

Best scenario for recovering costs. Continuing relationship that brings in rent or profit.

Easy to show when it's not being rented out

Then, when you have \$300 for old, and \$1000 new. The sole risk person, B has a right to share in the value increase due to the improvements. You normally were splitting \$150 each. Now, they are getting an extra \$700. We don't let A take that extra money.

What happens: The \$1000 that comes in must be shared 50-50. Then you amortize cost over the useful. Maybe

Worst chance of recovering costs: Partition. How? By in kind, or by sale? In kind you can argue to the court, I built this greenhouse on the property. Please give me the part of the land that has the greenhouse. But, a house w/ improvements must be partitioned by sale. That's when B says you spent \$10k but it's only worth \$2k. The judge will make a decision

In test packet there will be a lot more on this sort of stuff. The mining case where one of the co-owner tried to take his 1/7 of the mine. Court said no, the person couldn't do that b/c we don't know how much ore there is in that 1/7.

## POSSESSORY ESTATES

Types of Estates

1. **Fee Simple** – This has the potential of enduring forever. “To A and heirs.”
  - a. Fee Simple Absolute – Absolute ownership, potentially infinite duration w/ no limits on inheritability
  - b. Defeasible Fees
    - i. Fee Simple Determinable – Automatically reverts (So long as, until,
    - ii. Fee Simple Subject to Condition Subsequent – Requires action (but if, provided however)
2. **Fee Tail** – Ends if and when the first fee tail T has no lineal descendants. “To A and the heirs of his body.”
3. **Life Estate**- Ends at the death of a person. “To A for life.”
4. **Leasehold Estate**- An estate fixed by time “O transfers to A for a limited time.”

### FEE SIMPLE

Basic way we own and transfer property in USA. Feature is it's full ownership, it gives the right to possess, to modify, to transfer upon death. *Full ownership* and *free transferability* of property. Also ending dead hand control. We don't want people having control when they are dead for 500 years. But, a partnership can still give you dead hand control.

In the past, the courts and all the statutes focused on magic words. You had to use the right words.

“To A and his heirs.” Those are the magic words. “To A” means it's granted. “His heirs” means it's transferable.

A title company will go through the chain of title. If they go back to 1900, and there are no magic words, you may have a problem. May have been taken care of through AP, but you may be worried about minors and indigents.

A grant to “A and his heirs” gives A's heirs no interest in the property. The words “and his heirs” are only words of limitation indicating that A takes a fee simple. A can sell or give away the fee simple, or devise it by will, thus depriving A's heirs of the land. A's heirs can not prevent the gift to someone else or the selling of the property.

Modern View – The ancient requirement of words “and his heirs” has been abolished in all states. Many lawyers still use them, though. Under modern law, a *deed or will is presumed to pass the largest estate the grantor or testator owned*. Thus a conveyance of Blackacre to A conveys a fee simple if the grantor had a fee simple.

### LIFE ESTATE

Given for the life of or joint lives. Used where you get husband and wife have mirror image wills. If hubby dies, he gives wife a life estate in 1/2 the home. When she dies, the hubbys grant controls where it goes, so usually you say to my wife for life and then to my children.

Let you live there or get the income from it. So, wife gets half the house? She can sell her half, but not her husband's half. They can rent but not sell. What if wife goes into nursing home? She can rent for \$1000, but the T is taking a risk that wife might die before his lease is up, b/c once wife dies, the house transfers to the future interests.

The usual life estate is “O conveys to A for life.” On A's death, the land reverts back to O. A life estate can also be measured by the life of someone else.

Survivability Feature: When the hubby dies the life estate is a present interest. The people who get it after the person dies is a future interest.

A life estate can be created “to the children of A for their lives, remainder to B.” The principal question is what happens to the share of the first life T who dies? Usually it goes to the surviving life Ts and the remainder does not become possessory until all the life tenants die.

#### Construction Problems:

Sometimes it’s not clear what estate is created. Courts must construe the instrument based on *facts* and *probable intent of the grantor*.

Example: To my wife W so long as she remains unmarried. Does this create a FSD or a life estate determinable (on the theory that the condition, marriage, could only happen during W’s life)? Majority view: A FSD.

Example: To my wife W to be used as she shall see fit for her maintenance and support.” Does this give a FS or a life estate? Majority view: A fee simple, maintenance and support merely state the reason for the gift. (*White v. Brown*)

Alienability -A life T is ordinarily free to transfer, lease, or otherwise alienate her estate. But, the transferee gets no more than the life T had – an estate that ends at the end of the measuring life.

Limited Use – A life estate is of limited use b/c it’s a very inflexible way of providing for successive ownership. Suppose that O dies, devising Blackacre to H for life, and on his death, to their children. H may live a long time and problems may arise. Suppose H wants to add a room on the house and needs to borrow money from a bank, giving the bank a mortgage. The bank won’t lend money w/ only a life estate as security, b/c the bank’s security ends when H dies. Or suppose H wants to lease the land beyond his death, or wants to sell the land to move to a smaller place. It’s possible for H to do what he desires if all the owners of the remainder are adult, competent, and consent. But if one of them is a minor, or if one doesn’t consent, H may be locked in an inflexible position.

Equitable Life Estate (Trust) – Far more satisfactory than a legal life estate is an equitable life estate. To create such, O can devise Blackacre to X *in trust for H for life, remainder to O’s children*. X, the trustee, owns the legal fee simple and has the usual powers of a fee simple owner to sell, mortgage, or lease. H has the right to receive all income from Blackacre or to take possession of it. X, the trustee, must manage the property prudently and is held accountable for mismanagement. H can be named trustee by O.

#### Magic Words

Old view – O conveys Blackacre to H. It’s a life estate b/c O did not use “and his heirs.” You had to use magic words.

New View – We now presume fee simple conveyances. Life estates need magic words showing intent of a life estate.

Part of fee simple is Defeasible Fees. This category is “I give yo a fee simple but,,,” if you do or don’t do something. It’s a conditional fee simple. So O conveys to S a hospital for so long as it is used for medical purposes. That’s a defeasible fee. 2 types of fee simple determinable:

1. Fee simple determinable
2. Fee Simple

When you give charitable contributions to diseases, when that disease research is no longer needed, it goes under the doctrine of “cy pres” the nearest possible disease.

Whole concept of defeasible fee is that you want to control it. You can dictate church purposes. DZ says we don’t like defeasible fees, so we are a bit hostile to them. After a while, 25 years, it may turn into a fee simple.

More problematic: O conveys to A, Blackacre, so long as alcohol is not served on Blackacre. Some things are declared invalid and against public policy (race has been prohibited).

“To A and to heirs of the body,” is a fee tail. This is an attempt to control and keep the firstborn male descendants in control of the prop[erty]. In virtually all states fee tails have been abolished. Any time you see “and heirs of the body.” This is FEE TAIL!

In every state abolishing a fee tail, the court is going to tell you what they did w/ the fee tail. Some say A takes a life estate, and As heirs take a fee simple. The more prevalent view, is it creates a fee simple in A. That's the most common approach.

O is the old grandfather and thinks a fee tail exists, and he drafts to "my son A and heirs of his body, and if A dies w/o issue to my daughter B and her heirs." So, View I is A has a life estate and A's kids have a fee simple. View II says A has fee simple. That's most common. View III says A has a fee simple but we give the other language effect. If A dies w/o issue (meaning w/o kids), we will give it to B. Way we give it to B is that B just gets the fee simple. We are not letting generations upon generations control. Reason why some pick B is b/c O wanted it to go to the generation of A and Bs kids. Some states go to I is b/c heirs of his body is not fee simple.

Say O conveys a life estate to a married couple, A and B, and A dies. Does B get it until she dies, then the whole half the estate go to O's heirs and