

Property Outline -- Abravanel

I. Property in general

1. What do we mean by the term property?
 - a. Property may be used in the manner equivalent with title, synonymous with notice of interest or ownership.
 - b. "Property" is used in a descriptive fashion – "to describe things that are the subject of one's property."

2. What does it mean to say that one owns something, functionally? There are two elements of ownership:
 - a. Use
 - b. Disposition

3. Concept of property = a bundle of rights
 - a. Possession
 - b. Enjoyment of use
 - c. Transfer to another – the property owner is able to transfer use to buyer.

4. States offer protection to person with regard to property rights. This protection takes two forms:
 - a. Criminal Sanctions – does not result in restoration of property to owner
 - b. Civil rights or remedies—these do not seek to punish the wrongdoer, they seek to restore parties to the status quo.
 - 1) In cases – the courts by decrees seek to restore the object itself or the monetary equivalent. Through injunctive relief courts will join an individual to a commission of an act. If the individual violates the injunction, he/she will be held in contempt of court.

N.B. states have absolute power over property use and disposition, above the owner.
5. The original acquisition of property:

Undiscovered land – the 1st person or state to exercise dominion was vested with legal ownership. (This is the 1st rule of ownership).
6. There are 2 types of property:
 - a. Real property: land, real estate, or that which is permanently fixed to land.

N.B. Buildings and those things that the building contains that are permanently affixed constitute real property. (e.g. the tables in our classroom may be considered real property).
 - b. Personal property: "chattels" or "rights to chattel."
 - 1) Tangibles: movables, chattels
 - 2) Intangibles: rights against 3rd parties, which may be enforced by legal action. e.g. Bank Accounts, stocks, bonds, patents, copyrights, etc.

In a bank, the depositor is a creditor of the bank in which he/she places his/her savings. The bank is a debtor and the savings account represents a claim by the depositor to the bank's assets.

II. Personal Property

1. Acquisition by Capture:

A. Possession:

- a. Possession is defined as the union of 2 elements:
 - physical control
 - intent to control
- b. Rule & Pierson v. Post: The mere pursuit of a wild animal is not tantamount to possession, capture is required.
- c. Eads v. Brazelton: Π was a sailor and found a wreck and marked it with buoys. Π did not come back for a while. Δ located the wreck and engaged himself in retrieval. The issue was whether the Δ's process of retrieval was enough to satisfy possession. The court said NO, because *like wild animals*, the finder must acquire physical control over the object and have an intent to assume dominion over it; being in the process doesn't count.

B. Abandonment:

- a. Legal conclusion that property was previously owned and the owner has voluntarily divested himself of it and it is now not owned. *Therefore, abandoned property is awarded to the finder.*

2. Rights of Finders:

A. Recovery – Doctrine of the Election of Remedies:

- a. Replevin - Π asks for return of the object (a thing) to the rightful owner; the property owner seeks to affirm or reaffirm the original relation. Π gets compensation for damage done to the object and any damage sustained by the Π due to the loss. (Loss of car: get cost of rental and car damages). (In real property this is called *ejectment*).
- b. Trover - Π would be asking for monetary value of object or thing and forgo recapture. By this action, whatever Π had in the things (title, etc.) is transferred to Δ, and Π is awarded monetary damages in an amount equivalent to the value of the thing at the time it was taken plus a flat rate of interest. This is a *forced sale*, with interest transferred to defendant at time of original conversion
 - Doctrine of Relation Back: Since through an action in trover, the court will transfer Π's title to the Δ as though the Δ had title to the object at the time it was taken, Π cannot claim damages to injury of the object after it was taken or seek compensation for its use.
- c. Doctrine of Accession: if converter has acted in 1) good faith and 2) if the value of the object has increased dramatically, it is *possible* that the converter has acquired right to chattel by application of this doctrine. This is not to say that the converter is not liable, but only that the Π's options are limited in that he/she can only pursue an action in trover. (*This will come up later*)
- d. N.B.: In 1892 (date of Goddard), a Π could not sue in the alternative, now he or she can.
- e. Doctrine of Subrogation: (Principle of Suretyship law: my insurance company may sue driver #2's insurance company who may then "go" against driver #2

in an accident case because the company is subrogated to the rights of driver #1). Basically gaining someone else's rights to suit of someone else

- Subrogation in Armory: Assume that O sues B for the Brooch. B is now out the money paid in trover to A. B may sue A under the doctrine of subrogation because through an action in trover, B acquires all the rights of O's title, including O's right to sue A.

B. General rule: An owner of property does not lose title by losing property. O's rights persist even though the article has been lost or mislaid. However, a *finder has superior rights to everyone but the true owner* (but there are exceptions).

- a. Armory v. Delamirie: Π finds jewel and takes it to jeweler who keeps it. Π wins because he is the *prior possessor*. (***Prior possessor always wins over the subsequent possessor***). Jeweler commits wrongful detention (conversion of chattel)

C. Relativity of title: Title to the jewel in Armory is relative to who the claimants are. O prevails over A, A prevails over the jeweler. If A lost the jewel and B found it, A would still have title over B, because A would still be the prior possessor. (Also in Brazelton, court sought to determine the "relative" title).

D. Conversion: The wrongful exercise of dominion over personal property of another regardless of the good or bad faith of the alleged wrongdoer. The crux is that it is without the consent of the owner. If A takes from O, without O's knowledge, and sells to B, who sells to C, each transfer constitutes a conversion and O has a separate cause of action against A, B, and C. However, O is only entitled to 1 recover.

- a. Actions that constitute a conversion:
 - Wrongful taking
 - Wrongful transfer
 - Wrongful detention
 - Wrongful use
- b. You cannot have a conversion for real property.
- c. A converter may gain title that is good against the whole world by running the statute of limitations.
- d. Wrongful transfer: since O can only collect for once, no matter how many parties are involved in wrongful transfer, if he were suing in trover, he would want to collect from a second party if the chattel had increased in value between conversion and a later sale (for ex. O will sue A for wrongful transfer to B). He waives the first tort to collect on the 2nd one.
- e. **N.B.** In Armory, A is not a converter at the time he finds the jewel, but becomes a converter when he wins the trover suit because the object is converted from A to B. Now, O has a cause of action against A.

E. Prior Possessor as trespasser:

- a. Rule: Prior possessor rule applies to objects acquired through theft or trespass.
- b. Anderson v. Gouldberg: (Πs trespassed on timberland of 3rd party and took lumber away, which was later taken by the Δs. Πs sue Δs in replevin). B

cannot question A's title, because B is a subsequent possessor. Otherwise there would be a series of unlawful seizures. (Also Russell v. Hill, same facts)

F. Object Found under the Soil:

- a. Rule: If the object is found under or embedded in the soil, it is awarded to the owner of the premises, not to the finder.

Goddard v. Winchell (Meteorite falls on Π's land, Δ was sold the meteorite by Π's tenant. Replevin action)

- Real property v. Personal Property: When the meteorite was removed from the earth it became personal property. Also, when a tree is growing in the forest it is real property, however when it is sawed into lumber it is personal property. Classify property at time of suit as either real or personal.
- There are 3 types of interests here: the owner's, the tenant's, and the finder's.
- Winchell is not a BFP here: he must have paid full value, and not have any notice of the dodgy facts behind the chattel (he doesn't satisfy this, so no recovery)

Elwes v. Brigg Gas Co.: (lessees, a gas company, found a prehistoric boat embedded in the land of the lessor. Π gets the boat regardless of whether or not he knew that it existed.)

- b. Exception: Treasure Trove: gold, silver, or money *intentionally buried or concealed in the soil with the intent of returning to claim it*. (In English law it belongs to the state; in American Law it usually belongs to the finder – see page 113 for an exception. American law will also consider items not concealed underground to be treasure trove.)

G. Object Found in Private Home:

- a. Rule: Objects found inside a private home are usually awarded to the owner of the home.

- b. **Owner is not in possession**: Hannah v. Peel: *Exception to "private home rule" b/c the owner was not in possession*. If the owner of the house has not moved into the house, it has been held that the owner of the house is not in constructive possession of articles therein of which he is unaware. (Soldier found brooch in house owned by Π but requisitioned by the military. Δ reports finding, but Π wants the brooch.)

Policy Considerations:

- Return of Goods to the True Owner
- How best to do this in Hannah? By giving the brooch to the LIQ, because the T.O. will retrace his steps.
- Carrying out the expectations of the parties
- Preventing trespass
- Upholding public order
- Rewarding honesty
- Rewarding luck

- Rewarding finders

H. Finder is on premises for a limited purpose:

- a. Rule: If the finder is on the premises for a limited purpose, it may be said that the owner gave permission to enter only for the limited purpose, under the direction of the owner, and the owner is entitled to objects found.

South Staffordshire Water Co. v. Sharman: (Δ was employed by the Π to clean out a pool of water on their land and he found two rings embedded in the mud on the land. Π sued Δ for the rings).

I. Object Found in Public Place:

- a. Rule: Lost property goes to the finder rather than the owner of the premises. Bridges v. Hawkesworth (from Hannah, where patron finds purse and gives to owner of premises who advertises for the T.O., who never comes. Patron sues owner for purse and wins.) Public v. Private distinction: here public place, in Hannah private house.
- b. Rule: Mislaid property goes to the owner of the premises. McAvoy v. Medina: (Pocket book is found by the Π in Δ 's barber shop. The court finds that the pocket book is mislaid property and therefore finds for the Δ .) Idea behind this is that true owner may retrace steps, so best place for the property to stay is in the shop

J. Bona Fide Purchaser (for value) or Good Faith Purchaser

- a. Must have paid value
- b. Must be without notice or the facts that would raise doubt as to the sellers acquisition of the property
 - Winchell is not a BFP because he had facts about the acquisition of the property. If he had been a BFP, he could have sued Hoagland in a separate lawsuit. (The law protects the owner regardless of the situation of the purchaser).

K. Hypos:

- a. O brings a trover action against A. A has sold the object to B. Does B care that O prevails? What effect does any judgement have on B?
Answer: Bs title is validated. Through the doctrine of relation back, the title of the converter is deemed to relate back to the time of the conversion. It is as though A had full legal title at the time of the sale to B.
- b. Object has appreciated in value from date of taking by A and sale to B. How may O in an action in trover maximize potential recovery?
Answer: There were two conversions, both A and B are party to the wrongful transfer. Π can either sue A or B for the 2nd conversion. O may maximize recovery by waiving the 1st tort and acting on the 2nd tort. Both A and B are parties to that tort.

L. Summary for Finder v. LIQ

- a. On the exam, you will need to go through each variable below to determine who gets the property (how many of the following variables award the property to the

finder, how many to the LIQ). You will most likely state at the end that “it is more likely that overtime x will win over y.”

1. Armory
2. Return of goods to T.O.
3. Carrying out the expectations of the parties
4. Preventing trespass
5. Bridges: public v. private distinction
6. Constructive possession/attachment
7. Employee (depends on lost/mislaid/abandoned theory: p. 112)
8. Treasure trove
9. Abandoned property
10. McAvoy: mislaid/lost distinction

3. Bailments

A. Definition

- a. A bailment in the *rightful possession* of goods by one whom is *not the owner*. The true owner is the *bailor*, the person in possession is the *bailee*. The bailee has the duty to care for the goods and deliver them to the owner as agreed. Depending on the type of bailment, the legal relationship between bailor and bailee may differ.
- b. To create a bailment the bailee must have:
 - actual physical control with the
 - intent to possess.

B. Three classes of bailments

- a. Gratuitous Bailment: for the sole benefit of the bailor (e.g. finder of lost property)
- b. Sole benefit of the bailee (e.g. friendly borrowing)
- c. Mutual Benefit Bailment (e.g. typical commercial transaction such as a car rental)

C. Standard of Care in Bailments

The ordinary bailee is not an ordinary insurer, but is liable for loss of damage only by showing lack of care in its keeping. The standard of care applicable is directly related to who gets the benefit of the bailment.

- a. Bailment for the sole benefit of bailor (or Gratuitous Bailment): The bailee must use *slight care* and is only liable for *gross negligence*.
- b. Bailment for the sole benefit of the bailee: The bailee is required to use *extraordinary care*. The bailee is liable for even slight neglect that results in the goods being lost, damaged, destroyed.
- c. Bailment for the mutual benefit of bailor and bailee: The bailee must *exercise ordinary care* and is liable of *ordinary negligence*.
 - Today’s standard is ordinary care, except in misdelivery cases. If bailee misdelivers to someone other than bailor, he is liable for conversion, regardless of good faith (wrongful transfer of possession).
 - Peet v. Roth Hotel Co.: (Woman leaves ring with hotel, where the jeweler will pick it up. Ring is stolen). There is a *mutual benefit* in this case. Usually

there is only mutual benefit where the bailee charges for a service, but in this case the hotel gets a benefit from rendering a service to a guest. (*Mutual assent*).

D. Value Undisclosed to Bailee & The question of intent

- a. Rule: If a bailor gives an article to a bailee but does not disclose the exceptional value of the article, a bailment is created. The risk of caring for the article in its true value is put upon the bailee when he accepts possession of the article.

Peet v. Roth Hotel Company: (Hotel employee claimed she did not know the value of the ring, and therefore there was no mutual assent and no intent.) The parties will be held in accordance with what the reasonable expectations of the parties to the bailment transaction were. The Δ is held to a negligence standard.

Reasonable expectations test:

- Bailee is in possession of the container where the article is found
- It is reasonable to expect that such an article would be in that container.
- Another example: bailee of car is responsible for stuff in car, like spare tire, but not for a diamond necklace in the glove compartment. (The may use this test to say that the value of the ring was not within the reasonable expectations of the parties to the transaction)

Burden of Proof/Theory of Liability

- On Δ (this is the *minority rule*, but the court determine that the Δ was the only party that had access to the facts)
- Negligence

- b. Majority Rule:

The bailor can make out a prima facie case by showing 2 things:

- Delivery to the bailee of the subject matter of the bailment
- Bailee has failed on demand to return the goods or has returned them in a damaged condition.

We can say that “the bailor has satisfied its burden of going forward with the evidence” and is entitled to have the case left to the jury under instructions to find for the bailor if the jury believes what the bailor said. (Does not allow for full disclosure of the facts.)

- c. Minority Rule:

Departure from the usual view of Π being responsible for burden of evidence. In Peet, the Δ is the only one with the fact. Δ must show why he/she was non-negligent.

E. Voluntary v. Involuntary Bailments

- a. Voluntary Bailment: (all of the above) owner of goods gives possession to the bailee. *Consent*.

Examples:

- Parking lot cases: Park and Lock – No bailment; Attendant Lots – Bailment (there are expectations in A that B has accepted a duty of reasonable care)
- Coat cases: Bailment only occurs if A puts coat on a rack and B, the employee of a hotel/restaurant, knows specifically that the coat is there.

Liability:

Strictly liable for misdelivery (wrongful conversion)

- b. Involuntary Bailment: (also called constructive bailment) Bailment arises even though bailor and bailee have not consented to the bailee's possession.

Examples:

- Finder
- Person who pens up stray cattle
- LL who resumes possession of leased premises after T has vacated but left some goods behind.
- Television set on your porch although you did not order it.

Liability:

Liable for misdelivery only where he or she is negligent.

For example, where someone finds an unordered television set on his or her front porch, he or she should not touch it to avoid liability. Just because property is on your land, you do not necessarily have a duty to act reasonably.

Cowan v. Presstrich (NY): Π and Δ are both bond houses. Δ 's messenger comes to Π 's place of business and shoots a bond through the window intended for another bond house. Π sees that it is the wrong bond and shoots it back through the window in the door expecting the messenger to be on the other side. **Held:** The Π in picking up the bond and attempting to return it constituted dominion over the object as to transform it into a purely voluntary bailee. If the Π had left the bond on the floor, no bailment would have arisen. **Abraham and the Dissent:** Δ should be an involuntary bailee throughout. The basic idea behind an involuntary bailment is the thrust upon notion.

III. Personal and Real Property

1. Adverse Possession

A. Definition and Theory:

If, within the number of years specified in the *state statute of limitations*, the owner of land does not 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.

- Statutory periods vary from 5 to 21 years
- Before the statute of limitations bars the T.O., the adverse possessor has the right to evict a subsequent possessor (*prior possessor wins*) and can sue a 3rd party for damages. However, the adverse possessor has no interest in the property against the T.O., who may retake possession at any time.

B. Requirements - possessor must show ALL of the following:

- a. actual entry giving exclusive possession
 - Must be of the character that the community would regard the adverse possessor as the owner (versus constructive possession)
 - b. open and notorious
 - Acts of AP must constitute reasonable notice to the owner so that the owner can defend his/her rights.
 - c. adverse and under a claim of right (or hostility): 3 tests (p. 133)
 - Objective test: state of mind irrelevant, actions most important (majority view)
Patterson v. Reigle (see below)
 - Subjective test (or good faith): AP must have good faith belief that he/she owned the property
Halpern v. Lacy Inc. Corp. p. 133
 - Aggressive trespass: "I thought I did not own it [and intended to take it]"
Patterson v. Reigle p. 134: Δs enter upon Πs land for 20 years w/o claiming ownership and saying that they intended to leave when the real owner came. Ct. found AP.)
1. Color of Title: a claim found in a written instrument (deed, will) or a judgement or decree which is for some reason invalid. There is an advantage for AP with this because if they have color of title for part of the land, then they have constructive possession for all of the land. In as such, the activities relied upon to establish AP reach not only the portion of the land covered in color of title but the rest of the land as well. (*In most states this is not required*) see §38 on page 124.
 2. Boundary Disputes:
where A has been in open and notorious possession of land along Bs property, mistakenly believing it to be his.
Mannilo v. Gorsky: (Δ's son made additions, which encroached upon the Πs land by 15 inches) .
 - Objective Test (as above)
 - Maine Doctrine: If the possessor mistaken as to the boundary line and would not have occupied or claimed the land if he had known the mistake, the possessor has no intention to claim title and adversity is missing. (Problem: rewards consciously dishonest encroachers and denied the person who made an honest mistake. Also, encourages honest encroachers to lie on the witness stand.)
 - New Jersey Rule: objective test + 1 qualification (notoriety)
"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 this case the state of limitations will run against the owner only if the owner has actual

knowledge of the encroachment. (Mannillo test)

--- What happens if the occupation is not open and notorious but Π has actual knowledge? Notoriety requirement is satisfied (because it acts as actual knowledge) but requirements of AP may not be. *Sleeping Theory* would say that Π should lose, but *Earning Theory* would say that Δ should lose.

- Showing you acted like a true owner isn't always sufficient (but is necessary). Makes this case unusual.

d. Continuous for the statutory period.

- Requires only the degree of occupancy and use that the average owner would make of the particular type of property. A person can be in continuous possession even though there are considerable intervals during which the property is not used.
- Seasonal Use: Use of a summer home only during the summer for the statutory period is continuous use. *Howard v. Kunto*: (Howards want quiet title for Kuntos who mistakenly live on their property.)
- Tacking by Successive APs: (Purpose is to quiet title) To establish continuous possession for the statutory period, an AP can tack onto her own period of AP any period of AP by predecessors in interest, but there must be *privity of estate* between the APs.

Privity of Estate: The possessor has voluntarily transferred to a subsequent possessor either an estate in land or physical possession. (see Howard)

- Disabilities: Most statutes provide an additional amount of time to bring an action if the owner is under a disability. There are limitations:
 - only disabilities specified in the statute may be considered,
 - only disabilities at the time of the AP count. (see page 151/2 for more information and problems)

C. Statutory requirements:

Van Valkenburg v. Lutz, see statutes on page 124, each of the statutes (§34, 38, 39 addresses each of the elements of AP.

D. Earning and Sleeping Theories of AP:

- a. Earning: AP earned land through their good faith efforts (addressed in Halpern)
- b. Sleeping: Penalizing owners for sleeping on their rights (this is why there is a notice requirement) (chosen by the Restatement).

E. Cases:

Van Valkenburg v. Lutz: whether the Lutzes acquired title to subject premises by having held the same adversely for more than 15 years. Also, was there sufficient evidence of cultivation or improvement to satisfy statute? Ct. saw that the cultivation of the Lutzes garden and garage coupled with the “no claim of title” meant that they could not have the property.

Abravanel goes with the **dissent** (see key parts), in that it is immaterial that the

Lutzes lacked claim of title because they had intent. They acted like a T.O (acted like and was generally regarded as TO), which satisfied the statutes §39 and §40.

2. Adverse Possession of Chattels

A. Main difference between AP of chattels and AP of real property

1. Period of limitations is shorter
2. AP of land is open and notorious and AP of chattels rarely is

B. Old rule v. New Rule (Discovery Rule) with Statute of Limitations

1. Old rule: Cause of action accrues at the time of theft, absent fraud or concealment, unless the owner is entitled to Discovery Rule below.
2. Discovery rule: This rule sets out that the conduct of the *owner*, not the *possessor* is controlling. Thus, the cause of action accrues when the owner first knows, or reasonably should know through the exercise of reasonable diligence, of the cause of action, including the identity of the possessor. The discovery rule puts on Π the burden of showing that she conducted due diligence in trying to recover the paintings. (So, if she has not shown due diligence the statute of limitations runs when the paintings were stolen (and in this case she would not be entitled to get them).

O'Keefe v. Snyder: (Frank steals O'Keefe painting and sells to Snyder. Π sues Δ for replevin. Question of open and notorious possession is raised.)

3. BFP and the Discovery Rule:

Under the general rules, a BFP gets no better title than his/her transferor. BFP can only get possession, not title if transferor didn't have title to start with.

However there are 2 exceptions:

- Voidable title: A person has voidable title where the owner has voluntarily passed title to A, but the transaction is voidable by O because A was an imposter who deceived O about some matter or was fraudulent.

So, the question in O'Keefe is whether Snyder was a BFP, because Frank acquired voidable title. Maybe, maybe not. The one purchasing from Snyder would have a greater chance at being a BFP because they would be more likely to look in the registry.

- Entrusting to a merchant, estoppel: UCC § 2-403 (page 157) "A person with voidable title has power to transfer a good title to a good faith purchaser for value."

So, if O'Keefe had entrusted the paintings to her husband, a merchant who deals in like goods, he could have given good title to a BFP.

4. Hypos: always involve cases where property is sold on credit to one who fraudulently represents himself.

- Phelps v. McQuade (voidable title): O sells to a buyer on credit. Buyer fraudulently represents that he is Jones, a person of good standing. However, he is really Smith, a nere-do-well. Smith sells the property to Brown. Brown is a BFP. Who should prevail, Brown, or the O? O by virtue of fraudulent inducement intended to transfer title to the fraudulent vender, to be distinguished from cases where TO meant to transfer possession. After possession and title are transferred

to vendee, vendee does secure title, which he may transfer to a BFP. Did the owner intend to transfer the title to whom he dealt? If yes, then this voidable title does apply and the fraudulent vendee secures power to transfer good title.

- Good v. Easy Method (estoppel theory): Owner of property places his goods in the hands of a merchant who regularly deals in like goods and authorizes the merchant to obtain bids from prospective purchasers. Merchant in violation of its authority, sells the bailed chattel to a BFP. Who prevails and why? Or given the fact that the car dealer lacked the authority to sell the car, why did the court hold that the principle was bound by the unauthorized act of its agent in selling the cars? Because the agent had apparent authority to sell. Where an owner places his goods in the hands of a merchant who regularly deals in the goods, even though he has no intention of transferring title, the owner has created a situation where it appears an agent has authority to sell title to the goods. BFP in reliance on the agent, purchases from the agent, obtains a title which is superior to that of the original owner.

So, a BFP may get a better title than the agent. In order for principle of estoppel to operate, it must be the original owner who created the misleading situation, on which the 3rd party subsequently relied.

Answer #2: Since the O is the party who started in motion the train of events which culminated in the sale to the BFP, thereby creating a misleading situation, O will lose title to a BFP who paid value (w/o notice of restriction on agent.)

Answer #3: You are dealing with 2 good parties, O & BFP. When you have an adversarial system, its always a bad outcome, because you have two actors.

By what means can O be made whole? 1) O has a cause of action against merchant bailee, in as much as a sale violates the party's agreement. 2) O also has a cause of action against the BFP for wrongful conversion. The BFP has a cause of action against the agent for breach of implied warranty.

IV. Gifts

1. General

A. Definition

A gift is a voluntary transfer of property without consideration

B. Requirements

- a. Intention – the donor must intend to make the gift (*see below – D*)
- b. Delivery – the donor must deliver the chattel to the donee (*see below – E*)
 - Constructive (means of access)
 - Symbolic (means of writing)
 - Manual (actual delivery)
- c. Acceptance – the donee must accept the chattel.

C. Types

- a. Gifts inter vivos – made during the life of the donor, when the donor is not under the threat of impending death.
 - These gifts are *irrevocable*.

- b. Gifts causa mortis – made in contemplation of immediately approaching death.
- These gifts are *revocable* if the donor recovers from illness.
 - Courts are more likely to more strictly determine whether the requirements have been met because there is a greater likelihood of fraud that in gifts inter vivos.
 - If the donee does not die of the contemplated cause of death, but a short time later of another cause, the gift is revoked.

D. Intention

- a. Donor must intend to *pass title presently*, and not merely to transfer possession.
- b. A promise to give property in the future is not a gift. (N.B. a gratuitous promise is neither enforceable as a gift nor under the law of contracts.) (Also note the difference between this and passing a remainder interest in the property).

E. Delivery

- a. Symbolic Delivery – Where actual manual delivery is *impossible*, *symbolic delivery is permitted*.
- It is the handing over of some object, which is symbolic of the thing given.
 - The most common example is where the donor hands over an *instrument in writing* under the circumstances where manual delivery is difficult or impracticable.
 - Newman v. Bost: court rejects the notion of symbolic delivery, and thus makes it impossible to make a gift of tangible chattel by means of a written instrument. (pg. 177). For small chattels that can be hand-delivered, constructive delivery isn't allowed (insurance policy in this case).
 - Gruen v. Gruen: Father gave to son a *remainder interest*, by letter, to a Klimt painting. Stepmother does not want son to have painting and argues 1) that a gift of a *remainder interest* in a tangible chattel is invalid and alleges that a gift of chattel must transfer right to present possession; 2) that manual delivery is required; and 3) that the son did not officially accept the painting or mention it in his divorce proceedings. The court determined 3 things:
 - Intent: A present interest may be a future interest, provided it is presently transferred to the donee and the transfer is irrevocable.
 - Delivery: A letter delivery of a remainder interest is sufficient, because it is impossible to manually transfer a remainder interest (it is an abstract concept). If physical delivery were required, then the father would have to deliver to the son and the son back to the father, and the court finds that this is a waste of time.
 - Acceptance: (this is almost never an issue) The court finds that it is irrelevant that an acceptance was not express, given that the gift was clearly beneficial and he accepted by keeping the letters and following through on his father's request.

- Remainder interest: A present gift that is irrevocable and given during life. It is a transfer of title, not possession.
 - Will: Revocable and ambulatory, only effective after death.
 - N.B.: If the letter from the father had said, “I give you the painting when I die” there would be no delivery and a will would be needed.
 - N.B.: An inter vivos gift will trump a will.
- b. Constructive Delivery – Where actual delivery is *impossible*, then *constructive delivery is permitted*.
- The handing over of the *means* of obtaining possession and control, or in some other way *relinquishing dominion and control* over the property.
 - Newman v. Bost: Peltz gave Julia the keys to all the furniture in the house, and says she is to have everything in the house. In his bedroom bureau, there is an insurance policy. *There is no constructive delivery of the insurance policy because it is capable of manual delivery*. However, Julia receives all the furniture that is unlocked by the keys because manual delivery is impossible. (Also, Julia received the furniture in her bedroom because it was an inter vivos gift.)
Abravanel: The natural object of bounty is Julia because she is closest to him and is his fiancé. He owed other property to his siblings, but they were interested in stopping Julia because of her relationship with Van Peltz. There is some bias against Julia.
- F. Acceptance – acceptance by the donee is required.
- a. The law *presumes acceptance* when the gift is beneficial to the donee. (Gruen v. Gruen).

V. Landlord and Tenant (landlord tenant law remains land law)

A. The Leasehold Estates

1. Tenancy for Years
 - a. An estate that lasts for some *fixed period of time* or for a period of time computable by a formula which results in fixing *calendar dates* for beginning and ending, once the term is created or becomes possessory. The tenancy does not have to be for a year, it can also be for days, weeks, or months.
 - b. Examples: “Ten years from the date of this lease,” “one year from next Christmas,” “from the date of this lease until next Christmas,” or “until the end of the war.”
 - c. Termination: You do not have to give notice, since both parties know when the term will end.
2. Periodic Tenancy
 - a. A tenancy for some fixed duration, which continues for succeeding periods until either the landlord or tenant *gives notice* of termination.
 - b. Examples: “To T from month to month,” or “to T from year to year.”
 - c. Termination:
 - If notice of termination is not given, the tenancy is automatically extended for another period.

- At common-law, 6 months notice is required, however, statutes have reduced the time for notice to 60 days for a year tenancy and 30 days for less than a year. (The question of what constitutes sufficient notice is subject to *statutory enactment*.)
- If T is a year-to-year tenant beginning January 1, 1988, L must receive notice of termination before July 1, 1988 or T can be held over for another term, which is until January 1, 1990.
- Notice must terminate the tenancy on the final day of the period, not in the middle of the tenancy.
- For any periodic tenancy less than a year, notice must be given equal to the length of the period, but not to exceed 6 months.

d. Creation:

1. Express agreement: L and T may expressly create an estate to extend from period to period.

Example: “L to T for one year, at the end of such term, the lease shall continue in effect from month-to-month, unless one of said parties shall end this lease by notice in writing delivered at least one month prior to the end of the term in which such notice is given.” *T has an estate for 1 year (term of years), which then becomes an estate from period to period (month-to-month), which will continue as such until the requisite notice is given.*

2. By agreement only as to rent period: Where there is a letting without express agreement, and rent is preserved for a period, inference is that parties intend a periodic tenancy for such period.

Example: “T leases from L for no fixed term at an annual rental of \$2,400 payable at \$200 per month at the first of the month.” *Here, there is no fixed term. Rather there is a Reserved Annual Rent and it is to be paid monthly. A periodic tenancy will result in all jurisdictions, but not in a uniform manner. Many jurisdictions say that if an annual rent is reserved there is a year-to-year periodic tenancy even if the rent is paid monthly. The Rent Reservation Clause is determinative of the period. T or L must give 6 months notice or 30 days, if jurisdiction provided. Others will find a month-to-month periodic tenancy and you would look to the Rent Payment Clause. (N.B. There is no rhyme or reason to this. There is no majority rule. It is a common-law rule, not set in statutory regulation.)*

3. Takes possession under an invalid lease: Statute of Frauds violation.

Example: T has an oral lease for 2 years. (Most jurisdictions will only allow oral leases for less than 1 year). Court will find a tenancy at will, however the payment of rent converts the tenancy at will to a tenancy from period-to-period and the law will read a month-to-month lease.

4. Hold-over tenancy after end of term: When lessee continues to hold premises with consent of the lessor. After expiration of term, the tenancy is transformed to a *periodic tenancy*.

Example: Assume L and T have a written lease for 2 years. After 2 years, T stays on and pays rent to L without a new lease agreement. The previous estate will be converted to year-to-year or month-to-month.

How is it that these leases are effectuated, where they are annulled under the Statute of Frauds?

- a. L could have barred T from coming on the premises, and T would have no protection.
- b. Once T is allowed to enter into possession, he or she can become the true tenant and the effect placed upon the Statute of Frauds is to void the lease only as to the duration. All other terms are applicable.

Chrechale

5. Termination in general:
 - a. Common-law:
 - To terminate an estate from period to period, notice must be *equal to the length of the period itself*, with the exception of tenancies from year to year, where only *6 months'* notice is required.
 - Notice must fix the last day of the period as the date for termination.
 - Notice must be given so that the tenant or landlord will receive the required amount of notice prior to the expiration of the current term.
 - b. Statutory modifications:
 - Statutes in many states reduce the 6 months' notice required to terminate from year to year to one month's notice.
 - Other statutes indicate that a month-to-month tenancy can be terminated on any day, and not only on the last day of the period, provided that one month's notice before the day is specified.
 - c. Latches:
 - If L waited to wait too long, eventually L will be deemed to have waived your rights.
3. Tenancy at Will
 - a. A tenancy of no stated duration that endures only so long as *both* the landlord and the tenant desire. So a tenancy that is terminable by only one of the parties is by definition not a tenancy at will.
 - If a lease for years or a periodic tenancy contains a provision that the tenancy is terminable by only one of the parties, there is a ***determinable tenancy***. Example: "to T for one year, with the proviso that L can terminate at any time." This is a determinable term for years, terminable at the will of L.
 - b. Creation:
 1. Express language – indicating that the tenancy is to endure at the will of both parties.
 2. Gift of Tenancy – however, once a rental term is agreed upon the tenancy will be converted into a periodic tenancy.
 - c. Termination: Since there is no certain duration, courts will imply a power of termination in the other party:
Example: "L leases land to T for and during the pleasure of the landlord."
(This lease is terminable by either L or T). OR "L leases land to T for as many years as T desires at a yearly rent of \$300." (This is terminable by either L or

T.)

N.B.: This is different from a determinable tenancy that may be terminated by only one of the parties.

d. Problems (pg. 424)

- L leases Orangeacre “to T for as many years as L desires.” What estate does T have? Under common-law T has a tenancy at will. Some courts permit a tenancy at will for T only, not for L though. Restatement: takes the view that a tenancy is terminable by T or L alone. It suggests that a lease terminable at the will of 1 party may amount to an unconscionable arrangement.
- For rent payments of \$500 a month L leases Greenacre “to T for the duration of the war.” What estate does T have? Hawkins Court found a term of years, terminable at the will of L because the end of the war was a collateral event, which was certain to happen. (This is similar to the idea that a conveyance to T for T’s life is a term of years because T will die.) *Court goes through reasoning that it is not a tenancy at will, not a periodic tenancy, not at sufferance, so it must be a tenancy for years.* (Abravanel finds this to be arbitrary.)

4. Hold-over Tenancy or Tenancy at Sufferance

- a. Definition: A tenancy at sufferance arises when a tenant remains in possession (holds-over) after termination of the tenancy. *There is only a tenancy at sufferance until L makes his or her election.*
- b. Election: Common-law rules give the landlord confronted with a holdover essentially 2 options:
 1. Eviction (plus damages) – T must quit premises and is answerable to L for damages equal to the fair rental value of the premises for the period of T’s wrongful occupancy. If T refuses to surrender the premises voluntarily, L can evict T using some form of summary process.
 2. Consent to treat T as a periodic tenant – L must exercise this election indicating in some way his or her consent to the periodic tenancy. If L says “give me rent,” and L accepts rent for the next month after expiration of the lease, L elects to treat T as a tenant and the *tenancy at sufferance is transformed into a periodic tenancy.*
 - What type of periodic tenancy would it be? In some jurisdictions, the tenancy is from year-to-year if the original lease is for a year or more. In other, the duration will depend on the way rent was reserved in the previous lease.
- c. Latches Concept: (Not time specific) Although by his or her inaction, a L does not waive his or her right to possession, at some point in time the courts may infer from L’s inaction that L has consented to a periodic tenancy (and L may not increase the rent).
- d. What governs when there is a new periodic tenancy?: The original lease and all antecedent terms, except 1) duration of the lease and 2) options to buy.
- e. Excuses: to modify harshness of the common-law rule where there were no excuses for T.

1. Not T's fault: strike in moving industry, severe illness to a member of T's family
 2. L and T are in negotiations for a new lease: here an implied waiver of L's right to declare a periodic tenancy exists.
- f. Crechale & Polles, Inc. v. Smith: (T holds-over because new apartment is not ready. T says there was an agreement, L says T is liable for a new term of 5 years.) There was not a hold-over tenancy in this case because L exercised his election to terminate the lease in a letter asking T to vacate the premises. Later L tried to change his position – which is not possible. The court found a periodic tenancy from the acceptance of T's monthly rent by L, which implied a month-to-month periodic tenancy.
- Abravanel: This decision is odd. First the court finds that L elected to evict T, and then the court finds a periodic tenancy. *This shows the judicial disenchantment with periodic tenancies.* The court could have used another analytic model that is common in many jurisdictions – convert the hold-over tenancy to a *tenancy at will* and provide that the tenant should be liable for the reasonable value of use and occupation (which should be equal to the rent stated in the lease, although this is not always the case). **Note material on 429.**

B. The Lease (no cases)

A. Conveyance versus Contract: It's both

1. Lease is the conveyance of a leasehold estate:
 - A lease is a conveyance of property where the tenant has purchased a leasehold in the land. The traditional property rule is that the tenant has bought an estate in the land and assumes the risks for caring for the estate.
2. Lease is a contract:
 - A lease is a contract containing covenants (or promises) of the parties. The lease is a document governing the relationship of landlord and tenant over the term of the lease. Under contract law, covenants are deemed to be *mutually dependent*. However, until the last 20 years or so, lease covenants were deemed to be *independent* (i.e. difference between the lease creating a property interest or creating promises).

B. Form Leases and the Question of Bargaining Power:

- In contemplation of a continuing relationship between the landlord and the tenant, leases can often be long documents in an effort to preserve the relationship and handle certain contingencies. *Typically, landlords use form leases on a take-it-or-leave-it basis, without much negotiation.* Courts have sometimes policed such leases on the grounds of “unequal bargaining power,” but this is a case-by-case approach and is often thought to be insufficient. Some people have called for statutory reform – where terms are set-out in statutes as required, however landlords may respond by increasing the rents. The you could turn to rent control, but this can aggravate housing shortages.

C. Delivery and Possession (Hannan v. Dusch)

A. Definition: The L has a *duty* of transferring to the tenant at the beginning of the tenancy the *legal right to possession*. If another person has *paramount title* and is legally entitled to possession, then L is in default.

N.B. There are two implied covenants in a lease: covenant of quiet enjoyment, and covenant to deliver possession. (These are tenant protective covenants). CQE does not help a tenant against a 3rd party, but CDP may.

- a. Paramount Title: Any title or interest in the leased land held by a 3rd party at the time the lease is made, which is paramount to the interest of the landlord.
- b. Tenant Remedies before Entry: If T is unaware of the paramount title of a 3rd party, T may terminate the lease. However, if T is aware, he/she is presumed to have waived the possibility of eviction by the paramount claimant. *So, L must make full disclosure of the risks to T before the lease is signed.*
- c. Tenant Remedies after Entry: The mere existence of a paramount title does not breach the landlord's duties. T has no remedy unless *actually evicted by paramount title*. Thus there is an assumption that once T has taken possession, he has accepted L's title as adequate for the property. *The covenant of quiet enjoyment is not breached by L unless there is actual interference by the claimant.*

B. Actual Possession

1. English Rule (majority view; Restatement position):

- a. Definition: If the previous tenant has not moved out when the new tenant's lease begins, and the landlord does not remove the person within a reasonable period of time, the landlord is in default.
- b. Tenant's Remedies:
 - Terminate lease and recover damages from having to move elsewhere;
 - Affirm the lease, refuse to pay rent for the period that he was kept out of possession, and recover damages.
 - Damages include: cost of renting other premises; cost of ousting the hold-over tenant, and loss of profits.
- c. Policy:
 - L knows or should know better than T of the status of the leasehold prior to the date of entry by T. L is the only one who can get assurances from prior tenants.
 - T has not bargained for a law suit against the hold-over, T has only bargained for physical possession of the premises.
 - L is more familiar with eviction proceedings than T.
- d. Part Possession: If the hold-over tenant is in part possession of the premises, and the new tenant takes possession of the other part, the new tenant is entitled to an appropriate abatement in rent and damages.
- e. Waiver in Lease: Some standard form leases contain a provision that the tenant waives the landlord's duty to transfer actual possession. However, some cases find that this is *unconscionable*.

2. American Rule (minority view): (Hannan v. Dusch - Π sued Δ for not taking legal action to oust the hold-over tenants. There was no express statement of

the duty of the Δ to see that the property was open for entry by Π. Court found for the Δ.)

- a. Rule: The L has no duty to deliver actual possession at the commencement of the term, and hence is not in default under the lease when the previous tenant continues wrongfully to occupy the premises. L should not be held liable for wrongdoings of a third party.
 - b. Tenant's Remedies:
 - Breach of covenant and to recover damages. Damages are calculated according to the Premium Value of the Lease, which is the difference between the fair rental value and the rent reserved.
 - Cause of action in ejectment
 - Treat holdover tenant as a tenant for another term with rent payable to the incoming tenant.
 - T needs to insist on an express covenant in the lease that L has an express obligation to put T in physical possession.
 - c. Policy:
 - Lease conveys leasehold to T, so it is up to T to take possession if he wants it.
 - T has right to evict by summary proceedings and needs no additional remedy against L.
 - L should not be liable for the wrongful acts of 3rd parties. Otherwise the burden on L would be too large.
 - Since L is not required to evict a trespasser after the lease term begins, L should not be required to evict *before* the lease term begins.
3. Exculpatory Clauses: If there is a clause in the lease excusing L from liability for not being able to deliver possession on the specified date, is L ultimately excused? Generally, no. In Hartwig (Problem 3, page 464), court found that even with the clause, L had to make premises available within a *reasonable time*. In Seabrook, the court found that the clause, which was buried in the lease, was unconscionable.

D. Subleases and Assignments

- A. Assignment v. Sublease: Where lessee transfers the right to possession for the duration of the term there is an assignment. If the lessee transfers for 1 day or fewer than the lease term, there is a sublease.
 - a. Liability
 1. Privity of Estate: (*This was invented to get around privity of K problems*) L and the lessee are in *privity of estate*, and a T1 assignee is liable to L in privity of estate. So the lessee (T or T1) is liable to L, and L can sue lessee (T or T1) for rent unpaid. However, L has no rights against a sub-lessee of T.
 2. Privity of Contract: If there is privity of contract, there is liability regardless of whether or not there is privity of estate. So where T has assigned the property and the T1 defaults, L can sue T under privity of contract. N.B. L has no rights against a sub-lessee of T unless the

sublessee assumes the covenants of the main lease, there being a 3rd party beneficiary K where L is the 3rd party beneficiary.

3. T is a surety: When T transfers to T1, T1 is primarily responsible for the rent and T is secondarily responsible. T in this case is said to be the surety, although L can sue either T or T1.
 4. Release: The only way T can escape liability to pay rent is by an express or implied release from her promise to L. *An assignment is not a release.* If L assents to an assignment to T1 and T is *released*, then there is a **novation**. There is now privity of K and estate between L and T1.
- b. How to determine A or S?
- 1) Reversion: There is no assignment if T has a reversion interest in the property. (This is where T can at some point come back to the property).
 - 2) Right of Entry: This is different from a reversion interest. A L will retain a right of entry if T does not pay the rent. Under common-law, if L retains a right of entry, there can still be an assignment. However, some modern courts have determined that a right of entry is a “contingent reversionary interest” and have called such relationship a sublease.
 - 3) Intent: Ernst v. Conditt: (Go-cart race track case; Conditt was T2, Rodgers was T; T2 defaults on rent and says that T is liable because there was a sublease. T2 says that the word sublease was used in the lease document, Rodgers agreed to retain liability, and Rodgers retained a right of entry. Π wins because court looks at the intent of the parties. *This case typifies cases that claim to follow the intent of the parties and find an assignment, when the parties had no clue of the legal significance of their arrangement.*)
 - So 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. (N.B. if there is a transfer for a lump sum of \$, there is always an assignment.)
 - HYPO: If the court found a sub-lease, would Ernst be able to recover from Conditt?
- A: only if it was in a jurisdiction that recognized third party beneficiary contracts, so there would be privity of K between Ernst and Conditt where Conditt would assume the covenants of the original lease.
- c. Partial Assignments: If the lessee transfers all of his interest in some physical part of the premises.
- d. Problems:
1. Assume in main lease, L has power to terminate lease if T fails to perform material covenants therein. L has not received rent. Can L evict T1 for non-payment of rent.
A: Yes. L can evict T because L may terminate the main lease for breach of condition with the result that the sub-leasees interest is extinguished. Thus, if the main lease is terminated, the sub-lease is terminated as well.
 2. Using the above problem, assume that L proceeds against T. How can T be made whole?
A: T can be made whole by suing T1 under privity of estate.

3. Would the problem come out differently if T1 had agreed to pay rent to L?
A: Yes. Under 3rd party beneficiary theory, L and T1 would be in privity of K.

4. Do problems on pages 471 & 472.

5. Assume that L proceeds against T and that T pays the outstanding rent. Assume that T, by virtue of the assignment, does not have a K right of reimbursement from T1. The question is whether T has a cause of action against T1 under the factual situation posited, if so what is the theory on which such a cause of action is premised.

A: Yes, by subrogation. T can proceed against T1 on a subrogation theory, T is the secondarily liable party and it is for that reason that T succeeds to the cause of action against the primarily liable party. T stands in the position of the surety by having to pay L, and thus stands in Ls place. (Like an insurance company)

- B. Covenants against Assignments and Subleases: Absent any covenant to the contrary, a leasehold is *freely transferable* by the tenant. It may be assigned or sublet without the landlord's consent.
1. Express Covenants: These express covenants are strictly construed by the courts as it is a restraint on the transfer of land. Thus if a lease contains a covenant that says, "not to assign" the property, the tenant may sub-lease the property and visa versa.
 2. Implied Covenants: A covenant against transfer may be implied where the landlord enters into the lease in reliance upon some special skill or ability of the lessee that will have a material effect upon the fulfillment of the landlord's reasonable expectations.
 3. Arbitrary Denial of Consent:
 - a. Rule: If there is a covenant against transfer of the property, unless it provides that the landlord's consent to transfer cannot be unreasonably withheld, the majority view is that the landlord *may arbitrarily refuse to accept* a new tenant.
 - b. Minority View: The landlord's denial must be reasonable. (Kendall v. Ernest Pestana, Inc.)
 4. Waiver of Consent: The landlord may expressly or impliedly waive the covenant against assignment of sublease. Implied waiver usually occurs when the landlord accepts rent from the assignees with the knowledge of the assignment.
 - a. Rule in Dumpor's Case: Where the landlord expressly consents to one assignment, the rule is that the covenant thereafter becomes unenforceable. The rationale is that covenants are single entities and once waived, the covenants are destroyed. (*N.B. This rule only applies to assignments and not to subleases*).
 - b. Multiple Covenants: any covenant contained herein is binding upon the heirs, assignees, and successors hereto.

E. The Defaulting Tenant

1. The Tenant in Possession
 - a. Landlord's Remedies

1. Means of Assuring Performance: (want tenant to keep paying rent)
The landlord has a number of means to assure performance of the tenant's duties. The means available to the landlord to secure the rent may be provided by common law rule, by statute, or by clause in the lease.
2. Eviction of Tenant: The landlord may wish to 1) evict the tenant *during the term of the lease* or 2) evict the tenant who holds over *after the term expires*.
 - a. Termination for Breach of Covenant: *Old common-law*, the landlord had no power to terminate a lease of the tenant did not pay rent. The landlord's remedy was to sue for rent due. (Brown's Administrators v. Bragg: T does not pay quarterly rent and L evicts him. Court says this is not correct as the *lease covenants are independent*. Also there was a statute that gave L right to terminate for short tenancies, however T had a tenancy for years.)
 - b. Eviction through Judicial Process:
 1. Suit in ejectment (rarely brought by L because other civil litigation takes precedent in the courts, so it takes a long time to get a hearing)
 2. Summary Proceedings: Every state has summary proceedings whereby the L can recover possession quickly and at low cost. Often this proceeding is called an action for "forcible entry and detainer" or "unlawful detainer."
 - c. Self Help Rule: According to common-law, if the tenant has no right to continue in possession, then the law permits *reasonable force* to expel the tenant. However, some jurisdictions allow landlords to enter by *peaceable means*. *Changing the locks and locking out the tenant is not seen as peaceable*. So the requirements are:
 - Legally entitled to possession
 - L exercises right in a peaceable manner.
 1. Modern Trend: A growing number of states prohibit self-help in recovering possession, even if it is peaceable, and require the landlord to resort to a statutory remedy. (Berg v. Wiley: T operates a restaurant on Ls land and needed to remodel and was in violation of the health codes. L went nuts.)
2. Abandonment of Premises by Tenant:
 - a. Landlord's remedies:
 1. Terminates Lease: L may treat the abandonment as an offer of surrender and accept that surrender.
 - If L does so, T has no further obligation under the lease and need not respond in damages unless he has expressly covenanted with L not to do so.
 2. Stands by and does nothing: L may refuse to accept the surrender and sue for rent as it comes due. *There is no duty to mitigate damages*. Majority

rule, based on property law, that L has an obligation to mitigate where T has surrendered and abandoned.

- Minority View: Sommer v. Kridel: In a minority of states, the landlord has a duty to mitigate damages. A lease is treated as any other kind of K and is not viewed on this issue, through property glasses. If the landlord must mitigate damages, then this option is not available to the landlord.
3. Repossesses and Relets: L may re-enter the premises and re-let them as T's agent, suing for the difference of the amount that he re-lets it for and the amount he would have received from the abandoning tenant.
- Once L re-lets, he must act reasonably.
 - d. Hypos from 11/9 and **must read notes on pages 502-507**.
 - e. Notice: Notice to T of a re-letting of the premises is not essential (Novak v. Fontaine Furniture Co.: Π abandons after closing business, Δ tries to re-let and expends money to fix up the place, but can only re-let for 3 months. Δ argues that Π's re-letting acted as a surrender of the lease.) The court finds that the re-letting is like an assignment, and L is acting for T through the notion of *Fictionalized Agency*.
Abравanel: The fact is that notice should not make a difference, but if the L fails to notify T that re-letting is for Ts benefit, it is arguable that the court would construe Ls action as an implied acceptance of T's surrender of the leasehold.
 - f. HYPO: Assume lease contains a clause that L may relet in event that T abandons and still holds T liable for a deficiency in the rent realized from the re-letting. By means of such a case, the lease is at an end, but T remains contractually liable for the deficiency. Therefore, in Novak, there are 2 theories on which liability may be predicated.
 - Lease in existence: T is liable for rent due on the lease
 - or**
 - Lease not in existence: T is liable on the basis of the contractual obligation.

F. Duties, Rights, and Remedies

1. Landlord obligations and tenant remedies:

a. Quiet Enjoyment and Constructive Eviction:

1. Covenant of Quiet Enjoyment: A T has a right of quiet enjoyment of the premises, w/o interference by the L. This covenant can be expressly implied in the lease, *but it is **always** implied in the lease*. For LL to breach this covenant, he must have engaged in intentional conduct (trespass), misfeasance, or nonfeasance (if L breached some *pre-existing duty*, which prevents T of the use and enjoyment of the premises.)
 - Pre-existing Duties: For example, if LL has no pre-existing duty to repair, a failure on his part to repair will not constitute constructive eviction, even if it prevents T from the use and enjoyment of the property. The pre-existing duties can either be expresses or implied.

However, if they are implied they are restricted to the 4 following levers:

- Short term leases
 - Duty to abate a nuisance (Phyfe)
 - Duty to disclose latent defects
 - Duty to mitigate damages
2. Actual Eviction: If T is evicted, T's rental obligation ceases. Also, if T is evicted from *any portion* of the lease premises, T's rent obligation abates completely. If T is evicted by another T with paramount title, T may terminate the lease, recover damages, or receive a proportionate rent abatement.
 3. Constructive Eviction: Where, through the fault of the LL, there occurs a substantial interference with the tenant's use of the leased premises, so that the tenant can no longer enjoy the premises as the parties contemplated, the tenant may terminate the lease, vacate the premises, and be excused from further rent liability.
 - b. Dependent Covenants: The Doctrine of Constructive Eviction adopts the notion of dependent covenants such that T's obligation to pay rent is dependent on the L's performance of his covenant of quiet enjoyment.
 - c. Elements:
 1. Substantial Interference with quiet enjoyment: *This is a reasonable person standard* (Reste Realty Corp. v. Cooper: water floods the basement offices of a jeweler so there is substantial interference).
 2. Tenant must vacate the premises
 3. Reasonable time (this was addressed in Reste)
 4. Fault of the Landlord: The interference with a T's quiet enjoyment must result from some act or failure to act by the LL. Generally, a tenant cannot claim a constructive eviction growing out of the wrongful acts of a 3rd party unless the party's acts were induced by, or committed with the express or implied consent of, the LL.
 - a. Acts of the Landlord: Usually a *failure of the LL* to furnish heat or services or to repair in violation of an express or implied covenant to do so.
 - Reste Realty Corp. v. Cooper: overruled Stewart v. Childs (Where water filled the basement of a restaurant. Δ argued dependent covenants, but court said that the LL did not *intend* to deprive T of the enjoyment of the premises. *Now intent is not a factor*). Court expands the covenant of quiet enjoyment – they could have found a breach of the covenant to repair or that the water was a nuisance. Resigning the lease is not an acceptance that would trump L's duty under quiet

enjoyment covenant – she relied on agent’s promise to remedy.

- In Stewart: the T could sue L for breach of covenant and recover the difference between the market value and what was received. Or, T can recover lost profits – however, the T can only recover the *foreseeable* lost profits.
- b. Acts of other Tenants: *The general rule* is that a LL is not responsible for one tenant causing an annoyance to another tenant.
 - Exceptions: LL has a 1) duty not to permit a nuisance on the premises. 2) duty to control *common areas* under his control.
 - Phyfe v. Dale: LL failed to prevent noisy tenants from causing problems in the common areas and to keep them free from nuisance. (N.B. Again, the court does not look at LL’s *intent*.)

2. Responsibility for Condition of Premises:

1. The Illegal Lease Defense: A lease of the premise, which the LL knows are in substantial violation of the municipal housing code is an illegal agreement *if the code prohibits rental* of premises in violation of the code. If the lease is an illegal agreement, then the LL cannot enforce any covenant to pay rent (Brown v. Southall Realty Co.: T did not want to pay rent because of the violations. Note that the lease was signed when the LL had be given notice of the violations.)
 - a. Advantage: Allows T to stay on w/o paying rent
 - b. Disadvantage: requires a housing code violation (if there is no housing code violation, then T should please constructive eviction/breach of covenant of quiet enjoyment)
2. The Implied Warranty of Habitability: In recent years, courts have held that there is an implied warranty of habitability and fitness in leases of urban dwellings, including apartments.
 - a. Cannot be waived: A tenant cannot waive the IWH, or waive any housing code for that matter. (Javins v. First National Realty Corp.: Ts were in building with 1500 violations, however the violations only occurred after the Ts took possession. Court uses a K analysis and shows that parties cannot alter the LLs obligation to comply with the requirements of the housing code. The court uses the analogy of the UCC and the IW of Merchantability (but the IWM can be waived)).
 - b. Remedies for breach of IWH:
 1. Sue for damage for breach of IWH – this is the difference in value of premises with and without the breach of covenant.
 2. T can terminate the lease under the doctrine of constructive eviction

3. T is entitled to maintain an action for specific performance (this was discussed in Javins, but other courts have held that injunctive relief is inapplicable because of the inadequacy of damages at law.
 4. Repair and Deduct Rule: T may conduct repairs and deduct from the rent. (Some states adopt this rule with \$ limits; others limit to 1 month's rent in 12; some permit only under court order.)
 5. Rent abatement/Withholding: In Javins, on remand it is possible that T can remain in possession and not pay rent or stay on at a reduced rental until such time as LL made the necessary repairs.
 - Academy v. Brown: Ct. addresses measure of abatement to which T is entitled. Ct. finds a proportioned value test, where there is a 25% reduction in rent if LL breaches IWH (this is adopted by the Restatement)
 6. Escrow arrangement: T deposits rent in escrow or with a court. *This is a good protective remedy, b/c LL will not get money until he fixes the problems.* IWH, constructive eviction, and covenant of quiet enjoyment became the courts response to the **No Repair Rule**.
 7. Retaliatory Eviction: *This defense is adopted by the restatement.* Edwards v. Habib: (T reported violations and L retaliated by evicting T.) Ts must be allowed to report violations.
 - Robinson v. Diamond Housing Corp.: (1972 Companion case) The tenant has the burden of proof in a retaliatory eviction case. T can sustain burden, as court finds that where T was engaged in lawful rent withholding, there is a presumption of retaliatory motive on the part of the LL. Once the illegal purpose has dissipated, L can evict T.
 - LL counter-defenses: 1) LL must show that he was wishing to remove the property from the market. 2) It was impossible r unfeasible for LL to make the necessary repairs.
3. Landlord Tort Liability and Landlord Remedies
See pages 530-534: The information really addresses what is discussed above, but it is good to review it from the book as well.

That's all folks!