

Property I (Fall 2002)

Course Review

I. ALTERNATIVE/COMPETING VISIONS OF PROPERTY

A. Intuitive image vs. Bundle of rights analysis

1. **Intuitive image of property** as absolute and unchanging.
2. Contrasts with Hohfeld/Grey image of property as a **malleable "bundle of rights."**

Hohfeld destabilized the intuitive image of property by:

asserting all legal rights define relations among people as opposed to between people and things; if property defines social relationships, presumably property rights can and should change as those social relationships change.

challenging image of absoluteness by disaggregating bundle of rights into its constituent parts.

3. **Transcendental nonsense:**

Felix Cohen decries courts using circular arguments based on vague words like "property" and "justice." Courts should make clear the social forces that act like "gravitational fields" governing use of such words, thereby eroding the distinction between "law" and "policy."

That's what the "visions of property" try to do.

4. **Andrus v. Allard**

Prohibition on sale of eagle artifacts, even if artifacts were acquired before statutory prohibition enacted, did not constitute a taking of private property in violation of Fifth Amendment (not a deprivation of property without due process).

U.S. S.Ct. held that even though plaintiffs were deprived of right to sell the artifacts, they still retained rights to possess and transport their property, and to donate or devise protected birds. They could still make some economic use of the feathers by charging admission. All that they lost is the right to use

it in its most profitable way.

Example of "bundle of rights" analysis.

Contrast with *Hodel v. Irving*: Fifth Amendment taking because deprived of one of the most essential sticks in the bundle.

B. Feudal vision

1. **Significance** Conceptual basis of estates in land and future interests, and of "conveyance" analysis in LL/T law.
2. **Description:** Property as social glue that binds people together in interdependent hierarchical relationships (a "Great Chain of Being").

Feudal vision sought to create permanent and unchanging hierarchical dependencies.

Ownership was not absolute. Hohfeldian analysis fits better than intuitive image with feudal property rights, in that:

(a) they defined social relationships between people; and

(b) they often involved carving up the "bundle" into present and future interests.

3. **Tee-Hit-Ton** - U.S. Govt. sold rights to timber from land occupied by Alaskan Indians. Issue: Did Indians have a compensable interest in the land under the takings clause? Held: Indians had no compensable interest because they have "mere possession" not "ownership." Indians have "occupancy" that can be "extinguished" at will. Court uses evidence of Indian customs as proof that their relationship to the land is not "real" ownership, *e.g.*, that they are nomadic.

Another example of bundle of sticks analysis.

C. Republican rhetorics of property

1. The purpose of the institution of property is to give **citizens** the **independence** to pursue the **common good**. The best way to preserve the republic is to distribute property widely to give a wide range of citizens access to **virtue** through independence.

See Thomas Jefferson; Homestead Acts; State v. Shack.

Note: Exclusionary side of republicanism emerged when freedmen and women used republican rhetoric after the Civil War to stake claims to land and were rebuffed.

2. **The New Property** - Reich uses republican egalitarian rhetoric. Property is a social creation designed "to preserve the self-sufficiency of the individual;" it "represent[s] part of [his] rightful share in the commonwealth."

Reich's republican rhetoric is mixed with liberal rhetoric of individual dignity.

3. **Joy v. Daniels** - Although LL's contract gives him the right to terminate T's tenancy, court holds that LL cannot evict from subsidized housing without "good cause."

Republican rationale -- A purpose of property is to protect claims that people rely on in their daily lives so as to protect their independence and promote their stability (from which they derive a stable stake in the common good).

D. Liberal rhetorics of property

1. **Classical economic liberalism**

Property rights pre-date society. Society consists of free-standing individuals with rights-making choices pursuant to their own self-interest. If people pursue their own self-interest, they will create the best society, that is, the richest society that best maximizes wealth. The purpose of property is **economic**, not political.

Often accompanied with a strong "This is only common sense" rhetoric.
See Posner's law and economics analysis.

2. **Locke's nature narrative**

Property rights emerge when people inject labor into the common. Typically used to defend the current distribution of property ownership.
Associated with economic liberalism. *See Pierson v. Post.*

3. **Liberal dignity strain**

Commodification of property is fine, but traditional property rights should be limited to the extent they threaten human dignity. *See Locke's proviso. See State*

v. Shack.

4. **Vanna White** -- Private property provides the incentive for investment and innovation BUT dissent concerned that extending entitlements too far can prove harmful to innovation in withdrawing too much material from the “commons.”

E. Personhood property

Property rights that are bound up with the personality of the owner deserve greater protection than property rights that are not. Contains elements of liberal dignity strain of classical economic liberalism and egalitarian republicanism.

II. ESTATES IN LAND

Reviewing the problem sets is the best way to master the Estates in Land material. The problem sets reflect how this material will be tested.

III. LANDLORD/TENANT LAW

A. Types of tenancies

Often, the issue of what type of tenancy is involved arises only when the controversy focuses on whether or not a tenancy has been properly terminated.

1. **Common law tenancies** (Note: changed by statute in some jurisdictions)

- a. **term of years tenancy**

fixed or computable time period

termination automatic

- b. **periodic tenancy**

automatically continuing and successive periods of leaseholding with rent payable

need to know common law notice periods

- c. **tenancy at will**

need to know how they arise

LL or T can abruptly terminate at will (parties need not agree)

d. **occupancy at sufferance**

paradigm is the holdover T

originally there lawfully

2. **Nitschke v. Doggett**

Question of whether a term of years tenancy or tenancy at will with regard to who gets the condemnation proceedings.

B. Lease vs. License

1. By drafting rental agreement as license, LL can avoid incurring obligations to T.
2. License is revocable at any point by person giving the license.
3. Common example of a license is a dormitory contract.

C. Lease as conveyance or contract?

1. Historically, the lease was a **conveyance of an interest in land**. A conveyance is a transfer of property. **Rooted in feudal vision.**
2. **Doctrine of independent covenants**
 - a. Property principle: If one party breaches their covenant (promise/obligation), then the non-breaching party's only remedy is an action for damages. Must continue performing their covenants.
 - b. Still true in some circumstances in the absence of statute/relevant lease provision, but overruled in many contexts by statutes or cases.
3. **Doctrine of dependent covenants**
 - a. Contract principle: If one party breaches their covenant (promise/obligation), then the other party is released from theirs, *i.e.*, cannot be compelled to continue performing. See University Club v. Deakin.
 - b. Lease as contract reflects classical economic liberal vision.

D. Assignments and subleases; concern for restraints on alienation

1. **The issue is:** Who can LL sue in case of a breach, *e.g.*, non-payment of rent?
2. **The answer is:** LL can sue anyone with whom s/he has either privity of estate, privity of contract, or both.
3. **Privity of contract and privity of estate** analyses are **INDEPENDENT** and are governed by different principles of contract and property law.
4. **Privity of contract**
 - a. LL can have privity of contract simultaneously with many Ts ("Let 1000 deals bloom.")
 - b. LL typically has privity of contract with head tenant (T₁) because they have a contract (lease) together.
 - c. Once established, privity of contract persists until the contract (lease) term or period is completed UNLESS LL and T sign an explicit release.
 - d. Privity of contract is established between LL and remote T (T₂ -T_n) only if the remote T accepted some or all of the covenants in the original lease and if the jurisdiction accepts the doctrine of third party beneficiary contracts. Privity of contract arises because the assignment (or sublease) agreement is construed as a third-party beneficiary contract intended to benefit LL, so that LL is entitled to enforce it.
5. **Privity of Estate**
 - a. LL can have privity of estate with only one T at any given time (though T can be co-tenants), *i.e.*, does not have privity of estate with both T1 and T2 when T1 has signed over part or all of lease to T2.
 - b. Analysis of whether something is an assignment or a sublease is relevant only to privity of estate analysis.
 - c. Whether privity of estate exists turns on whether the sign-over of interests from T1 to T2 is an assignment or sublease:
 - i. If sublease, LL has no privity of estate with T2.
 - ii. If assignment, LL has privity of estate with T2.

terminates automatically if T assigns or subleases w/o LL consent.

10. **Rule in Dumpor's case:** Where LL agrees to one assignment, he is held to have agreed to subsequent assignments unless he specifically reserves his right to forbid them. (Does not apply to subleases; is abolished in most jurisdictions.)

E. **Landlord's rights and remedies**

1. **Termination of the tenancy for nonpayment of rent**

- a. **Doctrine of independent covenants** precluded LL from evicting T for nonpayment or other T breach of the lease because T's non-payment does not release LL from obligation to convey property to T for the lease period. Remember feudal concept of conveyancing.
- b. **Re-entry clauses in leases** allow LL to evict T for non-payment or other breaches.
- c. **In most jurisdictions, statutes allow LL to evict in certain circumstances;** establish summary proceedings for doing so.
 - Va.* Allows LL to evict whenever lease is properly terminated.
Statute provides minimum periods for cure and termination.
 - Md.* Allows LL to evict for nonpayment.
For other breaches of lease, provides a more complex process of eviction.
- d. **Acceptance of rent by LL gives rise to inference of waiver of eviction**
If T has a periodic tenancy, LL moves to evict, T sends rent check, and LL cashes, LL waives right to evict and creates a new tenancy period for T.

2. **Self-help and distraint**

Where T fails to pay rent or defaults on another lease provision, can LL use self-help to evict T or seize T's personal property?

a. **Self-help**

At common law, LL could use self help to evict and repossess premises; modern trend is to forbid it. *See Wheeler.*

Even in a jurisdiction where self-help is allowed (think Va.), LL is liable for damages for wrongful eviction unless:

1. LL is legally entitled to the premise; and
2. LL enters peaceably.

b. **Distrain**

LL goes on T's premises to seize T's chattel (personal property) as lien against unpaid rent. In some jurisdictions, LL can then sell property to make himself whole for value of rent.

Fifth Circuit in *Hall* rules it is a violation of procedural due process for LL to seize goods without prior notice to T.

3. **Tenant abandonment/Mitigation of damages by landlord**

When T abandons, LL has three choices:

a. **At common law, LL can do nothing and wait for rent to come due.**

This remedy is no longer available where courts (*see Sommer v. Kridel*) or statutes require LL to **mitigate damages**.

Sommer: Requires LL to treat apartment as vacant stock and not to show it in preference to other apartments. Places burden of proof on LL to show that he reasonably mitigated damages.

Sommer applies to residential units only; other states require mitigation in commercial leases.

b. LL can **re-let for T's account** (*i.e.*, offset against T's rent obligation).

c. LL can **accept T's surrender**.

Note: It is often hard to tell from LL's actions whether he is accepting T's surrender or reletting for T's account.

F. **Tenant's rights and remedies**

1. **Improper termination of a periodic tenancy**

a. **Easiest T defense to prove**, but only buys T time.

b. **Example**: Letter sent Jan. 10; says lease is terminated Feb. 1. There is a month-to-month tenancy, beginning on the first of the month.

Apply 1st rule: LL must give 30 days' notice

Jan. 10 - Feb. 10 = 30 days

Apply 2nd rule: Lease can only be terminated at expiration of period.

end of period = Feb. 28

So: Notice sent Jan. 10 could properly terminate tenancy no earlier than March 1.

c. **Effect of improper notice**:

Common law: Defective notice means that tenancy continues until properly terminated.

Restatement rule (only adopted in a limited number of jurisdictions): defective notice terminates tenancy on the first date on which the tenancy could properly have been terminated. (In example, lease would be terminated as of March 1.)

d. Remember that this doctrine **applies only to periodic tenancies**.

2. Historically, duty to repair lay with T, not LL (see feudal origins).

BUT a **covenant of quiet enjoyment** was implied into leases in most jurisdictions. If violated, T had no ongoing obligation to pay rent.

3. **Partial actual eviction**

a. **Requirements** LL or someone authorized by him must actually evict tenant from part of premises. See *Smith v. McEnany*: An encroachment amounting to actual eviction arose when LL authorized her husband to build a wall that encroached 9" onto T's leasehold premises.

- b. **Result** T has total defense to rent until encroachment is removed. Nevertheless, T is bound to perform his other obligations under lease (e.g., duty to repair) for entire lease term (thereby preserving doctrine of independent covenants); rent becomes due again once encroachment is removed. See Smith v. McEnany

4. **Constructive Eviction**

a. **By LL:**

Traditional test: (i) LL must have breached a duty (typically a statutory duty or a specific lease covenant). The breach must be so substantial that it interferes with T's use and enjoyment of the premises.

(ii) T must move out within a reasonable time after the breach arose.

Result: T can move out with a defense to future rents. See Dyett v. Pendleton.

b. **By another T:**

Some jurisdictions do not allow.

Restatement allows only if LL is chargeable with other T's activities.

5. **Partial constructive eviction**

Modern variation on prior rule:

T may be partially constructively evicted if only part of the leased premises become unusable. See East Haven v. Gurian.

T has a defense to future rents for that part of the leased premises.

6. **Implied Warranty of Habitability**

40 states and D.C. have adopted an IWH.

Typically, IWH is not waivable, largely due to concern for inequality of bargaining power between LL and T.

But see Restatement of Property suggesting it might be waivable in circumstances where parties have equality of bargaining power.

a. **Requirements**

Javins Substantial violation of the housing code = breach of IWH

Hilder Courts are directed to look first to the housing code:
"a substantial violation of the housing code" = violation of IWH;

BUT housing code violations are only a starting point and not all jurisdictions have housing codes;

Therefore, defect that has impact on health or safety of T = breach of IWH. (See also additional language re: latent defects, etc.)

b. **Applicability**

Javins limited to residential housing

Hilder detailed provisions re: applicability

c. **Preconditions**

Javins IWH cannot be invoked if T caused defect

Hilder T must give LL notice and a reasonable time to cure

LL can't argue T assumed risk

d. **Escrow**

Javins recommended but not required

Hilder same

e. **Remedies**

Javins Contract remedies, including rent withholding and specific performance

Hilder

Details rent withholding, with specific measure of damages.

Courts shall not require expert testimony.

T can get back part or all of rent paid in excess of amount apartment was worth due to defect.

T can repair and deduct

Punitive damages may be available.

f. **Local statutes**

Va. Includes escrow requirement, undermining (arguably eliminating) utility of IWH in typical LL/T case. (Va. statutes generally cut back on T rights).

g. **Implications of IWH: help or hurt low-income tenants?**

Be familiar with arguments of Posner, Ackerman, Kennedy, Meyers, and Bezdek.

7. **Retaliatory eviction**

a. **Test:** LL cannot evict T in retaliation for reporting housing code violations.

Habib: LL can evict only after retaliatory motive has been dissipated.

b. **Statutes:** Some jurisdictions create rebuttable presumption of retaliatory motive for 90 to 180 days after T reports violations, beyond which period T has burden of proof of retaliatory intent.

8. **Secure tenancies:** LL can terminate only for just cause.

a. **Public and subsidized housing units**

See Joy v. Daniels: LL can't evict without "good cause."

b. **Rent controlled units**

Again, requires "just cause" by LL to evict.

9. **Freedom from unlawful discrimination**

- a. General principle is that LLs can rent to whomever they choose.
- b. BUT, limited by prohibition on discrimination on basis of race, color, national origin, religion, sex, disability, and familial status.

No protection under federal law for marital status, sexual orientation, age, job, and/or income, although some states and/or localities provide protection for some of these statuses.

- c. Fair Housing Act exempts buildings with four or fewer units where LL actually lives.
- d. Advertising never exempted from prohibitions of Fair Housing Act.

IV. CONCURRENT ESTATES/MARITAL PROPERTY

A. Concurrent estates

1. **Defined**

Two or more parties hold the same interest in the same property at the same time.

Can be a present interest; can be a future interest; can be both.

Each party holds a share in the whole property and has use and possession of the whole. No party has an identifiable portion.

2. **Tenancy in common**

- a. Modern presumption for this tenancy under common law.
- b. Rebuttable presumption of equal shares.
- c. Can be unilaterally partitioned. Either by partition in kind (*e.g.*, fence) or by partition by sale. Doesn't matter whether moving party has a good reason or none. Inconvenience to non-moving party immaterial. Partition in kind results in neighbors with contiguous lots, where they were

previously co-tenants.

- d. No survivorship rights. Shares can be devised.

3. **Joint tenancy**

- a. Four unities must be satisfied
 - i. Subsequent violation of any unity constitutes a severance.
 - ii. Once there is a severance, a tenancy in common arises (and not neighbors with contiguous lots).
- b. Must use explicit language to create a joint tenancy to overcome common law presumption in favor of tenancy in common.
- c. Survivorship rights.
- d. Must have equal shares.
- e. Unilateral partition allowed.

4. **Tenancy by the entirety**

- a. Type of joint tenancy available only to married couples (requires four unities plus marriage).
- b. Must be married at or before the time of acquisition of property by tenancy by the entirety.
- c. Partition only with consent of the parties.
- d. General rule is that individual spouse's creditors cannot reach tenancy by the entirety property. Protects the family home.
- e. *King v. Greene*: Looking to impact of Married Women's Property Act, concludes that if husband can alienate his survivorship right, then so can wife. This is the minority rule. Most states prohibit altogether the alienation of survivorship rights in tenancies by the entirety.

B. Coverture

1. Prior to marriage, women are "feme sole." Married women are "feme covert."
2. Pursuant to doctrine of marital unity, husband and wife became one upon marriage -- the husband, according to Blackstone. *See Borelli.*
3. Married women were considered incompetent as a matter of law. Therefore, married women had no right to property or to enter into contracts. *See Dibble.*

C. Common law marital estates

1. **Jure Uxoris**

Husband had right to control wife's property, including her personal property (except for clothes/bedding), real property (husband got life estate for their joint lives, which was reachable by his creditors).

Husband's right of control ended with end of marriage UNLESS there had been a birth of live issue, *i.e.*, a live birth, in which case the doctrine of CURTESY governed.

2. **Curtesy**

Governed the husband's right to wife's property after children born.

Objective to provide for children whose mother died in untimely manner.

3. **Dower**

Wife got 1/3 of husband's personal property (if she had kids; 1/2 if not).

Wife given a life estate in 1/3 of inheritable freehold lands of which husband seised (had possession) during marriage.

Wife had right to control her real estate if she survived her husband.

She owned her clothes and bedding during marriage.

Complex rules re: ornaments and trinkets:

Husband can sell them during his life, but must return them to her after his death, UNLESS they are needed for his creditors (after all other assets

of his estate are exhausted).

D. **"Equitable" distribution of marital property**

Distribution of marital property originally based on title theory; now "equitable" division.

Community property: All marital property acquired during marriage owned 50/50 (allowed in small number of states).

Is professional degree or career considered marital property? See *Elkus*; *Martinez*.