Property notes, Spring 2004. Professor Vincenti.

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Monday, April 26

Recording systems

Recording systems

***Daniels* redux**

- You are not a purchaser until you've paid the full amount, itc. says.
- What remedy itc.? There are several possibilities:
  - Divide the land, pro rate based on what the subsequent purchaser has paid (this is rarely used).
  - Give the land to the subsequent purchaser and have him pay the remaining balance to the prior claimant (this would be a good choice if the subsequent purchaser has not paid much yet).
  - Give the land to the prior claimant, but make him pay to the subsequent purchaser whatever the subsequent purchaser paid for the land. This is what the court chooses itc.

Lewis

- Here, unlike in *Daniels*, the subsequent purchaser actually got a deed:

1. Real estate contract—S agrees to buy from L for $2.3m.
2. F files a lis pendens, but it is <u>not</u> indexed yet.
3. L pays S $350K on the balance.
4. S and L close, L getting a deed and recording it.
5. F's lis pendend is indexed.
6. L pays S the remaining $1.95m.
7. L invests $1.5m in remodeling the home.
8. F sues.

F argues that his lis pendens was indexed <u>before</u> L had completely paid the purchase price. The court overrules its prior *Ward* rule that required complete payment before a subsequent purchaser would be protected. The *Ward* rule, the court says, punishes unfairly those who finance through the seller rather than through a bank; also, the court thinks it's silly to have a different rule for the two kinds of financing.

- Note also, however, that in *Ward* the purchasers had actual notice of the encumbrance there, unlike the purchasers here, who were unaware of the lis pendens.

Inquiry notice

The primary type of inquiry notice is where someone is actually in possession—then you're obliged to find out what the possessor's interests are. This is because possession is an indication that someone is using the land.

Waldorff

- Sequence of events:

    1. C mortgages to a bank.
    2. C → W, a contract for sale of unit 111.
    3. C mortgages to a bank on units 111 and others.
    4. C mortgages to a bank on units 111 and others.

    The second- and third-mortgage banks want to foreclose C; they argue that they hadd no notice of W's possession because there were so many occupants in the building that were just C's shills, living there for free. The court rejects this argument, saying the banks should have asked those occupants about their interests, considering that the specific unit numbers were itemized in the mortgages.

    N.b., why isn't there an issue here as to whether or not W is a protected purchaser? Because W isn't a subsequent purchaser (wrt. the second- and third-mortgages) and doesn't need protection.

Paradise

- Will anything besides possession lead to inquiry notice? Yes. An easement is a good example (e.g., you seee a path on the land).
- Itc., because the deed in question actually mentioned a lost, prior deed, inquiry notice arises. (But inquiry of whom?! Maude?? Would Maude know what she had??)

<u>Thursday, April 22</u>

Recording systems

Recording systems

Bona fide purchasers

It helps to break BFP into:

- BF: good faith—taking without knowledge.
  - Generally, record notice is constructive notice, defeating any good faith. But there are exceptions:
    - Wild deeds: good faith exists even if a title is on the record but not actually in the chain of title.
    - Chronological anomalies: courts are split on these—some say you're held to constructive knowledge of transactions that are in chronologically wierd places; some say you're not.
- P: a purchaser for value (e.g., not a donee).

Daniels

- Zografos argues that he is BF because has no notice—either actual or constructive—of Daniels's right of first refusal.
  - Daniels replies, okay, but Zografos is not a P.
- Equitable conversion: wasn't allowed itc. because it wasn't raised below, but the argument would be that Zografos got title—in equity—at the time of the land sale contract.
  - Note that if this had been a mortgage sale, Zografos would have had a deed to record.
  - In either case, though, it doesn't matter, Vincenti says—the question of whether Z was a purchaser remains no matter what.

Wednesday, April 21

Recording systems

Recording systems

Guillette

- Itc. is like *McQuade* (n1p873).

O owns Blackacre and Whiteacre.
O → A, Blackacre with restriction on Blackacre and Whiteacre.
O → B, Whiteacre, without mention of the restriction.

If O can bind all others in a deed out for just one of the subdivided parcels (as court says O can, itc.), does this mean that a subsequent purchaser must check every deed out from O for restrictions?

- Yes (Mass. rule). But this is normal, right? Once you've

gone back in a title search, you have to go forward, too. And you still have to check all of the deeds out—even if there are different descriptions—for overlap if nothing else. An additional check for restrictions too isn't a huge burden (right?).
- But see n1p701—the courts are split on this. The opposing argument is: why should you have to investigate things other than boundaries (i.e., overlap) wrt. people who are essentially strangers to your title.

Monday, April 19

Recording systems

Recording systems

Messersmith

- What's the difference between a lease and a deed, wrt. oil/mineral rights?
  - Lease: the lessor gets royalties.
  - Deed: the grantee can make his own deal with the extractor.
- Itc., as of July 9, 1951:
  - According to the record, Seale is the owner.
    - Is Seale a BFP? No—see fn11p694: race-notice protects subsequent purchaser who records only if all prior conveyances in his chain are recorded; i.e., a wild deed won't be protected.
      - Why this rule? It can be justified itc. because Seale did not buy from a record owner. (But, n.b., Smith's deed from O was at laid on the record (but without valid acknowledgment, and after a prior, record transaction).
    - So, since Smith's deed wasn't recorded, Seale isn't protected (and so Frederick wins).
- Note the subtext of the grantor aunt's possible incapacity.
- The point of itc.? Just because there's something in the record about a transaction does not mean that that transaction is "recorded." Here, this is because of the statutory requirement of acknowledgment—it is not a SoF question (a deed invalid under the SoF would mean the entire conveyance was invalid, not just that it wasn't recorded).

Hughes

- Timeline:

5/17/6	O → H	not recorded, grantee's name blank (SoF requires <u>both</u> names on deed)
4/27/9	O → D&W	not recorded
11/19/9	D&W → BoE	not recorded
1/27/10	BoE records.	
12/16/10	H fills in his name and records.	
12/21/10	D&W records.	

So, because H didn't fill in his name until 12/16/10, he turns out to be a subsequent purchaser (!!). Thus, the result itc. turns on the court's determination of H's actual time of purchase.

- BoE's recording on 1/27/10 does not protect it (see fn11p694, ¶2p698).
- The upshot for BoE is that O holds D&W's money in constructive trust for D&W, and D&W in turn holds its interest in that money in constructive trust for BoE. (If H <u>lost</u>, O would have held H's money in constructive trust for H.)

<u>Thursday, April 15</u>

Recording systems

Recording systems

Recording acts

Condsider:

O → A
O → B

- Common law: first in time wins. B is (almost) never protected.
  - Equity exception (see ex1pp662-663): B might be protected if his interest is purely equitable.
- Race statute: B is protected iff B records first (even if B knew about A's purchase).
- Notice statute: B is protected iff B is a BFP from a record owner (even if A recorded).
- Race-notice statute: B is protected iff:

1. B is a BFP from a record owner, and
2. B is the first to record.

Wednesday, April 14

Recording systems

Recording systems

Luthi v. Evans

- The buyer here would not have been able to find the problems with the specific property he'd buying here, because it wasn't specifically described in the prior lease conveyance.
    - Note that a tract index wouldn't have solved this, either (again, because there was not specific description in the prior conveyance).
    - If Tours had wanted that specific lease (e.g., if it had bargained for it), it could have filed an affidavit into the record regarding its ownership. As such, Tours is the best cost-avoider here.
- In situations like these, we have at least two concerns:
    1. The equities between the parties.
    2. The integrity of the recording system.

    Tours's remedy?
        - As between it and the seller (only), it has the right to drill on that lease.
        - It can sue seller, who would be said to have been holding buyer's purchase price in constructive trust for Tours.

In most states, the index does not have to be correct (see e.g. ¶0p673). Why? Because the seller, after recording, will have done all he could—it's no longer in his hands to do more. (N.b., ULTA requires seller to make sure the transaction actually gets listed (i.e., assigned a number).)

Government surveys

- Township—6 mi^2
    - Section—1 mi^2 (640 acres)
        - Quarter—½ mi^2 (160 acres)
            - Quarter—¼ mi^2 (40 acres)
                - etc.

Orr v. Byers

- The Byerses argue that they're BFPs because of the misspelled "Elliott."
- The Orrs argue that the Byerses were obligated to search all common spellings of "Elliott."
    - But n.b. that even if the Byerses had, the judgment lien would not have had a property description attached to it (and so in this way, a judgment lien is like a Mother Hubbard clause). So, this case doesn't address situations where there is an attached property description—it's not clear whether *idem sonans* would apply there, or not (e.g., with a mortgage, buyers would find it in the tract index, even if there was a name misspelling).
- Note that itc. does apply *idem sonans* in one way—e.g., if O sells to Elliot and then Elliott sells to Byers, there is no cloud in the title unless you can prove that Elliot is actually not Elliott, and that instead they are two different people.

Monday, April 12

Mortgages
Recording systems

Mortgages

Murphy v. Financial Development Corp.

- Itc. involves a power of sale mortgage foreclosure—i.e., the lender runs the foreclosure sale (as with a trust deed). Contrast this with a judicial sale, which costs more for the lender (because it has to go to court, pay its lawyers, etc.).
- Power of sale foreclosures:
    - Lender's obligations:
        - Publication of legal notice
            - Itc., Δ posted three notices; then buyers requested a postponement; then Δ posted notice of the postponement only at the house itself, only on the day of the sale—but this fulfilled the statutory requirements.
            - A judicial sale might be just a poorly published—but it is much more likely to be upheld then a private sale.
        - Good faith
            - Itc., the court says the lender satisfied this requirement—it did not discourage potential buyers.

- Due diligence: the lender has an obligation to get a fair price.
  - How can a lender a get a fair price?
    - Have an (fair) upset price, below which it will not sell. The upset price could be set by reappraisal (and maybe other methods).
    - List the property with a realtor, and reduce the price over time until the property sells.
  - Itc., the lender immediately resold for $11K profit.
- ULTA requires a "commercially reasonable" sale—i.e., a sale as if the owner was selling it himself.

- The sale <u>from</u> the lender is upheld itc. So the buyer Πs don't get their house back. This is because we want to maintain the security of title. Everyone involved here wants titles at foreclosure sales to be secure (but n.b. statutory right to buy back <u>after</u> foreclosure for some length of time, in some jurisdictions (¶1p646)).
  - If the lender had breached the good faith duty, then the sale <u>would</u> be defective and the buyer Πs could get the house back.

Bean v. Walker

- Itc. involves a land sale contract, which is distinguished from a mortgage. In a land sale contract, the owner is the lender; he sells to the buyer an agreement to convey once buyer has paid off the sale price plus interest. (This is a lot like the situation when mortgages arose, historically.)
- Itc., if default the owner-lender was supposed to be able to:
  - Repossess, or
  - Accelerate the payments.

  The court won't allow this—it decides to treat land sale contracts like mortgages.
- What can be said for the owner-lender here?
  - He might have taken a lower interest rate because of the conract remedies (that he thought would be enforced).
  - He wrote <u>in the conract</u> that the amount paid in by buyer would be considered liquidated damages <u>and</u> rent (not just very penalty-like liquidated damages).

Recording systems

- The recording system provides a presumption of notice, and so solves a lot of BFP problems that arise when there is no recording system.
  - With a recording system, actual notice is not required—record notice (constructive notice) is enough.

- Note, though, that the fact that a transaction is recorded does not say anything about the legitimacy of the transaction.
- How do you assure title?
    - Do a grantor/grantee index search, backwards and forwards.
    - Check for judgment liens, which might be in a separate index.
    - Check for mechanics' liens.
    - Check the tract index. The tract index gives all property a number; under that number is a history of the property. Searching this index is considerably easier than searching the grantor and grantee indexes.

Thursday, April 8

Deeds: delivery
Mortgages

Deeds

Delivery

Sweeney (cont'd)

- What should M have done?
    - A will would not work—it wouldn't keep his wife from her forced share.
    - A conveyance to M & J as joint tenants might work.
    - M could convey fee simple to J, J in turn could convey a life estate to M. This might work, but it might be viewed as an illusory transfer.
    - M could give a future interest to J. This might be disallowed because it is too much like a testamentary transfer (and so would be governed by the Statute of Wills).
    - M could put the deed in escrow. See *Rosengrant*.
    - M could set up a revocable inter vivos trust. But, in many states, this would not cut off the wife's forced share.
    - M could set up an irrevocable trust. This cuts off the forced share, but there's a tax disadvantage, because this is a gift transfer.
    - M could trust J—he could give a fee simple to J, who would will it to M (but M must trust J not to revoke the will).

Rosengrant

- Why no delivery itc.? Was the escrow revocable?
  - Both names were on the envelope. (But the banker, not the parties, put those names on the envelope!)
  - The bank's custom was to return safe deposit items to any name on the envelope on request. (But the parties may not have known—and probably didn't know—about this custom!)
  - What about the parties intent!? Vincenti asks: shouldn't there be a presumption that transfers are valid (as in *Sweeney*) so as to uphold parties' intent??
- Why should a revocable escrow be void?
  - For valid delivery, there must be a delivery with the intent to pass title. Why wouldn't that intent be revocable, though?
    - It would look too much like a testamentary disposition, and so would contrary to the Statute of Wills. (But an irrevocable transfer would look like a will, too, itc.!)
  - The revocability of the escrow transfer would turn on the escrow agent's tesimony (unless there are writings).
  - There's a better way to do the same thing—a revocable trust.

Mortgages

- Private foreclosure sales—there must be:
  - A notice sent to the debtor.
  - Notice of the sale (and its date) published in a major newspaper for four successive weeks.

  Who goes to these sales? At the very least, the lender will be there, to make sure the property doeesn't go for less than its FMV.

- By using a trust deed, a mortgagee can choose between a private or judicial sale in foreclosure.

Wednesday, April 7

Deeds: delivery

Deeds

Delivery

- A note on taxes: any gift over a certain amount is subject to taxation. The capital gains basis will "step up" at the time of the testamentary or gift transfer. So, there may be a tax disadvantage to inter vivos gifts (vs. transfer at death).

Sweeney

Deed #1: M to J. It was understood that M would stay in possession, and that at M's death, J would take. This deed was recorded.

Deed #2: J to M, in case J died before M. This deed was not recorded.

The widow, who hasn't lived with M for 20 years, can take a <u>forced share</u>, by statute. I.e., the widow can waive the will and take a share. Itc., the forced share is a one-third life estate. So, you can't disinherit your spouse (completely).

- The forced share right is based on the historical dower rights.
  - Dower: the wife's right to part of the husband's estate.
  - Curtesy: the husband's right to the wife's entire estate.
- These rights <u>can</u>, however, be waived in a prenuptial agreement.

Itc., M's shenanigans didn't work—he ends up intestate and his estranged widow get the whole kit and kaboodle, in fee simple.

Delivery?

- Actual delivery? No. A deed handed over is a deed delivered, prima facie. This presumption is rebuttaable with evidence that there was no intent by the parties to pass title.
- Conditional delivery? No. To effect a valid conditional delivery, the deed must be given in escrow to a third party—it cannot be given to the grantee, this court says (n.b., some say it can, though). If it's given to the grantee, no parol evidence wrt. conditions is admissible —why? because the grantee is a stakeholder.

Why is the court so strict?

1. It wants to preserve safety of real estate titles and the recording system.
2. It's concerned about fraud.

Remember—a deed is not title; but it is the "best evidence" of title.

Monday, April 5

Deeds

Deeds

Brown v. Lober

- Π can't sue on the covenant of seisin because the SoL has run on it.
- So, Π sues on the future coventants of general warranty and quiet enjoyment (which, remember, are basically the same thing).
  - This won't work, the court holds—claims on these future covenants don't ripen until the enjoyment is actually disturbed, through eviction, constructive eviction, or some other interference with possession. It is not enough that there's someone lurking out there with the legal right to disturb—they have to do something to you.
- N.b. that Π is suing an estate administrator—thus they have to assert whatever claims they have before a deadline.

Frimberger

- Cf. *Lohmeyer* (p580), the two-story house case:
  - The existence of a zoning ordinance is not an encumbrance because it's in the public records.
  - The actual violation of the ordinance that made the title unmarketable.
- The court itc. says that latent violations of certain kinds are not encumbrances—this is basically the other way from *Lohmeyer*.
  - Distinguish *Lohmeyer* and itc. on the fact that *Lohmeyer* involved a contract for sale, which includes a warranty of merchantability. Itc. involves a deed, which includes a warranty against encumbrances.
  - Also, distinguish the two on the fact that contracts for sale are not recorded, whereas deeds are—so holding that the violations itc. are encumbrances could end up clouding titles and deteriorating the reliability of the recording system. In the sale

contract situation, the contract can simply be voided, without too much long-term disruption of the land sale system.

- Note the remedies issue here: we don't know what Π's damages are. He could apply for an get a variance, for all we know, and thus have no damages.
- The court says problems like those itc. ought to be handled by contracts. This means that it is important to say in a sale contract that the contract survives conveyance (i.e., it does not merge). (N.b., the difference? Why not just use the deed? Because the contract doesn't run with the land—we don't want covenants like those in the sale contract to run with the land, as they would if they were in the deed.)

Rockafellor

- H&G took from Dixon by special warranty deed, Dixon took from Connelly by general warranty deed. (N.b., that there is no evidence of possession by either Connelly, Dixon, or H&G.)
- So, the question is: can H&G sue Connelly? I.e., does a warranty of seisin run with the land?
    - The court says that the warranty, as a present covenant, doesn't really "run" with the land—but, the grantee does get a chose of action if the CoS was breached at conveyance.
    - So, the question becomes: is a grantee's chose assignable to a remote grantee? Yes, the court says itc. In fact, it reads the assignment into the deed from Dixon to H&G.
- Why can't H&G sue on a future covenant? Because it never took possession (and thus its possession couldn't have been interfered with, obviously).
- Remedies issues:
    - The upper bound on damages is what the grantor got from the grantee (not what the remote grantee paid); this is because it is the original grantee's chose that's passing down the chain.
    - Connelly can't introduce parol evidence as to actual conderation paid in his case against H&G (the remote grantee). (He could bring it, though, if he was suing Dixon, his immediate grantee.)
        - Why? Because we say that H&G relied on the consideration recited in the record (which itc. was in the deed (!!)).

Thursday, April 1

Deeds

Deeds

Merger: traditionally, once a real estate deal closed (i.e., the deed changed hands), the contract for sale was no longer applicable—it merged into the deed.

- This rule is changing. Some covenants in the sale contract survive closings. This means we have property law and contract law to apply to many real estate transactions.

Taxonomy of deeds

- General warranty deed
  - The grantor says: "I (and my executors and assigns) will warrant good title and quiet possession to you and anyone who takes from you."
  - That sounds perpetural, but it's not—when the grantor dies, his estate is probated and notice is issued to all creditors, with a time limit. All claims must be presented before that time is up.
- Special warranty deed
  - The grantor says: "I (just me) have not done anything—since Ive owned this property—that will cloud the title."
- Quitclaim deed
  - Warrants nothing—the grantee gets what the grantor had, whatever that was. Even if the grantor had nothing.

Elements of valid deed: the minimum requirements:

- Names of the grantor and grantee.
- "Words of grant."
  - The words of grant need not mention the sale price or consideration—but it's a good idea to be safe and mention consideration, so it can be later proved that the transaction was a purchase (and not, e.g., a trust assignment or gift). (N.b., tax stamps can be used to determine the selling price—but they can be manipulated, e.g. where purchaser affixes more than are required.)
  - Habendum clause might also be required in some cases (e.g., life estate grants).
- Description of the property.
  - Metes and bounds description: starting point (either an artificial or natural landmark), followed by distance and direction pairs. The pairs must lead back to the starting point or the metes and bounds description is invalid.
- Signature of the grantor (grantee's signature is not included, because the grantee is not promising anything).
- Acknowledgment: a swearing by the grantor before a notary public. This is needed so that the transaction can be recorded.
- In some jurisdictions a seal is required—where it is required, anything

will do (n.b., it used to be that sealed contracts required no consideration).

Forgery: a forged deed is void in the hands of a BFP. Period.
Fraud: if a defrauded victim passes a fraud deed to a BFP, the BFP wins (the BFP is the more innocent party, so the law figures that the original owner should bear the loss in this situation).

General warranty deeds

- The included warranties:
  - The present covenants (these are breached or not at the closing, and so the SoL begins to run when the deed is handed over):
    - Seisin ("I own it").
    - Right to convey ("I have the right to sell it").
    - Against encumbrances ("There are no encumbrances").
  - The future covenants (the SoL begins to run if and when there is a breach):
    - General warranty ("I will defend you against lawful claims and compensate you for loss due to a superior title").
    - Quiet enjoyment ("You may enjoy the property free of concern"). For all practical purposes, this is the same as the general warranty (and sometimes is omitted).
    - Futher assurances ("I will execute any other necessary documents for perfecting the title").

Special warranty deeds: these have the six warranties that general warranty deeds have, but the grantor will also list all the encumbrances he knows about. (N.b., he will nevertheless be bound wrt. any encumbrances that he doesn't know about.)

Wednesday, March 31

Real estate contracts

Real estate contracts

The duty to disclose defects

- The starting point for the duty to disclose is *caveat emptor*. That doctrine has over time been riddled with exceptions (e.g., *Stambovsky*).
- Most states now have statutes about what sellers must disclose.

Implied warranties

- Implied warranties wrt. real estate is developing law—developing past *caveat emptor*. This law straddles tort and contract (like products liability and wrongful discharge law).

The implied warranty of quality

- Tort and contract conflicts:
  - Tort:
    1. No privity requirement.
    2. Pure economic loss not recoverable.
    3. Punitive damages available.
    4. Negligence standard, usually.
  - Contract:
    1. Privity required.
    2. Pure economic loss is recoverable.
    3. Punitive damages not available.
    4. Strict liability standard.

  As a result, many courts find the IWoQ grounded in public policy, and so pick and choose IWoQ's characteristics from both tort and contract.

Lempke

- This court had held only two years earlier (in *Ellis*) that IWoQ must fit entirely either in contract or tort—no mixing would be permitted. Itc., the court revisits *Ellis*, overrules it in part, and picks IWoQ's characteristics from both tort and contract.
  - No privity requirement.
  - Pure economic loss recoverable.

  Why? (see pp606-607)
  - The builder is the cheapest cost-avoider.
  - Latent defects often don't manifest for a long time.
  - Society is changing—people are increasingly mobile, and houses might be resold in short order.
  - Subsequent purchasers don't have a good opportunity to inspect and don't know much about construction.
  - Builder already has a duty to build in a

workmanlike manner, so this isn't a big extension of the builder's existing duties.
- A privity requirement might encourage sham (strawman) sales to limit liability.

Limitations on the IWoQ:
- Reasonable time requirement—latent defects must have shown up in a reasonable time. (The court doesn't want to make builders insurers. Claimants must show unworkmanlike quality, determined from the standards of the profession.)
- The defects must be latent—i.e., undiscoverable by reasonable inspection.
- Π has the burden of proof.
- Builder has defenses:
  - Intevening changes.
  - Ordinary wear and tear.

Disclaiming warranties

- Generally, we:
  - Don't allow tort disclaimers.
  - Do allow contract disclaimers.
  - Don't allow public policy disclaimers.
- ULTA (Uniform Land Transaction Act)
  - General disclaimers: valid wrt. commercial property, but <u>not</u> wrt. residential property.
  - Specific disclaimers: can be valid wrt. any property.

<u>ULTA</u>
- Warranties run with the land.
- Warranty of suitability—narrow protection, but it covers both used and new homes.
- Warranty of quality—broader protection, but it covers only new homes.

<u>Thursday, March 25</u>

Real estate contracts
Marketable title

Real estate contracts

Walker v. Iterton (n1p579): different from *Hickey*:

- The seller itc. didn't know the buyer was going to sell his own home, and wouldn't have even contemplated that he would (nor was it even forseeable, since farmers buy additional land all the time).
- So, maybe an additional requirement for the estoppel/part performance doctrine is that the seller have some kind of notice that the buyer is going to rely on the agreement.

Marketable title

- What's marketable title?
  - A title that doesn't carry a lawsuit with it.
  - "A title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person, one which such persons, guided by competent legal advice, would be willing to take and for which they would be willing to pay fair value" (pp579-580).

Lohmeyer

- What kind of encumbrances will destroy marketable title?
  - Any easement, covenant, private restriction, or similar will destroy it.
  - But a zoning ordinance will <u>not</u>. Why?
    - Presumption of familiarity with the law??
    - Incurable??
    - Title search won't reveal federal, state, or city regulations??
    - Reflect public interest?? (And we don't want private parties to bear the cost of the benefit of zoning (by requiring them to search for this in title searches).)
  - What about a utility easement? See n2p584: the authorities are split—some say it destroys marketable title, some say it doesn't.
- Π wins itc. even though a noticed covenant and a zoning ordinance are involved because the house <u>actually violates</u> those restrictions. That menas that if the property had been a vacant lot, Π would have to go through with the deal.
- Could Δ remedy the violations? Only if the corrections would not force Π to buy something he didn't contract for.

Conklin

- Buyer's arguments:
  - Adversely possessed property does not come with "marketable title." The court rejects this—adverse possessors can either perfect the record title (e.g., by suit) or rely on their title's marketability and enter into a sale contract. The buyer itc. could have protected himself by requiring "marketable title <u>of record</u>."
  - Seller can't give adequate proof of title <u>before</u> the time of closing (because seller would have to determine the status of the title with a lawsuit). The court rejects this—it says that the determination of the title's status can be determined now (in this suit), and that that determination will relate back to before the closing. (Buyer probably could have protected himself from this with a "time is of the essence" clause.)
- The <u>sellers</u> could have protected themselves by bringing a quiet title action (or settling with the record owners for a deed prior to suit). But, note that the court says the sellers don't <u>have</u> to do that—they can wait until now (when the buyer sues them).
- On remand, seller will have to prove:
  - The elements of adverse possession.
  - Any other claimants to the land could not prevail in a suit.
  - No real likelihood that any claims to the land will ever be asserted.

  However, n.b. that those "claimants" would not be bound by those determinations on remand. And note that there would be problems in simply quieting the title, due to the constitutional notice requirement (*Mullane v. Hanover Trust*).

<u>Equitable conversion</u>: if there is a specifically enforceable sale contract for land, "equity regards as done that which ought to be done." I.e., the buyer is viewed as owner from the date of the contract (he has "equitable title") and the seller holds legal title in trust for the buyer. Seller has a claim for money secured by a vendor's lien on the land.

<u>Wednesday, March 24</u>

Real estate contracts

Real estate contracts

<u>Escrows</u>

- Could the escrow pay the seller's mortgage if it's at a lower interest rate than the buyer's? Yes, but the seller might be leary of this—the buyer might default on payments into the escrow account, which would default on the mortgage in turn.
- Who can get a home equity loan if escrow is used?? Well, surely not the buyer, at least. Maybe not the seller, either.
- Note that escrow is usually not part of the record—however, a party can file a notice of escrow in the record.

The "Western Suburbs" contract (pp565-572)

- ¶ 18: a survey is required.
- ¶ 20: tax stamps. Some states tax real estate transactions—tax stamps must be purchased and affixed to the deed (this allows you to approximate the selling price from the deed).

General and sub contractor problem: subs can get mechanic's liens if they aren't paid by the general. The seller will usually only be required to disclose general contracts to the buyer (he often won't even know of all the subcontracts). To solve this, some states require that generals be bonded against this risk. The buyer could (and should, if there's no bonding requirement in the state) require the seller to provide an itemized list of subcontracts; the buyer can then seek lien releases from the subcontractors.

The Statute of Frauds

- What will satisfy the SoF for a real estate contract? This isn't clear.
  - The book says:
    - The names of the parties.
    - A description of the land.
    - The selling price.
    - The signature of the "other" party (i.e., the one not trying to enforce the document).

Hickey v. Green

- Is the check a satisfactory writing?
  - It doesn't identify the parties (the payee line is blank).
  - It doesn't precisely identify the property—no city or state is mentioned. (However, note that to satisfy the SoF, a legal description is not required.)
  - It doesn't have the seller's signature.
  - It doesn't identify the purchase price (only the deposit amount).
- So, if the check doesn't satisfy the SoF, what is Π's argument?
  - Part performance: "performance that is unequivocally referring to the agreement"; plus, the party has to have done something that reasonable person wouldn't have

done (if not for the agreement) and that indicates that they own the property.
- Estoppel: demonstrated reliance on the agreement.

Note: the Restatement 2d of contracts § 129 collapses part performance and estoppel. Under the restatement, you have to prove that what's happened:
  - shows evidence of the promise, and
  - was done in reliance on the promise.

Π satisfies the evidentiary component itc. because Δ admitted to the agreement. I.e., the agreement was stipulated.

- Was Π's sale of his own house sufficient under the SoF? The court says it probably was—so, it doesn't take much to satisfy the SoF was long as a writing touches all the required bases.

Monday, March 22

Real estate contracts

Real estate contracts

What every residential sales contract ought to include

1. Title information: a land abstract, a certificate of title, title insurance, etc.
2.
3.
4.
5. Warranty of title
6. Date of possession: specify it.
7. Proration clause: wrt. taxes, casualty insurance, utility bills (and, e.g., the buyer will pay for the oil left in the tank), etc.
8. Risk of loss: specify who bears it and until when it's borne.
9. Itemization of chattels: itemize any chattels that are to be left (e.g., appliances, shrubbery, AC units). Also, identify any chattel that will be removed if it might be perceived as a fixture.
10. Escrow terms: if there's an escrow agreement involved, specify its terms. (N.b., a deed put in escrow will be considered to have been delivered at the time it was put in escrow.)
11. Earnest money: provide for conditions in which it will be returned.
12. Signatures: each party needs to sign.

Financing

- Real estate contracts must recognize how important financing is.
- The mortgage—the borrower gives to the lender:
    1. A promissory note.
    2. A security document ("If I fail to live up to my obligations, you get my collateral"). Note that the security document handover is a conveyance—the lender gets an interest in the property.

The "Western Suburbs" contract (pp565-572)

- ¶ 1
    - Note that marital status is not mentioned here, even though marital status can be real important:
        - Dower rights.
        - Homestead rights.
        - In a community property state, titles might not mention all parties in interest.
    - And this ¶ doesn't indicate how the parties will take—in joint tenancy or in tenancy in common.
- ¶ 3: the closing date—contracts must not be open-ended. Have some date by when the transaction must either be completed or fail.
- ¶ 5
    - "Good title." Note that this includes title by adverse possession. ("Good recorded title" would not include adverse possession. "Marketable title" might also mean something other than "good title.")
    - Permitted exceptions
        - pb1p572: easement or Georgian restrictions—these would be recorded and so, under the terms of this contract, the buyer may be bound by them.
- ¶ 6: financing conditions
    - If the buyer can't get financing, he must tell the seller within a certain period of time (or else the contract will remain in force and the buyer will have to find the money somewhere; note ¶ 11—the seller might be able to sue buyer for specific performance ("at seller's option")).
    - The seller can find financing for the buyer if the buyer can't do it himself. (Could the seller use a loan shark??)
- ¶ 10: attorney modification. This is included because realtors want to get buyers to sign right away. This provision (a) gives the buyer a chance to see an attorney after signing, and (b) shields the realtor from liability for the unauthorized practice of law.
- ¶ 11: "time is of the essence" clause makes time a material element of the contract.
- ¶ 14: title insurance is conclusive evidence of good title. (But, n.b.,

title insurance only covers the purchase price—not any later appreciation.)

Affidavit of title: seller swears that:

- there neither outstanding debts nor unrecorded liens for labor (either of these could turn into mechanics' liens);
- he is in exclusive possession;
- he has not been executed against.

Thursday, March 11

Scope of easements
Common interest communities

Scope of easements

Pocono Springs

- Unconscionable? Probably not, because the sewer standards probably changed after the buyer's bought.
- See *Oceanside* (n2p884) for a novel solution to a problem like this one: damages awarded, which increase at a certain rate, but at no point may they become greater than the value of the land.

Common interest communities

Nahrstedt

- Reasonability is determined in general, not with respect to an individual party.
- What deference to the master deed?
  - Great deference, because, primarily, of the potential for reliance by buyers.
  - Standard for considering the master deed are those of equitable servitudes. The court itc. looks to other jurisdictions—but note that these jurisdictions had no legislative guidance, as itc.!!
- Deference to community associations regulations?
  - Less deference.
  - Standards for considering these regulations: a reasonableness test? If so, what kind? The court is allowed to judge the wisdom of the regulation; i.e., it should be "good."
    - See *Lamden* (n4pp940-941): the court applies a "business judgment" test—did the association make a good faith effort to fulfill its obligations?
    - Note that *Nahrstedt* adopts a "reasonableness" standard

that other courts have juxtaposed with a reasonableness standard!!!

- Even though itc. is mushy, the 3d Restatement has embraced its rule.

Test taxonomy

- Against public policy test
- Arbitrariness test
- Reasonableness test
- Business judgment test

Any one of these can be re:

- Master deed
- Association regulations
- Financial decisions

Wednesday, March 10

Scope of easements
Common interest communities

Scope of easements

Western Land

- What's wrong with the owner's argument that his property is no longer useful?
  - It focuses on the wrong property, i.e., the servient estate. The focus has to be the dominant estate.
- So what would the owner have to argue?
  - That other owners aren't following the covenant (he does argue this). He just can't show itc. an extensive enough change in circumstances for unencumberance.
- Zoning and covenants: covenants are enforced so long as they are more restrictive than the zoning ordinances.
- How else might the owner get the covenants lifted?
  - He could buy the court's injunction. But, this involves high transaction costs and the possibility of holdouts.
  - The court could have awarded damages instead of ordering an injunction. But how would you measure damages itc.? Do we compensate owners closer to the border more than those further in the interior??
  - What about reverse damages—the court orders and injunction

and that the owners pay the developer??

Just note that there are multiple solutions to economic problems like the one itc.

Rick v. West: West is a holdout—the only holdout; all the other owners have waived their rights under the covenant. The court enforces the covenant even so.

- The developer could buy the injunction (the usual transaction costs aren't present here, but there would be a bilateral monopoly).
- This might be a good case for damages instead of an injunction.

Pocono Springs

- Affirmative covenant itc. The Land becomes unsalable after the owners buy it because no sewer can be put in. The owners still have to pay homeowner's dues, though.
- The owners try to abandon:
  - Stop paying property taxes.
  - Try to give the land to the homeowners' association.
  - The city siezes it but can't sell it.
  - Stop going on the land and receiving letters and other information about it.
- The court says you can't abandon if you have unclouded title in fee simple.
  - Note that you can abandon an easement—because you immediately benefit the servient estate by doing so.
  - But if you could abandon a fee simple, there'd be all sorts of problems:
    - Statue of frauds requires a writing for conveyance—the recording system wouldn't work for lots that were abandoned.
    - Tort liability—who would be liable?
    - How would title pass? What would you have to do to get the property?

    N.b., you can't just convery to anybody—they have to accept.
- How could the owners solve their problem?
  - Convey to a judgment-proof person.
  - Form a corporation and convey to it.
  - Look at assessment provisions re: the definition of "lot." If you gave the lot to an adjoining property owner, the two lots might merge into one.

Common interest communities

Nahrstedt

- Π argues that her cat stays inside and is quiet and fastidious and so is not a nuisance and so the covenant, as to her, is unreasonable (i.e., Δ has no basis for complaint).
    - Δ demurs and the trial court grants it.
    - The appeals court says there is a triable issue of fact, viz., are the cats a docile as Π claims they are? If so, Π is entitled to have the covenant limited as to her.
- So, the issue becomes whether you decide reasonableness
    - On a case-by-case basis, or
    - In general

  The court decides you decide reasonableness in general—i.e., not whether a covenant should be enforced against this Π, but whether it should be enforced against <u>anyone</u>.
- Where can regulations come from?
    - The master deed: more important and so given more deference:
        - Buyers will rely on it.
        - It reflects the developer's intent.
    - Board meetings of the community association
- Note that the restrictions in the master deed itc. are very much like real covenants. The court, in fact, takes the validity test for the regulations directly from that for servitudes.

<u>Monday, March 8</u>

Scope of covenants

Scope of covenants

<u>FHA suits</u>

1. Intent to discriminate
2. Disparate impact from a rule or regulation
3. Disparate impact from something other than a rule or regulation

In *Hill*, the court says the balance of the impact is in favor of Δ.

- n3p905: recovering (i.e., not currently using) drug addicts and alcoholics are covered as disabled under the ADA.
- n4p905: there is no bright line rule on "nonresidential." Look to impact.

Shelley v. Kraemer

- How might the state courts have come out the other way, still without having done a constitutional analysis?
    - T&C
    - Clean hands doctrine in equity courts
    - Unreasonable restraint on alienation

    But these are all state law matters, so SCOTUS can't deal with them. So SCOTUS decides on 14th amendment Equal Protection.
        - But is there a state action? Yes, because the courts are enforcing a judgment here.
            - Does itc. really jibe with *Bay Head*? Maybe not —there seems to be a difference in SCOTUS's analysis between cases involving economic rights and those involving civil rights.
        - N.b., that even though the covenant is ruled unconstitutional, it could still be valuable in an "order without law" way—residents may choose to follow it. Except that they can't, because of the FHA and the Civil Rights Act of 1966.
            - Where does congress get the authority to pass FHA and CRA1966?
                - Interstate commerce
                - Necessary and property
                - States tied to federal funding

n2p911: under the FHA can you disseminate a recorded deed if it includes a discriminatory restriction? No, you might not be able to.

Western Land Co.

- Why is city permission for abandonment required? Probably because of a subdivision ordinance. Such ordinances are passed to limit land use and insure that developers add roads and utilities to their developements (otherwise the city would have to).
- Isn't this suit premature—the subdivision is zoned residential (and, in fact, remains so today)? Maybe the residents wanted to send a message to the developer.
- The developer's problem: because of growth, the exterior lots aren't as valuable for residential purposes as it was when it was subdivided.
    - Is this fair? Especially considering the interior lots may be more valuable now? Well, if the border lots are unencumbered, that will probably lead to the interior area shrinking as commercialization takes over.

Thursday, March 4

Review
Covenants

Review

Servitude issues

- 3d party beneficiaries
- Horizontal privity
- Vertical privity
- Burdens
- Benefits
- Implication
- Prescription
- Notice
- American vs. English rule
- Traditional vs. modern rules

N.b., on an exam, if no rule is specified (e.g., on a narrow issue), go through all different rules—across time and across jurisdictions.

Covenants

Caullett

- A quiet title action—Π seeks to remove an encumberance from the record.
- The court agrees with Π and removes the encumberance:
    1. The covenant is too ambiguous
        - But what about windfall, as in *Tulk*? Unclouded title itc. might not mean there are no longer an contract obligations—it just means that the promise doesn't run with the land. However, amiguity may be just as much of a problem in the contract action on this promise (and there would also be a damages issue in the contract action).
    2. The covenant doesn't touch and concern the land.
        - But can we treat this as an equitable servitude (i.e., a negative easement)? To do so, we're saying that the owner can't build unless certain conditions are met—doesn't that touch and concern the land??

3. The benefit is in gross, so this is strictly a personal agreement.
    - Doesn't this just mean that the benefit doesn't T&C? The court says a burden can be in gross, but that a benefit cannot be. Why? Because of alienability:
        - With a benefit in gross, one estate will be less valuable without another estate being more valuable.
        - With a burden in gross, one estate is more valuable but another estate is not less valuable.
        - Also, benefits in gross are more dispersable—they could be divided up among hundreds of heirs, making it difficult for a servient owner to buy the benefit back.

What about covenants not to compete?

- Are these defeasible fees? Not exactly.
- Do they run with the land? They have been held to; but this may be an anomaly—it seems to run counter to the rule.

N.b., having some provision for termination of the servitude will make the servitude more likely to be enforced.

What about options?

- Do they run with the land? Yes.
- Hypo: I sell an option to buy my land. Then I sell my land before the option is called. The notice requirement must be satisfied. Also, this affects salability.

So, how do we solve the *Caullett* problem?

- The court suggests using a right of first refusal on building the house.
- What about an option to repurchase??
- Don't close until the house is built—this is how it's most often done today (package buying).

Hill v. Community: Π argues:

- It's not a residence. Court says it is a residence in atmosphere.
- It's not a family. Court says it is a family-like setting. Plus the zoning ordinance defines family in a way that includes Δ's situation.
- There's too much traffic. Court says this is irrelevant under the covenant.

Court bolsters its opinion with the FHA.

Wednesday, March 3

Covenants

Covenants

Hypo: D sells to B_1 . . . B_{n-1} with mutual restrictive promises. Then D sells to B_n with no promise.

- D is bound to his promises.
- Does B_n have notice of the other promises?
  - *Sanborn* says the deeds and documents of D's sale to B_1–B_{n-1} are in B_n's chain of title. So are B_i's sales (for $i < n$) to later buyers, for that matter.
- What about land retained by D? D made no promise re: his retained land, so D isn't bound to anything.
- So, how can there be an equitable servitude in *Sanborn* without an express promise? The court finds an implied promise from the grand plan.
  - How do we know if there's a grand plan?
    - See how the property is developed (but not that this doesn't help a B_2).
    - Look at the plat.
    - Consider parol evidence.
    - Look at brochures and ads.

Ask:

1. is there a restriction at all?
2. Does B have any kind of notice of the restriction.

N.b., there is also a potential statute of frauds problem in these cases.

Neponsit

- Two problems:
  1. 3d party beneficiaries (stranger to the transaction). See *Willard*.
  2. No privity of estate between the promisor and the benefitted party.

  Some courts require PoE between promisee and the benefited party for the benefit to pass in an equitable servitude.

- Hypo: D sells to B_1 . . . B_n. So D is in PoE with all buyers.
  - D sells all the land (retains nothing) and claims a benefit. This benefit would be in gross—can you have an affirmative

covenant in gross?? See problem 1 above.
    - Then D assigns the covenant to the owners' association. So, the association isn't in PoE with the owners.
        - But the association is the owners themselves—it either represents the owners or it is the same as the owners. Either way, the *Neponsit* court sees no problem with enforcing the covenant in such a case.

- Touch and concern:
    - Professor Bigelow's test (fn30p879): "if the covenantor's legal interest in land is rendered less valuable by the covenant's performance, then the burden of the covenant satisfies the requirement that the covenant touch and concern the land. If, on the other hand, the covenantee's legal interest in land is rendered more valuable by the covenant's performance, then the benefit of the covenant satisfies the requirement that the covenant satisfies the requirement . . ." This is circular, Vincenti notes.
    - Note ¶2p879—the court notes that this easement was part and parcel of other, more traditional easements.
    - Why have a T&C requirement?
        - Distinguish between contract relations and property relations. (But is it fair to burden nonparties to an agreement??)
        - Allow courts to waive a promise when there's no good reason to enforce it anymore.
    - Restatement 3d: favors freedom of contract and enforcing parties' intentions. But still covenants cannot violate public policy—e.g., when they are:
        - Arbitrary
        - Unconstitutional
        - Restraining alienation
        - Restraining trade
        - Unconscionable

Monday, March 1

Covenants

Covenants

***Tulk* redux**

- Covenant provision #3 (allow tenants to use the garden) seems to run to the benefit or 3d party beneficiaries, Vincenti says.
- Injunction vs. damages
    - An injunction could destroy the value of the property.
    - Damages could exceed the value of the property.
- N.b., once we obliterate the law/equity distinction, we obliterate as well the real covenant/equitable servitude distinction.

Sanborn v. McLean

- There is no express statement of reciprocal agreement in the deed to the puchasers itc.
- The first 21 lots included the restriction, but only 53 of 90 lots had the restriction overall. Why?
    - Maybe this was an oversight or the result of poor drafting.
    - But couldn't it be that the plan was to have some commercial use?!
- Δ buys the lot:
    - Without any restriction in the chain of title.
    - Without notice of any other restrictions on other lots.

    But the court nevertheless finds a restriction.
        - See *McQuade* (n1p873): all the documents out from the seller (except the last) said that the remaining lots would be bound.
        - But itc., there is <u>nothing reciprocal</u> in the documents out.
        - "Duty to inquire": who has it—Δ or the original purchaser? There are two questions here:
            1. Was there a restriction at all?
            2. If so, did Δ have notice of it?
        - The last four lines on p870 suggest that <u>all</u> agreements are reciprocal—but this can't be true, so it's unclear what the court means.
        - Perhaps it's fair to hold the original purchaser to the restriction, since he bought at the same time as everyone else. But why hold Δ to it?
            - Because he could look around and see there were no commercial uses?
                - But where is Δ going to find out about restrictions?? From neighbors?? From a record??
                - Maybe, it's just that you buy in a subdivision at your own risk re: restrictions within an observable pattern of use.
- Compare itc. with the statement on p869: "A real covenant cannot arise

by estoppel, implication, or prescription." Isn't the court itc. creating a negative easement by implication?? Itc. is a problematic case, says Vincenti; with a negative easement, something must be substituted for apparency—but what??

- So, if you're a subdivider, what would you want to do if you have a general plan?
    - Put it in every deed.
    - Submit a plat that includes all restrictions to the recording office.

Neponsit

- Property itc. was acquired by Δ bank in a judicial sale. There was a provision in the deed requiring the owner to pay a $4 fee for maintenance to the subdivision.
    - N.b., why would Δ sue over $4? Probably because the bank acquired a bunch of such lots and it wants to find out its rights as to all of them by testing one of them.
- Π argues that:
    1. Yes, the parties intended the promise to run with the land, but
    2. No, the covenant doesn't touch and concern the land, and
        * Isn't the "benefit the property" test for T&C circular?? I.e., doesn't benefit imply runs and runs imply benefit??
    3. No, there is no PoE.
        - Π is a corporation that doesn't own land—making this look like an easement in gross.
        - Is the court saying that Π is an agent of the owners? Kind of. But how can Π be allowed then an exclusive right to enforce the covenant??
        - Also, Π is like a trustee, maintaining a "trust" re: the real covenant for all the (actual) owners.

<u>Thursday, February 26</u>

Review

Review

1. Positive easements: which are at law.
    - These involve the loss of a right to exclude.
    - The can arise from:
        - An express grant.
        - Implication from prior use.
        - Prescription.

- Necessity: this usually requires
    1. That the lot be landlocked.
    2. Some kind of prior transaction (this is something like a PoE requirement).
- Private right of condemnation.

2. Duty to refrain:
    - Negative easement (at law)
        - In America, no acquisition by:
            - Prescription
            - Implication from prior use
            - Necessity

            (And these doen't make a lot of sense with negative easements, besides).
        - The courts are hesitant to create new negative easement types (and they are limited to only four in England); but real covenants and equitable servitudes are effectively the same thing.
    - Real covenant (at law)
        - Affirmative
        - Negative
    - Equitable servitude (at equity)

<u>Wednesday, February 25</u>

Review
Negative easements
Real covenants
Equitable servitudes

Review

There are <u>three ways</u> that one owner can be burdened to the benefit of another owner:

1. Owner of the dominant estate has the right to do something to the servient estate.
    - Easement appurtenant (at law)
    - Profit
2. Owner of the servient estate is bound to refrain from doing something, for the benefit of the dominant estate.
    - Negative easement (at law)
    - Real covenant (at law)

- Equitable servitude (at equity)

3. Owner of the servient estate is bound to do something, for the benefit of the dominant estate.
    - Real covenant (at law) (e.g., condiminium owners bound to pay money for the upkeep of the whole scheme).

Note that real covenants and equitable servitudes seem more like promises than property rights; this has given trouble to some courts.

Negative easements

- In England, there are only four negative easements (p855). Even these have been sharply curtailed. Why?
    - No recording system—problem for new owners and possessors finding out about the negative easement.
    - Reluctancy to make negative easements full-fledged easements—that would mean they could be acquired by prescription.
    - Difficulty for the courts in viewing negative easements as property rights rather than promises.
- In America:
    - We have a recording system, so this isn't a problem.
    - Courts won't allow negative easements to be acquired by prescription, so that's not a problem.
    - But, American courts <u>have</u> had trouble with viewing negative easements as property rights instead of promises, just as the English courts have.
        - This is purely a conceptual problem, though—a problem with the meaning of words.
        - N.b., can a negative easement be in gross, or only appurtenant??
        - But, American courts have also developed promises that run with the land that are enforceable at law: real covenants.

Real covenants

- Real covenants arose because American courts were willing to extend the idea of privity to promises binding on estates.
- But there are limitations on real covenants:
    - Hypo: A and B promise each other not to use their own land for a trailer court. A sells to C, who puts in a trailer court.
        - B is not in privity of contract with C.
        - Could B sue A? It's possible, but B could only recover money damages. But such a suit may never have happened ever.
        - Is B in privity of estate with C? How could he be—he isn't even in PoE with A.
    - First Restatement:
        - No horizontal privity required for <u>benefit</u> to flow.

- Horizontal privity required for burden to flow.

  How do we get horizontal privity? The archetypal example is the subdivision.

  N.b., an adverse possessor is not in PoE with the original owner.
- Third Restatement: real covenants do not depend at all on horizontal privity.

Equitable servitudes

Tulk v. Moxhay

- Πs conveyance to Elms:
  1. Keep and maintain the garden (like a category 3, in the review above).
  2. Let tenants into the garden (like a category 1). (N.b., aren't the tenants (and other inhabitants strangers to the agreement??)
  3. No building at the site (like a category 2).
- Δ buys when the garden is run down (in violation of (1)) and Δ wants to build at the site (which would violate (3)).
- Why does Π go to chancery? Because he wants an injunction.
- The court grants an injunction—to prevent a windfall to Δ. What must Π show for an injunction?
  - Δ must have had notice of the covenant.
  - The covenant must have been a promise.
  - The covenant must have been intended by the original parties to run with the land.
  - The covenant must "touch and concern" the land in some way.

  Note that there is nothing here about privity!!

Monday, February 23

Scope of easements
Negative easements

Scope of easements

Voss: a note on Voss's lawyer's behavior: see p841—he didn't tell a lot of the story that might have made the court want to find for his client.

Preseault

- N.b., the Federal Circuit Court of Appeals is a special appeals court for appeals from special federal courts (e.g., claims, bankruptcy).
- Πs already questioned the constitutionality of the Rails-to-Trails act in a prior case, which went all the was to SCOTUS, which said the act is constitutional.
- In this suit, Πs are raising an <u>inverse condemnation</u> claim.
    1. Πs lose in Federal Court of Claims.
    2. Πs appeal to the Federal Circuit (itc.).
- Issues:
    - What interest did RR have?
        - Lots A and B: acquired by commissioner's award, which was silent on the kind of estate granted.
        - Lot C: acquired through a voluntary transaction (a warranty deed), which purported to convey a fee simple.
            - Court says the warranty deed conveyed only an easement, due to concern about compulsion—bargaining with RR isn't done with free will because of the possibility of condemnation if you refuse to sell to RR. So in such cases the court says it will limit the estate to the smallest necessary, the barest minimum.

        So, Πs are owners of a servient estate.
    - What is the scope of the easements?
        - The court says they don't include use for trails. In reaching this, it considers three factors:
            1. Burden on the servient estate.
            2. RR as commercial enterprise.
            3. Other states' decisions.
    - Alternatively, were the easements abandoned?
        - 1970—RR stopped running trains: nonuse doesn't show abandonment; intent to abandon must be present as well.
        - 1975—RR tears up rails and switches: Δ argues that RR:
            - Left improvements (e.g., bridges)
            - Licensed crossings
            - ICC didn't give RR permission to abandon until 1986.
                - The court says that the authority of the government to regulate interstate commerce doesn't necessarily say anything about the property law consequences of RR's actions.

So, Πs win either way:

- Abandonment
- Transgression of scope of the easements

Was it the federal government that took, or was it the city & state? The court says it was the federal government—the city was acting under federal authority.

Πs get $230K plus interest in the end.

Termination of easements by prescription: there must be some activity by the servient owner; nonuse alone is not enough.

n4p855: foreclosure doesn't (usually) terminate and easement.

Negative easements

Is the purchase of a negative easement a contract or a grant? I.e., it the right only between the parties to the purchase, or can the easement be passed to a subsequent owner?

Thursday, February 19

Scope of easements

Scope of easements

Problems:

- The dominant estate could:
  - Increase its use.
  - Change the nature of the use.
- The servient estate could:
  - Change the location of the easement.

Voss

Two questions:

1. Easement misuse.
2. Remedy—injunction or damages?

Remedy considerations: see Calabresi and Melamed, "Two Views of the Cathedral." Three ways to secure entitlements:

1. Property rules (where you get your price): e.g., injunction.
2. Liability rules (where courts set the price): e.g., damages.

3. Inalienability (no sale): e.g., slavery prohibited.

Advantages of injuctions:

- They force parties to bargain, which will lead to good economic results.
- Exper testimony on damages isn't required.
- They are usu. quicker in the long run.

Detriments of injunctions, as opposed to damages:

- Courts have to supervise injunctions.
- Noneconomic motives lead to inefficiency.

General scope of easements rule: there can be no increase in the scope of an easement when the dominant estate expands. The remedy is injunction.

- Itc., following the old rule, Π would have to build on lot B (see Fig. 10-5, p834) (assuming he is really landlocked (he really isn't, but the court itc. doesn't know that)).
- However, servicing an inujunction itc. would probably be costly to the courts.

So, here, the court uses its equity powers to deny injunction (and so effectively changes the traditional rule). The court orders Π to use its lot only for a single-family dwelling if Π wants to keep the easement. Note that Δ should still be worried:

- Servants' quarters??
- Guest cottage??
- Charity retreat??
- Horses kept??

What would the court do if Π brings in a bunch of aunts and uncles, living in tents? Invoke the rule of reasonableness: any use should be anticipatable.

See Restatement 3d Property, Servitudes § 4.10 (n2p482):

- Easement may change with technology. E.g., phone lines to fiber optic; copper lines to ceramic.
- Note, though, that the limits on prescriptive easements are drawn narrowly (n5p843).

What if the servient owner wants to change the easement's location?

- The traditional rule says he can't.
- The Restatement rule says that reasonable relocations by the servient owner are allowed, but the servient owner must pay for them.

Wednesday, February 18

Lutheran Conference and Camp

Lutheran Conference and Camp

Must there be a dominant estate? I.e., must one piece of property benefit from the use of another piece, or can a person benefit without owning an appurtenant piece of land?

- In England, there must be a dominant estate.
- In America, there needn't be. Consider railroad easements.

This is the distinction between easements in gross and appurtenant.

- In gross: e.g., parking use rights.
- Appurtenant: run with the land; assignability makes no sense.

Can easements in gross be assigned? Should the be assignable? Note that if I but parking use for a law office, wouldn't it be burdensome to the landowner if I seel my easement to a trucking company??

Itc., we have an (artificial) private lake.

- Public lakes come with riparian rights to appurtenant landowners.
  - A riparian system is hard to administer: appurtenant owners have a right to "reasonable" use of the water. In the west, a 1st come, 1st served policy is used.
- With private lakes, it's as if the water wasn't there—appurtenant owners have no use rights.

Here, Δ Lutherans bought appurtenant land on a private lake.

Why does Π object to Δ Lutherans' use? Π wants to run a bathing and boating business—the lake would probably be much less desirable to prospective customers if it's got a bunch of Lutherans running around.

Π's arguments (n.b., parties concede that the easement is in gross)

- Bathing rights were not included in the grant. Δ rebuts that that was an oversight. The court rejects Δ's argument. Note that possibly the uses are distinguishable because Π used the lake for ice and perhaps declined to grant bathing rights because it would be too dirty.
- No prescription.

Prescription

- Problems with proving an easement in gross by prescription: the court must decide how much use is enough, and how exclusive it must be. This leads to proof problems. Itc., though, the use was commercial—so it is easeier to show continuous, open, and exclusive use.

Court says Δ acquired bathing rights by prescription.

Assignability of easements in gross

- Problems:
  - There's an owner—how do we protect his rights??
  - The grant may have been to a specific person for a particular reason—if it can be sold, someone else might not fit the owner's wants (a similar argument applies to perscriptive easements in gross).

Court says that easements in gross can be assigned.

Divisibility

- Δ argues for a tenancy in common, providing equal rights to enjoy as between Π and Δ.
- Π argues for divisibility of easements.

Court says that easements can be divided. Note that a problem with division is that the original owner of the servient estate could be overburdened.

One stock rule: you can have a separate economic stake in something, but the enterprise has to remain entire. Partners can not extend the use. These means that each partner effectively gets a veto.

So, Π wins.

n4p833: appurtenant or in gross? In the cited case, the court says any such easement would have to be appurtenant, which means there is no easement here. The grantee must own the dominant estate at the time of the grant. The dissent says there is an easement—an easement in gross. This is because we should presume grants are valid, then find a reason for it.

- Note *Willard*, where the church was the grantee and owner (so it doesn't break the rule here).

Thursday, February 12

Easements
Bay Head

Easements

- Private right of condemnation: may occur merely because a piece of property is landlocked. The servient owner gets damages from the dominant owner.
- Easement by necessity: only available where there has been an actual, prior transaction between the owners (or prior owners).

Vincenti asks: even though the court rejected it, isn't *Othen* a really good situation for using prescription?? Especially considering the lost grant fiction??

Conrad Hilton's house (n4p814): the golf club will eventually get an easement. What could Hilton do to prevent that?

- Permit it—seek and agreement with the golf club; post signs indicating permission.
- Prevent it—put up a bitg and sturdy fence (because otherwise, he'll just prove adversity).
- Seek an injunction—a judgment that there is no easement.

N.b., *Malouf* (cited in this note): the general rule is that there is a trespass even if the "trespass" itself wasn't intended. But *Malouf* is a Texas case, where unintentional trespasses may not count. So, in *Malouf*, the landowner could:

- Put up fences.
- Sue for nuisance.
- Get an injunction.

Rockefeller Center (n11pp814-815): closing the street is an effective interruption because it is policed. It establishes that:

1. RC can interrupt use.
2. RC is permissive to uses for the rest of the year (and so those uses are not adverse).

Bay Head

The court says the public should have a right of access through, and use of, the dry sand area (¶4p820). This applies to private property, too (¶1p821).

What about the private owners? Bay Head is held to be quasi-public—so

the judgment just affects Bay Head land. But, if Bay Head loses its leases, they must take steps to insure public access.

So, aren't owners losing their right to exclude?? Historically, judicial declarations haven't been considered condemnations under the 5th Amendment. See n1p823. Also, n.b., the "customary right" in Oregon.

Wednesday, February 11

Othen v. Rosier

Othen v. Rosier

Arguments for easement besides necessity and prescription?

- Prior use: no. Texas follows the English rule (necessity required where there was a reservation). Even under the *Van Sandt* rule, the easement would have to have been apparent and continuous (how apparent is, itc., "picking your way around hogwallows"?).
- Estoppel: Texas may not recognize estoppel, for one thing. Also, estoppel requires investment in improvements. Π made no investments itc. Plus, estoppel probably can't carry over from Hill to Rosier (unless there was a judgment w/r/t it, which there wasn't). Π might have had an estoppel argument in, say, 1913.

Why do we have easement by necessity?

- N.b., implication from prior use assumes a sort of mistake in drafting—it is based on the parties' presumed intent.
- Necessity is based somewhat on intent, but also on policy—the policy that we should make land usable. (Thus we have the doctrine that an easement by necessity ceases when the necessity ceases.)

N.b., *McQuinn*, prob2p810: no strict necessity—B can row to his home.

N.b., private right of condemnation (n4p811): dominant owner has to pay servient owner under this mechanism (whereas he does not have to pay for an easement by implication. That's because we assume it's already been paid for in our assumption about the parties' intent).

Prescription

- Fiction of the lost grant: how do we know the grant wasn't a license, which could have been revoked? Well, we don't. So courts began distinguishing between permission and acquiescence.

- Most states do prescriptive easements like they do adverse possession. Restatement § 217:
    - Effectively interrupt.
    - Stop using.
    - Statutory procedure.
    - Legal action for landowner's right to use.
- N.b., if you're worried about prescription and you put up a fence, it better be a sturdy one, because use in spite of the fence is evidence of adversity.

Court finds no prescription itc.

- No exclusive use—it was consistent with the actual owner's use. On exclusivity, see n3p814: right independent of other's use (this is the majority view, but not the view itc.).
- Road was fenced and gated in 1906. Why does this matter itc.? Maybe the existence of a gate is evidence of permissive use in Texas. Π tries to argue that prescriptive easement existed prior to gating in 1906. The court says there was not enough evidence. Plus, two pieces were in the same ownership before 1906.

Monday, February 9

Othen v. Rosier

Othen v. Rosier

See Fig. 10-3, p803.

Π argues for easement by necessity or prescription.

- Necessity: not available for an easement across Rosier's 100-acre lot. N.b., there might be an easement by necessity elsewhere, but that isn't before the court itc. This is because Hill was not landlocked after he conveyed the 100-acre lot—he still owned 1000 acres of land around the lot.
- N.b., what about an easement by implication from prior use? Hill could argue that he has such an easement under the *Van Sandt* rule. However, Texas follows the English rule, which would require Hill to show strict necessity (because he would have reserved, not granted, an easement).

Thursday, February 5

Acquiring easements
Van Sandt v. Royster

Easements

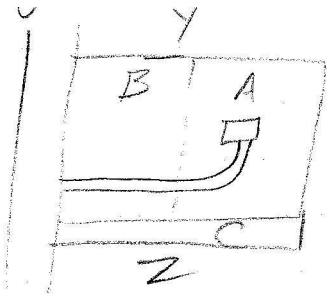
Why doesn't Π get damages in *Holbrook*? Because that's the law. Damages would be hard to calculate, plus Π acquiesced and didn't seek compensation then.

N.b., *Henry v. Dalton*, pp794-795: there should be no easement by estoppel—we don't want to add anymore possible clouding of titles.

Acquiring easements

- By implication.
- By strict necessity.

Example one: requires some prior use.



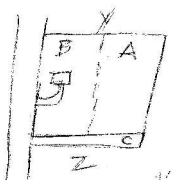
If A divides and sells B, does he successfully reserve easement to the driveway? Under the older rule, only strict necessity would work.

What if B divides and seels A and C to the same buyer? In that case there would be no stricct necessity—but A and C buyer could still argue for an easement to the driveway based on the parties' intent.

The older rule makes a distinction between a reservation and a grant. Why?

- In a grant by warranty deed, buyer wouldn't get all he bargained for. Whereas with a reservation, buyer would get more than he baragained for. The grantor is in control, since only he signs the deed.

Example two: no prior use required.



Here, no prior use—A's only argument is for strict necessity. A will likely get it; if he does, it will have to be located.

What if seller divides and sells B, landlocking himself? Still, seller would have an (unlocated) easement by strict necessity.

N.b., necessity is limited to reasonable access.

Van Sandt v. Royster

Π's arguments:

- Not on notice about the easement—there is not record in the chain of title.
- Older rule: easement implied from prior use can't arise from a reservation; strict necessity is required.

The court rejects the older rule. After itc., either party can make an argument for easement implied from prior use. The prior use must be:

- Apparent
- Continuous

What are Π's remedies? He'll have to fix the sewer pipe—but Δs have an obligation to contribute. Π may have to sue them to make that happen.

Wednesday, February 4

Servitudes
Easements

Servitudes

Servitudes limit a landowner's use.

- Easements: a right to use a piece of land you don't own. One piece of land is benefitted (the dominant estate) and one piece of land is burdened (the servient estate).
  - Can be sold.
  - Can be determinable.
  - Are not revocable.
- Licenses: permission to come on someone else's land.
  - Usually revocable.
- Profits: a right to take something from another's land. E.g., minerals, oil, timber. Comes with a right to reasonable access.

N.b., "enclosing the commons" (p783).

Easements

Willard v. First Church of Christ, Scientist

Π argues that since the church is a 3d party beneficiary, it can't be given an easement; the is the common law rule (¶¶1-2p787: ". . . one cannot 'reserve' an interest in property to a stranger to the title").

- How could you get around this rule?
  - Original seller could insist that the buyer convey an easement to the church.
  - Original seller could sell to the church and insist sell to the buyer, reserving an easement for itself.
  - Original seller could convey an easement to the church and then sell to the buyer, expressly claiming the encumbrance.

Is Willard, the ultimate buyer, a BFP? Did he have notice that the church wanted to use the parking lot? Yes, he had notice—it's in the deed from the original seller to the intermediate buyer, so it's in the chain of title; Willard was <u>not</u> a BFP.

- N.b., too, that there is no evidence that Willard relied on the common law rule (¶1p788).

The court rejects the common law rule:

- Prevent a windfall to the buyer.
- Preserve the intent of the parties.

N.b., how does the church own the easement itc.? Fee simple determinable (that is, the church owns it for a as long as it uses it for church purposes).

<u>Appurtenant easement</u>: benefits owner of a piece of neighboring land. That is, it is a <u>part of the land</u>. When you sell the land, you also sell the easement—it <u>runs with the land</u>. E.g., a driveway.

<u>Easement in gross</u>: <u>doesn't</u> run with the land.

How do we determine if an easement is appurtenant or in gross? Look at the words of the conveyance. See n4pp789-790: in this problem, there are arguments both ways. Vincenti likes appurtenant.

Holbrook v. Taylor

Landowner wanted $500 for the easement. So the Taylors are risking acess to their land and $25K home by not paying and going to court.

Δ's arguments

- Prescriptive easement. Court rejects this.
- Estoppel of license revocation. The court says there are ecognized exceptions where a license can become irrevocable. For instance, when the owner acquiesces to investments by the licensee. Note that the licensee's investment needn't be in the licensed land itself—itc., it's Δ's investments in their own land and home that provokes the estoppel.

So, Δs effectively get an easement by having an irrevocable license. N.b., the estoppel here is like the reliance interest in contract.

Monday, February 2

Jurisprudence

Jurisprudence

Realists: "there will never be two like cases." This is a problem w/r/t *stare decisis*. The new *stare decisis* question would be, "When is it fair to treat two cases as if they were alike?" This gives a judge a lot of discretion, it seems.

Realists, in this way, follow Holmes—law is a prediction of what courts will do. Period. The realists like this because it is forward-looking, rather than backward-looking, like the positivists.

N.b., the Brandeis brief: uses statistics, economics, sociology, etc., to make the argument.

Note that the realists liked the system. They wanted to better equip judges. The critical legal movements that emerged from realism (e.g., CLS, Critical Race Theory, Feminist Legal Theory) don't like the system as it is.

Law and economics: "judges must do what is efficient if things are to be good. Also, economics can help us understand how the law has developed as it has."

Thursday, January 29

Warranty of Habitability

The Warranty of Habitability

Measuring economic damages (p542)

- Contract measure: you get the value of the bargain (difference between "as is" and "as should be."
- Alternative measure: you get the difference between "as is" and the bargained-for rent. But see problem 4cp543: "as is" = agreed on rent, so damages = 0 (n.b., this wouldn't be a problem under the *Hilder* approach).

Hilder: WoH is a better remedy than constructive eviction. But, see pp540-541: some jurisdictions haven't adopted WoH; and where it has been adopted, WoH applies only to certain residential leases. Also, WoH only covers health and safety concerns, whereas constructive eviction may be broader in some cases.

Retaliatory eviction: usu. there are rules against this.

Wednesday, January 28

Covenant of Quiet Enjoyment
Illegal leases

Covenant of Quiet Enjoyment

L's duties (additions to the common law):

- Disclose latent defects.
- Keep up common areas.
- Keep agreements to repair.
- Make repairs carefullyl.
- Avoid fraud and deception.
- Abate nuisances.

Note that T has no way to perform the first five duties, whereas L does.

Reste: the court could have based its holding on several of L's duties (e.g., latent defect, make careful repairs). Instead, the court gives a broader rule (see p526).

Constructive eviction: a remedy for T in case of L's breach of CoQE. T's other remedies include staying in possession and suing for damages.

Limits on breach of CoQE

- Defects must be "permanent" (as opposed to temporary).
- T must move out within a reasonable time after the breach in order to claim constructive eviction.

Illegal leases

Before the Warranty of Habitability, if L did something illegal, T was not bound by the lease. So, T could stay in possession, withhold rent, and sue for damages. The WoH expands the illegal lease law.

Hilder

- Π sues for all of the rent she's paid, and she has remained in possession (note that she could have moved out instead). Π seeks back rent, consequential damages, money for repairs, and punitive damages.
- Implied Warranty of Habitability:
  - Doesn't have to be bargained for; and L and T can not bargain for a waiver (according to itc.).
  - Why have WoH?
    - L is in a better position to maintain habitability.
    - Leaseholds used to be agricultural but now are mainly residential – back then, unlike now, T was usu. better equipped to make repairs.
  - Itc. Implied WoH rule:
    - T doesn't have to prove the defect was caused by L's negligence – this is a warranty. Except, L can't have caused the problem (if L did, L might be off the hook). So, this is almost strict liability.
    - Violation of the housing code is usu. sufficient to show a breach of WoH, but it is not necessary.
  - Remedies for WoH breach:
    - Withholding rent while staying in possession (note the difference with constructive eviction).
    - Damages: the value of the premises as warranted (as they should have been) less the actual value of the premises (as they are). This means T will have to introduce (expert) testimony about what the rent should have been.

Monday, January 26

Landlord's remedies
Landlord's duties

Landlord's remedies

Sommer

- Suppose L finds a new tenant but at a lower rent? L may seek damages from the prior tenant. Such damages may include the difference in rent, rent for the time the property was vacant, and incidental damages. So, T is not off the hook, but L may not just sit on his hands.
- Note that the *Sommer* court finds contract rules re: leases apply – L has a duty to mitigate damages. This helps L in some ways because it means L can reenter, whereas under a strict property analysis L could not.

Surrender of leases: if T actually abandons it is considered an offer to surrender (even under the old common law). L could reenter.

If L does reenter, L's reentry need not be an acceptance of the surrender offer – L could relet "on T's account"; this is effectively damage mitigation.

If the rent has gone up L may want to accept the surrender, but this risks that the new tenant doesn't pay, in which case the first tenant is off the hook (and L is the only one on the hook).

How do we determine whether L, in reentering, has accepted to offer or surrender or has relet to T's account? From L's intent. Note that L can change his mind if he chooses not to accept the surrender and later accept it.

N.b., mere nonpayment of rent does not imply an offer of surrender; only abandonment does.

Anticipatory breach: this is when L doesn't want to sue T each month for rent and so sues for all damages into the future. This isn't available unless T abandons (otherwise there is no guarantee that T will be in breach in the future).

Mitigation: L must make a reasonable effort to mitigate. N.b. the pictures on pp511-512: these apartments look pretty fungible. *Sommer* says that L mujst put T's apartment into his vacant stock. So, until a new tenant rents T's specific apartment, T is still on the hook.

Landlord's duties

Covenant of Quiet Enjoyment: the starting point here is remedy against ouster.

- Initially, CoQE could be bargained for, and it was not implied.
- What is breach of CoQE?
    1. L made specific promises the he has failed to perform.
    2. L allows a nuisance to occur on the premises.
    - Also see the ALP excerpt on ¶2p530 (ALP § 3.51):
        - Latent defects.
        - Common areas (note that T has no control over common areas).

Reste Realty

- Was the defect latent? It could be seen as latent at the beginning of the first lease and then patent at the beginning of the second lease. The court rejects the notion because L promised to repair the defect.
- *Stewart v. Childs* (cited at p526) is based on old property principles where there was no mutuality of obligation between L and T. The *Reste* court rejects this doctrine.
- Π's arguments:
    - The defect is not a permanent problem. The court says the flooding occurred often enough, for one thing, and that the cause of the defect (the driveway) was permanent.
    - Δ waived her right to claim constructive eviction because she waited too long.
        - What does T have to do if there's a breach of CoQE? T must prove an actual constructive eviction – this means T must move out. Note that this is a risk for T, because if T moves out and leases new property, and a court finds there was no constructive eviction, then T is on the hook for both leases (re: the first lease, T has breached it by abandonment). T could sue for declaratory judgment, but that's expensive and there is no summary proceeding for it.

Thursday, January 22

Review of last hour
Tenant default

Review of last hour

Krieger (n1ap499): focus of the reasonableness test should be on the particular property in question only.

Pay 'n Pak (n1ap499): inconsistent with *Krieger*? With *Pestana*?

- In *Pestana*, L stands to lose nothing, arguably, whereas in *Pay 'n Pak* maybe L does stand to lose something.
- Vincenti says the real question may be Who owns the value appreciation? -- or, at least, Who should get it? Also, don't forget to pay heed to alienability of property.

The Rule in Dumpor's Case

1. L leases to T requiring permission for assignments.
2. T assigns to T1, with permission; T1 does not assume the lease obligations.
3. T1 assigns to T2, without permission.
4. T2 defaults and L sues T1.

N.b., L is not in PoC with T1 here.

Is the T1 to T2 assignment valid? The Rule in Dumpor's Case says yes – no permission is required in such situations (n.b., Restatement 2d says no).

What if Dumpor's doesn't apply, and L accepts rent from T2 – is that permission? Not *ipso facto*, but is strong evidence of permission.

Tenant default

Berg

- Common law rule:
  1. Landlord must be legally entitled to repossess.
  2. Landlord must make a peacable entry (itc., there is only theoretically a breach of the peace – which means there's not much left of the common law rule here, anyway).
- This court says self-help is not permissible. L must use judicial process.
  - At common law, this means L must sue for ejectment; that could take a long time.
  - In all states now, L may use a summary proceeding, which usu. provides for a trial within 10 days.

Summary proceedings: how long do they take, really? T can throw a lot of wrenches in the process. Considering this, is there any valud in allowing self-help? For one thing, it can keep rent costs down. But what about wrongful evictions? To protect against these, we can allow T to sue for injunction and

damages, and/or seek a declaratory judgment.

Sommer: what if T abandons? Then T has breached – does this mean L can breach? I.e., is there a mutual obligation?

- At common law, no. L's only remedy is to sue T for rent for the entire period. So L doesn't have to mitigate damages and maybe even he can't. However, L could put a provision in the lease that allows him to retake possession in case of default (such a provision looks only to property law and not to contract) – this is called a forfeiture provision. But still, L doesn't have to reenter.

Wednesday, January 21

Ernest Pestana
Tenant default

Kendall v. Ernest Pestana, Inc.

Δ won't allow Π to assign his lease because the property's value has gone up.

Consent for assignments and sublets

The reasonableness requirement

- Arguments against a reasonableness requirement:
  - The lessor's interests are protected without one.
  - Policy in favor of freedom to contract, freedom to lease. (I.e., the parties could have bargained for a reasonableness clause – so why assume reasonableness??)
- Restatement 2d (the minority rule) requires commerical reasonableness (¶1p493). Itc., why wasn't Δ's position commercially reasonable? This depends on who owns the property value increase – the court says the tenant does; why is this a good rule? It furthers alienability.
  - Factors in determining commercial reasonableness include the financial position of the assignee and the proposed use.
  - The reasonableness requirement does not apply to residential leases. Why not?? How do we distinguish between commercial and residential landlords??

Drafting concerns

- Always imagine the worst-case scenario so that you can provide for it.
- Start with formbooks but don't finish there – modify the formbook form for your client's circumstances.

Tenant default

Two situations:

1. Tenant remains in possession.
2. Tenant abandons.

Thursday, January 15

Leasholds review
Ersnt v. Conditt

Leasholds review

Taxonomy

Term of years: has a set end-date. Unilateral power of termination possible.
Periodic tenancy: automatic renewal. N.b., the lease must terminate at the end of the term. Notice is required for termination. Unilateral power of termination possible.
Tenancy at will: *necessarily* involves a *mutual* power of termination. Often looks like a periodic tenancy (but it's not).
Tenancy at sufferance: as in holdovers. N.b., look to statutes for the actual nature of holdover tenancies.

N.b., a tenancy can be given for *life*; such a tenancy is terminable at the will of the *tenant*. This is not quite a life tenancy, though.

Leases: conveyances or contracts?

Both, really. In leases there are *covenants* that complicate the situation beyond a mere conveyance. So, some remedies in lease disputes are in K, some are in property, some are elsewhere.

Some convenants *run with the land*; i.e., whoever is in possession must obey the covenants (possibly in addition to the prime transferee).

Delivery of possession

American rule: T1 must remove T; L hasn't such duty.
English rule: L must remove T for the benefit of T1.

Subleases and assignments

Ersnt v. Conditt

Provisions in the lease in q'n govern sublets/assignments; to wit: they required L's permission. What if no permission? Then the lease would be violated, i.e. materially breached, by T. This means L could evict T or the subtenant(s).

The amended lease: consisting of three documents:

1. a novation between T and L.
2. T's offer of transfer to T1.
3. T1's acceptance of T's offer of transfer.

Privity of contract and of estate

Consider 3d party beneficiary Ks, as in a K btwn. T and T1 to have T1 pay L.

Privity of estate

Consider substitution (like assignment) vs. subinfeudation (like sublease).

Substitution/assignment: T is no longer in PoE, but is still in PoC with L. T1 is now in PoE with L and PoC with T.

Subinfeudation/sublease: T remains in PoE and PoC with L. T1 is in *neither* PoE or PoC with L, but is in PoC with T.

Hypos

1. Rent control apt. in Manhattan: you'd want to sublet, setting T1's rent higher than your own.
2. You have a house you like a bunch: you'd want to sublet.

N.b., the court in *Ernst* look both to the *intent* of the parties and to policy (in favor of free alienability of property).

My questions

How much like a surety is assignment (or sublease)?
Vincenti: a lot. Wait until next class. But they are not identical.

Does the contingency of T's future interests matter? I.e., is it distinguishable where T has a (certain) reversion (as in where the sublease ends a day before the prime lease) from where T has just a right-of-reentry (as in *Ernst* (default of T1), or even where the T-T1 transfer instrument makes out a contingency (like use only for a school)?

Vincenti: yes, there is an argument that these are distinguishable.