THE LAW OF PROPERTY

SUPPLEMENTAL READINGS

Class 14

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barbri

Review

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Outlines:

PERSONAL PROPERTY
REAL PROPERTY
CONSTITUTIONAL LAW
NEW YORK TRUSTS
NEW YORK WILLS

II. LANDLORD AND TENANT

A. NATURE OF LEASEHOLD

A leasehold is an estate in land. The tenant has a present possessory interest in the leased premises, and the landlord has a future interest (reversion). Certain rights and liabilities flow from this property relationship between landlord and tenant. The three major types of leasehold estates are ***tenancies for years***, ***periodic tenancies***, and ***tenancies at will***. There is a fourth category called ***tenancies at sufferance***.

1. Tenancies for Years

a. Fixed Period of Time

A tenancy for years is one that is to continue for a fixed period of time. It may be for ***more or less*** than a year (*e.g.*, 10 days or 10 years); it may be determinable (similar to a fee simple determinable) or on condition subsequent. The termination date of a tenancy for years is usually certain. As a result, the tenancy expires at the end of the stated period ***without either party giving notice to the other***. Even if the date of termination is uncertain (*e.g.*, L leases the premises to T "until the end of the war"), ***most courts*** hold that if the parties have attempted to state some period of duration, the lease creates a tenancy for years.

b. Creation

Tenancies for years are normally created by written leases. In most states, the Statute of Frauds requires that a lease creating a tenancy for more than one year be in writing. In

addition, most states have statutes that restrict the number of years for which a leasehold estate may be created (*e.g.*, 51 years for farm property and 99 years for urban property). When the lease term exceeds the statutory maximum, most courts hold that the lease is ***entirely*** void. Likewise, where the lease contains an ***option to renew*** for a period beyond the permitted maximum, most courts hold the entire lease void.

c. Termination
A tenancy for years ends ***automatically*** on its termination date.

1) Breach of Covenants
In most tenancy for years leases, the landlord reserves the right to terminate if the tenant breaches any of the leasehold covenants. This reserved power is called the landlord's ***right of entry***.

a) Failure to Pay Rent
In many jurisdictions, if the tenant fails to pay the promised rent, the landlord has the right to terminate the lease ***even in the absence of a reserved right of entry***.

2) Surrender
A tenancy for years also terminates upon surrender. Surrender consists of the tenant giving up his leasehold interest to the landlord and the landlord accepting. Usually the same ***formalities*** are required for the surrender of a leasehold as are necessary for its creation. Thus, a writing is necessary for the surrender of a leasehold if the unexpired term is more than one year.

2. Periodic Tenancies
A periodic tenancy is a tenancy that continues from year to year or for successive fractions of a year (*e.g.*, weekly or monthly) until terminated by proper notice by either party. The beginning date must be certain, but the ***termination date is always uncertain*** until notice is given.

All conditions and terms of the tenancy are carried over from one period to the next unless there is a lease provision to the contrary. Periodic tenancies do not violate the rules limiting the length of leaseholds because each party retains the power to terminate upon giving notice.

a. Creation
Periodic tenancies can be created in three ways:

1) By Express Agreement
Periodic tenancies can be created by express agreement (*e.g.*, "Landlord leases to Tenant from month to month").

2) By Implication
A periodic tenancy will be implied if the lease has no set termination but does provide for the payment of rent at specific periods.
Example: "Landlord leases to Tenant at a rent of $100 ***payable monthly*** in advance." The reservation of monthly rent will give rise to a periodic tenancy from ***month to month***.

Note: If the lease reserves an annual rent, payable monthly (*e.g.*, "$6,000 per annum, payable $500 on the first day of every month commencing January 1"), the majority view is that the periodic tenancy is from ***year to year***.

3) By Operation of Law
A periodic tenancy may arise even without an express or implied agreement between the parties.

a) Tenant Holds Over
If a tenant for years remains in possession after the termination of his tenancy period, the landlord may elect to treat the tenant as a periodic tenant on the same terms as the original lease. (*See* 5.b., *infra*.)

b) Lease Invalid
If a lease is invalid (*e.g.*, because of failure to satisfy the Statute of Frauds) and the tenant nonetheless goes into possession, the tenant's periodic payment of rent will convert what would otherwise be a tenancy at will into a

periodic tenancy. The period of the tenancy coincides with the period for which the rent is paid.

b. Termination—Notice Required

A periodic tenancy is ***automatically renewed***, from period to period, until proper notice of termination is given by either party. Many jurisdictions have statutorily prescribed the notice required to terminate a periodic tenancy. In general, the guidelines are as follows:

(i) The tenancy must end at the ***end of a "natural" lease period***.

(ii) For a tenancy from year to year, ***six months' notice*** is required.

(iii) For tenancies less than one year in duration, a ***full period in advance*** of the period in question is required by way of notice (*e.g.*, for a month-to-month periodic tenancy, one full month's notice is required).

In general, the notice required to terminate a periodic tenancy must be in ***writing*** and must actually be ***delivered*** to the party in question or deposited at his residence in a manner similar to that required for service of process.

3. Tenancies at Will

A tenancy at will is an estate in land that is terminable at the will of either the landlord or the tenant. To be a tenancy at will, both the landlord and the tenant must have the right to terminate the lease at will.

(i) If the lease gives ***only the landlord*** the right to terminate at will, a ***similar right*** will generally be ***implied in favor of the tenant*** so that the lease creates a tenancy at will.

(ii) If the lease is only at the will of the ***tenant*** (*e.g.*, "for so long as the tenant wishes"), courts usually ***do not imply a right to terminate in favor of the landlord***. Rather, most courts interpret the conveyance as creating a life estate or fee simple, either of which is terminable by the tenant. (If the Statute of Frauds is not satisfied, the conveyance is a tenancy at will.)

a. Creation

A tenancy at will generally arises from a specific understanding between the parties that ***either party may terminate*** the tenancy at any time. Note that unless the parties ***expressly agree*** to a tenancy at will, the payment of regular rent (*e.g.*, monthly, quarterly, etc.) will cause a court to treat the tenancy as a periodic tenancy. Thus, tenancies at will are quite rare. Although a tenancy at will can also arise when the lease is for an indefinite period (one that does not satisfy the requirements for creating a tenancy for years), or when a tenant goes into possession under a lease that does not satisfy the requisite formalities (usually the Statute of Frauds), rent payments will usually convert it to a periodic tenancy.

b. Termination

A tenancy at will may be terminated by ***either party without notice***. However, a reasonable demand to quit the premises is required. A tenancy at will terminates by ***operation of law*** if:

1) Either party ***dies***;

2) The tenant commits ***waste***;

3) The tenant attempts to ***assign*** his tenancy;

4) The ***landlord transfers his interest*** in the property; or

5) The ***landlord executes a term lease*** to a third person.

4. Tenancies at Sufferance

A tenancy at sufferance (sometimes called "occupancy at sufferance") arises when a tenant ***wrongfully*** remains in possession after the expiration of a lawful tenancy (*e.g.*, after the stipulated date for the termination of a tenancy for years; or after the landlord has exercised a power of termination). Such a tenant is a wrongdoer and is ***liable for rent***. The tenancy at

sufferance lasts only until the landlord takes steps to evict the tenant. No notice is required to end the tenancy, and authorities are divided as to whether this is even an estate in land.

5. **The Hold-Over Doctrine**
When a tenant continues in possession after the termination of his right to possession, the landlord has two choices of action:

a. **Eviction**
The landlord may treat the hold-over tenant as a trespasser and evict him under an unlawful detainer statute.

b. **Creation of Periodic Tenancy**
The landlord may, in his sole discretion, bind the tenant to a new periodic tenancy.

1) **Terms**
The terms and conditions of the expired tenancy (*e.g.*, rent, covenants, etc.) apply to the new tenancy. If the original lease term was for ***one year or more***, a year-to-year tenancy results from holding over. If the original term was for ***less than one year***, the periodic term is determined by the manner in which the rent was due and payable under the prior tenancy. In ***residential*** leases, however, most courts would rule the tenant a month-to-month tenant (or a week-to-week tenant if the tenant was a roomer paying weekly rent), irrespective of the term of the original lease.
Example: A nonresidential tenant was holding under a six-month term tenancy with rent payable monthly. The tenant holds over and the landlord binds him to a new tenancy. The new periodic tenancy is a month-to-month tenancy.

2) **Altered Terms**
If the landlord notifies the tenant before termination of the tenancy that occupancy after termination will be at an increased rent, the tenant will be held to have acquiesced to the new terms if he does not surrender. The tenant will be held to the new terms ***even if he objects*** to the increased rent, provided that the rent increase is reasonable.

c. **What Does Not Constitute Holding Over**
The landlord cannot bind the tenant to a new tenancy under the hold-over doctrine if: (i) the tenant remains in possession for only a ***few hours*** after termination of the lease, or leaves a few articles of personal property on the premises; (ii) the delay is ***not the tenant's fault*** (*e.g.*, because of severe illness); or (iii) it is a ***seasonal lease*** (*e.g.*, summer cottage).

d. **Double Rent Jeopardy**
Many state statutes provide that if a tenant ***willfully*** remains in possession after his term expires and after the landlord makes a ***written demand for possession***, the landlord may collect double rent for the time the tenant in fact remains in possession.

e. **Forcible Entry Statutes**
Most states by statute prohibit forcible entry, *i.e.*, entry against the will of the possessor. Under such statutes, a landlord must not use force or self-help to remove a hold-over tenant. Some states also bar the landlord from more subtle methods of regaining possession, *e.g.*, changing the locks and locking out the tenant.

The statutes allow the landlord to ***evict*** a tenant who has remained in possession after his right to possession has terminated. The sole issue is "who has the right to possession"; questions of title must be litigated in ejectment actions rather than in eviction actions.

B. LEASES

A lease is a contract containing the promises of the parties. It governs the relationship between the landlord and tenant over the term of the lease. In general, covenants in a lease are independent of each other; *i.e.*, one party's performance of his promise does not depend on the other party's performance of his promise. Thus, if one party breaches a covenant, the other party can recover ***damages***, but must still perform his promises and ***cannot terminate*** the landlord-tenant relationship.
Example: L leases an office space to T for five years. T covenants to pay $750 per month, and L covenants to paint the office once each year. At the beginning of the second

year, L refuses to paint the office. T may recover damages from L (the decrease in fair rental value or the cost of painting), but T may not terminate the lease or refuse to pay his rent because of L's breach.

Note that the doctrines of actual and constructive eviction (D.2., *infra*) and implied warranty of habitability (D.3., *infra*) are exceptions to this rule of independence of covenants. An exception also exists in nearly all states for nonpayment of rent; under these statutes, if a tenant fails to pay, the landlord may terminate the lease.

C. TENANT DUTIES AND LANDLORD REMEDIES

1. Tenant's Duty to Repair (Doctrine of Waste)

A tenant cannot damage—commit waste on—the leased premises. The rules governing waste in the leasehold context are very much like those governing waste in the context of the life estate.

a. Types of Waste

1) Voluntary (Affirmative) Waste

A tenant is liable to the landlord for voluntary waste. Voluntary waste results when the tenant intentionally or negligently damages the premises. It also includes exploiting minerals on the property unless the property was previously so used, or unless the lease provides that the tenant may do so.

2) Permissive Waste

Unless the lease provides otherwise, the tenant has no duty to the landlord to make any ***substantial*** repairs (*i.e.*, to keep the premises in good repair). However, the tenant has a duty to make ***ordinary*** repairs to keep the property in the same condition as at the commencement of the lease term, excluding ordinary wear and tear (unless the tenant ***covenanted*** to repair ordinary wear and tear; *see* c.1), *infra*). For example, it is the tenant's duty to repair broken windows or a leaking roof and to take such other steps as are needed to prevent damage from the elements (*i.e.*, keep the premises "wind and water tight"). If the tenant fails to do so, he is liable to the landlord for any resulting damage, but not for the cost of repair. By statute in a growing minority of states, residential tenants have additional duties: (i) not to cause housing code violations; (ii) to keep the premises clean and free of vermin; and (iii) to use plumbing, appliances, etc., in a reasonable manner. Note that even when the burden of repair is on the landlord, the tenant does have a duty to report deficiencies promptly to the landlord.

3) Ameliorative Waste

A tenant is under an obligation to return the premises in the same nature and character as received. Therefore, a tenant is not permitted to make substantial alterations to leased structures even if the alteration increases the value of the property.

a) Liability—Cost of Restoration

The tenant is liable for the cost of restoration should he commit ameliorative waste.

b) Modern Exception—Value of Premises Decreasing

When, through the passage of time, the demised premises have been significantly reduced in value, courts will permit a change in the character of the premises as long as:

(1) The change ***increases the value*** of the premises;

(2) The change ***is performed by a long-term tenant*** (*e.g.*, 25 years); and

(3) The change ***reflects a change*** in the nature and character of the neighborhood.

b. Destruction of the Premises Without Fault

If the leased premises are destroyed (*e.g.*, by fire) without the fault of either the landlord or the tenant, no waste is involved. In this situation, the common law held that the lease continues in effect. In the absence of lease language, neither party has a duty to restore the premises, but the tenant has a duty to continue paying the rent.

1) **Majority View—Tenant Can Terminate Lease**
In most states, statutes or case law now give the tenant an option to terminate the lease if the premises are destroyed without the tenant's fault, even in the presence of an explicit covenant to repair (*see* below).

c. **Tenant's Liability for Covenants to Repair**
When the tenant covenants to keep the premises in good repair, the condition of the premises at the beginning and end of the tenancy must be compared in order to determine whether there has been a breach.

1) **Ordinary Wear and Tear**
If the tenant ***specifically covenants to repair*** the premises, he has a duty to repair even ordinary wear and tear unless the covenant ***expressly excludes*** such wear and tear. However, there is no duty to repair structural failures or damage resulting from fire or other casualty unless such repairs are ***expressly included*** in the covenant.
Examples: 1) L leases a restaurant to T for one year. T covenants to "maintain, repair and keep in good order the interior of the building, including the plumbing, heating, and electrical facilities, and the grounds." Because the covenant does not expressly exclude ordinary wear and tear, T is liable for such repairs (*e.g.*, torn vinyl in booths). [Santillanes v. Property Management Services, Inc., 716 P.2d 1360 (Idaho 1986)]

2) L leases a large tract of land to T for five years. T covenants "to keep the irrigation system then in operation on the lands, including the dams, ditches, laterals, and other improvements in connection with the irrigation system, in as good repair as when the lease was made," but covenants to keep other portions of the leased premises "in good repair, ordinary wear and tear and damages by the elements excepted." A flood destroys one of the retaining dams. Because there is an absolute obligation to keep the dams in repair without exception and because damages by the elements are expressly excepted for other portions of the leased premises but not the dams, T is liable to rebuild the dam. [Black v. La Porte, 271 F. 620 (8th Cir. 1921)]

2) **Acts of Third Parties**
Under the common law, the tenant is liable under such a covenant for all other defects regardless of their cause (*e.g.*, third persons, acts of God, etc.).

3) **Reconstruction**
At common law, if the tenant has covenanted to repair and the premises are completely destroyed, the tenant is liable for reconstruction.

2. **Duty to Not Use Premises for Illegal Purpose**
If the tenant uses the premises for an illegal purpose, and the landlord is not a party to the illegal use, the landlord may terminate the lease or obtain damages and injunctive relief.

a. **Occasional Unlawful Conduct Does Not Breach Duty**
Occasional unlawful conduct of the tenant does not breach this duty. The duty is breached only when the illegal conduct is continuous (*e.g.*, if the tenant operates a gambling ring out of the leased premises).

b. **Landlord Remedies—Terminate Lease, Recover Damages**
If the conduct is continuous, the landlord may terminate the lease and recover the damages. If the conduct has first been stopped by a public authority, the landlord may terminate and recover damages, but only if she acts within a reasonable time after the use has been stopped. Alternatively, the landlord faced with unlawful tenant conduct may keep the lease in force and seek injunctive or monetary relief.

3. **Duty to Pay Rent**
At common law, rent is due at the end of the leasehold term. However, leases usually contain a provision making the rent payable at some other time (*e.g.*, "monthly in advance").

a. **When Rent Accrues**
At common law, rent is not apportionable; *i.e.*, it does not accrue from day to day, but rather accrues all at once at the end of the term. However, most states today have statutes that provide that if a leasehold terminates before the term originally agreed on, the tenant must pay a ***proportionate amount*** of the agreed rent.

b. Rent Deposits
Landlords often require a deposit by the tenant at the outset of the lease. If the money is considered a ***security deposit***, the landlord will not be permitted to retain it beyond the extent of his recoverable damages. But if the deposit is denominated a ***"bonus"*** or a future rent payment (*e.g.*, the last month's rent), then most courts permit the landlord to retain it after the tenant has been evicted.

c. Termination of Rent Liability—Surrender
If a tenant effectively conveys back (surrenders) his leasehold to the landlord, the tenant's liability for future rent ends. Normally, this occurs when there is an agreement between the landlord and tenant that the tenant's interest in the demised premises will end. If the unexpired term of the lease is more than one year, the surrender must be in writing to satisfy the Statute of Frauds.

4. Landlord Remedies

a. Tenant on Premises But Fails to Pay Rent—Evict or Sue for Rent
At common law, a breach, such as failure to pay rent, resulted only in a cause of action for money damages; a breach by either party did not give rise to a right to terminate the lease. Most leases, however, grant the nonbreaching party the right to terminate. Furthermore, nearly all states have enacted an ***unlawful detainer statute***, which permits the landlord to evict a defaulting tenant. These statutes provide for a quick hearing, but severely limit the issues that may be raised. Under most statutes, the only issue properly before the court is the landlord's right to rent and possession. The tenant cannot raise counterclaims.

b. Tenant Abandons—Do Nothing or Repossess
If the tenant ***unjustifiably*** abandons the property, the landlord has two options: she may do nothing, or she may repossess.

1) Landlord Does Nothing—Tenant Remains Liable
By the traditional view, the landlord may let the premises lie idle and collect the rent from the abandoning tenant, unless the tenant tenders an acceptable substituting tenant. However, the majority view requires the landlord to make reasonable efforts to ***mitigate*** his damages by reletting to a new tenant. Under this view, if he could have done so but does not attempt to relet, his recovery against the tenant will be reduced accordingly.

2) Landlord Repossesses—Tenant's Liability Depends on Surrender
If the landlord repossesses and/or relets the premises, the tenant's liability will depend on whether the landlord has accepted a surrender of the premises. If surrender is not found, the tenant remains liable for the difference between the promised rent and the fair rental value of the property (or, in the case of reletting, between the promised rent and the rent received from the reletting). However, if the landlord's reletting or use of the premises for her own profit constitutes acceptance of surrender, the abandoning tenant is free from any rent liability accruing after abandonment.

a) Acts that Constitute Acceptance of Surrender
If the landlord resumes possession of the demised premises for himself, this conduct usually constitutes acceptance of the surrender, and the tenant will be relieved of any further liability.

b) Acts that Do Not Constitute Acceptance of Surrender
The fact that the landlord enters the premises after abandonment to make repairs, receives back the keys, or offers to attempt to relet the premises on behalf of the tenant, does not by itself constitute an acceptance of the offered surrender.

D. LANDLORD DUTIES AND TENANT REMEDIES

Subject to modification by the lease, a statute, or the implied warranty of habitability, the general rule is that a landlord has ***no duty to repair or maintain*** the premises. Leases, however, commonly prescribe landlord liability to tenant in several areas. If a lease does not expressly prescribe landlord duties, some duties will be implied.

1. Duty to Deliver Possession of Premises

a. Landlord Duty—Must Deliver Actual Possession
Statutes in most states require the landlord to put the tenant in actual possession of the premises at the beginning of the leasehold term. In a minority of states, the landlord's

obligation is merely to give the tenant the legal right to possession. The difference can be important if the leased premises are occupied by a prior, hold-over tenant who has not moved out. Under the majority view, the landlord is in breach if she has not evicted the hold-over tenant by the beginning of the new tenant's term. Under the minority view, it is up to the new tenant to bring eviction proceedings against the hold-over tenant.

b. Tenant Remedy—Damages
In states following the majority rule, a tenant is entitled to damages against a landlord in breach of the duty to deliver possession. If, *e.g.*, the tenant had to find more expensive housing during the interim or suffered business losses as a consequence of the landlord's breach, he may recover for these items.

2. Quiet Enjoyment
There is implied in every lease a covenant that neither the landlord nor someone with paramount title (*e.g.*, a prior mortgagee of the landlord who forecloses) will interfere with the tenant's quiet enjoyment and possession of the premises. The covenant of quiet enjoyment may be breached in any one of three ways: actual eviction, partial actual eviction, or constructive eviction.

a. Actual Eviction
Actual eviction occurs when the landlord or paramount title holder excludes the tenant from the ***entire*** leased premises. Actual eviction ***terminates*** the tenant's obligation to pay rent.

b. Partial Actual Eviction
Partial actual eviction occurs when the tenant is physically excluded from only ***part*** of the leased premises. (The part from which the tenant is excluded need not be a substantial part of the premises for breach to occur.) The tenant's remedies for breach will differ depending on whether the partial eviction was caused by the landlord or by one with paramount title.

1) **Partial Eviction by Landlord—Entire Rent Obligation Relieved**
Partial eviction by the landlord relieves the tenant of the obligation to pay rent for the ***entire*** premises, even though the tenant continues in possession of the remainder of the premises.

2) **Partial Eviction by Third Person—Rent Apportioned**
Partial eviction by a third person with paramount title results in an apportionment of rent; *i.e.*, the tenant is liable for the reasonable rental value of the portion that he continues to possess.

c. Constructive Eviction
If the landlord does an act or fails to provide some service that he has a legal duty to provide, and thereby makes the property uninhabitable, the tenant may ***terminate the lease*** and may also seek ***damages***. The following conditions must be met:

1) The acts that cause the injury must be by the ***landlord*** or by persons acting for him. Acts of neighbors or strangers will not suffice.

2) The resulting conditions must be very bad, so that the court can conclude that the ***premises are uninhabitable***. Typical examples are flooding, absence of heat in winter, loss of elevator service in a warehouse, etc.

3) The tenant must move out, thereby showing that the premises were uninhabitable. If he does not ***vacate within a reasonable time***, he has waived the right to do so.

3. Implied Warranty of Habitability
More than half the states have now adopted by court decision or statute the implied warranty of habitability for residential tenancies; it is clearly a growing trend. (It is rarely applied to nonresidential cases, unlike constructive eviction.) The standards are more favorable to tenants than in constructive eviction, and the range of remedies is much broader.

a. Standard—Reasonably Suitable for Human Residence
The standard usually applied is the local housing code if one exists; if there is none, the court asks whether the conditions are reasonably suitable for human residence.

b. Remedies
The following remedies have been adopted by various courts for violation of the implied warranty (although few courts have adopted all):

1) Tenant may move out and ***terminate lease*** (as in a constructive eviction).

2) Tenant may ***make repairs*** directly, and ***offset the cost*** against future rent obligations. (Some states limit this remedy by statute to a fixed amount, such as one month's rent, or to only one occasion each year.)

3) Tenant may reduce or ***abate rent*** to an amount equal to the fair rental value in view of the defects in the property. (In many jurisdictions, the tenant may withhold all rent until the court determines the amount of this fair rental value, and may then pay it without risk of the landlord's terminating the lease for rent delinquency.)

4) Tenant may remain in possession, pay full rent, and seek ***damages*** against the landlord.

4. Retaliatory Eviction

If a tenant exercises the legal right to report housing or building code violations or other rights provided by statute (*e.g.*, a residential landlord-tenant act), the landlord is not permitted to terminate the tenant's lease in retaliation. The landlord is also barred from penalizing the tenant in other ways, such as raising the rent or reducing tenant services. This protection is recognized by residential landlord-tenant acts in nearly half the states. These statutes usually ***presume*** a retaliatory motive if the landlord acts within, say, 90 to 180 days after the tenant exercises his or her rights. In other states, the same conclusion is reached by judicial construction of the eviction and code statutes. The protection generally applies to tenants under both periodic leases when the landlord gives notice to terminate and fixed-term leases when the landlord refuses to renew. To overcome the presumption, the landlord must show a valid, nonretaliatory reason for his actions.

E. ASSIGNMENTS AND SUBLEASES

Absent an express restriction in the lease, a tenant may freely transfer his leasehold interest, in whole or in part. If he makes a ***complete transfer of the entire remaining term***, he has made an ***assignment***. If he ***retains any part*** of the remaining term, the transfer is a ***sublease***.

Example: L leases property to T for a 10-year term. One month later, T transfers his interest to T1 for nine years, retaining the right to retake the premises (reversion) after nine years. The effect of his transfer is to create a sublease between T (sublessor) and T1 (sublessee).

If, on the other hand, T had transferred to T1 for the remaining period of the lease, reserving no rights, the transfer would constitute an assignment of the lease from T (assignor) to T1 (assignee). (*Note:* It is not controlling that the parties denominate the transfer an "assignment" or "sublease." The court still examines what interest, if any, is retained by T to determine the nature of the transaction.)

1. Consequences of Assignment

The label given to a transfer—an assignment or sublease—determines whether the landlord can proceed directly against the transferee or only against the transferor. To be an assignment, the transfer must be on the same terms as the original lease ***except that the tenant may reserve a right of termination (reentry) for breach of the terms of the original lease*** that has been assigned; *e.g.*, "to A for the balance of the leasehold term. However, should A fail to make the rental payments to the landlord, the right to reenter and reclaim the premises is reserved." If the transfer is an assignment, the assignee stands in the shoes of the original tenant in a direct relationship with the landlord. The assignee and the landlord are in ***"privity of estate,"*** and each is liable to the other on all covenants in the lease that "run with the land."

a. Covenants that Run with the Land

A covenant "runs" if the original parties to the lease so intend, and if the covenant ***"touches and concerns"*** the leased land; *i.e.*, it benefits the landlord and burdens the tenant (or vice versa) with respect to their interests in the property. (These requirements are discussed in detail at IV.D., *infra*.) Covenants held to run with the land (unless the parties specify otherwise) include: covenants to ***do or not do a physical act*** (*e.g.*, to repair, to conduct a business on the land in a specified manner, to supply heat); covenants to ***pay money*** (*e.g.*, rent, taxes, etc.); and covenants regarding the ***duration*** of the lease (*e.g.*, termination clauses).

b. Rent Covenant Runs with the Land

Because the covenant to pay rent runs with the land, an assignee owes the rent ***directly*** to the landlord. He does not owe rent for the period before the assignment, but only for the time that he is in "privity of estate," *i.e.*, from the time of assignment until the end of the lease or until the assignee himself reassigns.

1) **Reassignment by Assignee—Privity of Estate with Landlord Ends**
If the assignee reassigns the leasehold interest, his privity of estate with the landlord ends, and he is not liable for the subsequent assignee's failure to pay rent. However, if the first assignee specifically promised the landlord that he would be liable for the rent for the remainder of the lease term, he may be obligated to pay based on ***privity of contract***, even though his reassignment ended the privity of estate.

a) **Effect of Assignee Assuming Rent Obligation**
If the assignee made no promise to the landlord but did promise the original tenant that he would pay all future rent, the landlord may be able to sue the assignee as a ***third-party beneficiary*** of the contract between the original tenant and the assignee.

2) **Original Tenant Remains Liable**
After assignment, the original tenant is no longer in privity of estate with the landlord. However, if (as is likely) the tenant promised to pay rent in his lease with the landlord, he can still be held liable on his original contractual obligation to pay, *i.e.*, on privity of contract. This allows the landlord to sue the original tenant where the assignee has disappeared, is judgment-proof, etc.
Example: L rents to T for three years at $2,400 per year. After one year, T assigns to T1. T1 pays the rent for one year, and then assigns to T2. T2 fails to pay rent. L can collect from T or T2 but not from T1 (unless T1 made some ***promise*** on the basis of which L can sue him).

2. **Consequences of Sublease**
In a sublease, the sublessee is considered the tenant of the original lessee, and usually pays rent directly to the original lessee, who in turn pays rent to the landlord under the main lease.

a. **Liability of Sublessee for Rent and Other Covenants**
The sublessee is liable to the original lessee for whatever rent the two of them agreed to in the sublease. However, the sublessee is ***not personally liable to the landlord*** for rent or for the performance of any other covenants made by the original lessee in the main lease. The reason is that the sublessee has no contractual relationship with the landlord (no privity of contract), and does not hold the tenant's full estate in the land (no privity of estate); therefore, the covenants in the main lease do not "run with the land" and bind the sublessee.

1) **Termination for Breach of Covenants**
Even though the sublessee is not personally liable to the landlord, the landlord can still terminate the main lease for nonpayment of rent or, if so stated in the lease, breach of other tenant covenants. If this occurs, the sublease will automatically terminate at the same time.

2) **Distress—Landlord's Lien**
In many states (especially in nonresidential leases), the landlord who does not receive rent when due can assert a lien on the personal property found on the leased premises. This applies to property owned by sublessees as well as that owned by the original tenant.

b. **Assumption by Sublessee**
It is possible for the sublessee to assume the rent covenant and other covenants in the main lease. An assumption is not implied, but must be expressed. If this occurs, the sublessee is bound by the assumption agreement and becomes personally liable to the landlord on the covenants assumed. The landlord is considered a third-party beneficiary of the assumption agreement.

c. **Rights of Sublessee**
The sublessee can enforce all covenants made by the original lessee in the sublease, but has no direct right to enforce any covenants made by the landlord in the main lease. However, it is likely (although there is very little case law on point) that a sublessee in a residential lease would be permitted to enforce the implied warranty of habitability against the landlord.

3. Covenants Against Assignment or Sublease

a. Strictly Construed Against Landlord
Many leases contain covenants on the part of the tenant not to assign or sublease without the consent of the landlord. These are strictly construed against the landlord. Thus, a covenant prohibiting assignment does not prohibit subleasing and vice versa.

b. Waiver of Covenant
Even if the lease has a valid covenant against assignment, the covenant may be held waived if the landlord knows of the assignment and does not object. This often occurs when the landlord knowingly accepts rent from the assignee.

c. Continuing Waiver
If the landlord grants consent to one transfer, he waives his right to avoid future transfers unless he expressly reserves the right to do so. Reservation of right must take place at the time of granting consent.

d. Transfer in Violation of Lease Not Void
If a tenant transfers (assigns or sublets) in violation of a prohibition in the lease against transfers, the transfer is not void. However, the landlord usually may terminate the lease under either the lease terms or a statute. Alternatively, he may sue for damages if he can prove any.

e. Reasonableness
In a minority of states, the landlord may not unreasonably withhold consent to transfers by the tenant. The majority imposes no such limitation.

4. Assignments by Landlords

a. Right to Assign
A landlord may assign the rents and reversion interest that he owns. This is usually done by an ordinary deed from the landlord to the new owner of the building. Unless required by the lease (which is very unlikely), the consent of the tenants is not required.

b. Rights of Assignee Against Tenants
Once the tenants are given reasonable evidence that the assignment has occurred, they are legally obligated to recognize and pay rent to the new owner as their landlord. This is called ***attornment***. The benefits of all other tenant covenants (*e.g.*, to repair, to pay taxes) also run with the landlord's estate and benefit the new landlord, provided that they touch and concern the land.

c. Liabilities of Assignee to Tenants
The assignee is liable to the tenants for performance of all covenants made by the original landlord in the lease, provided that those covenants touch and concern the land. The burdens of those covenants run with the landlord's estate and become the burdens of the new landlord. The ***original landlord also remains liable*** on all of the covenants he made in the lease.

Example: L leases to T, and in the lease covenants to repair and maintain the premises. L then sells the building to L2, subject to the lease. Because a covenant to repair and maintain touches and concerns the land, L2 is personally liable to T if L2 fails to perform the covenant. L also remains liable.

F. CONDEMNATION OF LEASEHOLDS

1. Entire Leasehold Taken by Eminent Domain—Rent Liability Extinguished
If all of the leased land is condemned for the full balance of the lease term, the tenant's liability for rent is extinguished because both the leasehold and the reversion have merged in the condemnor and there is no longer a leasehold estate. Absent a lease provision to the contrary, the lessee is entitled to compensation for the taking of the leasehold estate (*i.e.*, fair market value of the lease).

2. Temporary or Partial Taking—Tenant Entitled to Compensation Only
If the taking is temporary (*i.e.*, for a period less than the remaining term), or if only a portion of the leased property is condemned, the tenant is ***not*** discharged from the rent obligation but is entitled to compensation (*i.e.*, a share of the condemnation award) for the taking.

G. TORT LIABILITY OF LANDLORD AND TENANT

1. Landlord's Liability

At common law, subject to a few exceptions, a landlord had no duty to make the premises safe. Today there are many significant exceptions to this rule.

a. Concealed Dangerous Condition (Latent Defect)

If, at the time the lease is entered into, the landlord knows (or should know) of a dangerous condition that the tenant could not discover upon reasonable inspection, the landlord has a ***duty to disclose*** the dangerous condition. Failure to disclose results in liability for any injury resulting from the condition.

Once disclosure is made, if the tenant accepts the premises, she is considered to have assumed the risk of injuries to herself or her guests (*e.g.*, family members, invitees, licensees); the landlord is no longer liable.

b. Public Use

A landlord is liable for injuries to members of the public if, at the time of the lease, he: (i) knows or should know of a dangerous condition, (ii) has reason to believe that the tenant may admit the public before repairing the condition (*e.g.*, because of short lease term), and (iii) fails to repair the condition. The landlord's liability extends only to people who enter the premises for the purpose for which the public is invited. Note that the tenant's promise to repair does not relieve the landlord of liability if the landlord has reason to suspect that the tenant will admit the public before making the repair.

c. Defects Arising After Tenant Takes Possession

Generally, a landlord is ***not liable*** for injuries resulting from dangerous conditions that arise after the tenant takes possession. However, if the landlord voluntarily undertakes repairs that he is not obligated to make, he owes a duty of reasonable care. If the repairs are done negligently, the landlord is liable to those who do not know of the negligence and are injured.

d. Landlord Contracts to Repair

If a landlord covenants to repair, most courts hold that he is liable in tort for an injury to the tenant or the tenant's guests resulting from his failure to repair or negligent repair.

e. Legal Duty to Repair

If the landlord has a statutory duty to repair (*e.g.*, under the housing code), he may be liable to the tenant or the tenant's guests for injuries resulting from his failure to repair. Some courts hold that violation of the housing code (or similar statute) is negligence per se, but most courts hold that it is merely ***evidence of negligence***, which the jury may or may not find conclusive. The same analysis probably applies to a violation of the implied warranty of habitability, but there are very few cases on point.

f. Common Areas

The landlord has a duty to exercise ***reasonable care*** over common areas, such as halls, walks, elevators, etc., that remain under his control. The landlord is liable for any injury resulting from a dangerous condition that could reasonably have been discovered and made safe. This duty is the same as the duty an owner-occupier owes his guests (*see* Multistate Torts outline).

g. Furnished Short-Term Residence

When a furnished house or apartment is leased for a short term (*i.e.*, three months or less) for immediate occupancy, many jurisdictions hold that the landlord is liable if the premises are defective and cause injury to a tenant.

h. Modern Trend—General Duty of Reasonable Care

Increasingly, the courts are simply holding that landlords have a ***general duty of reasonable care*** with respect to residential tenants, and that they will be held liable for personal injuries of tenants and their guests resulting from the landlord's ***ordinary negligence***, without regard to the exceptions discussed above. This duty is ordinarily not imposed until the landlord has ***notice*** of a particular defect and a reasonable opportunity to repair it.

1) **Security**
Some recent cases have held landlords liable for injuries inflicted on tenants by third-party criminals, where the landlord failed to comply with ***housing code*** provisions dealing with security, or failed to maintain ***ordinary security*** measures (*e.g.*, working locks on apartment doors), or where he ***advertised extraordinary security*** measures (*e.g.*, television surveillance, doormen, security patrols) and then failed to provide them.

2. **Tenant's Liability**
The tenant, as occupier of the premises, may be liable in tort to third persons for dangerous conditions or activities on the leased property. The duty of care owed by the tenant as an occupier of land is discussed in the Multistate Torts outline.

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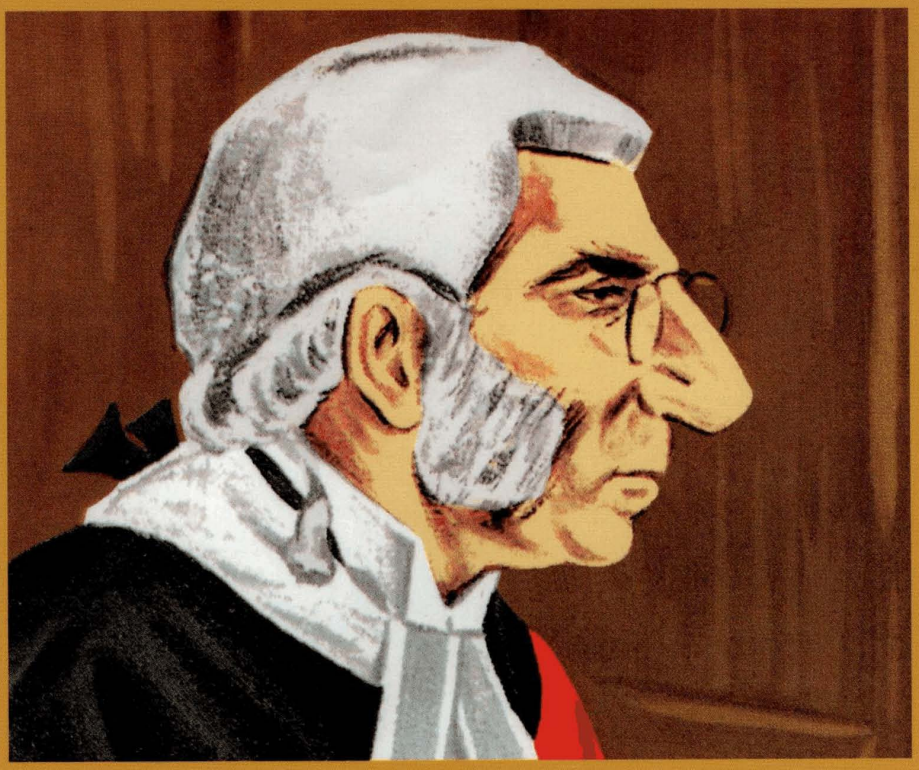

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CHAPTER 5

LEASEHOLD ESTATES

ChapterScope

This chapter examines leaseholds, including their nature and the duties and obligations of landlords and tenants. Here are the most important points in this chapter.

- The legal conception of leases has been transformed. While a leasehold is a property interest, it is also a contract and contract notions of dependent covenants play a large role in regulating the relations of landlords and tenants, particularly in residential leases.
- There are three types of true leaseholds.
  - The term of years is a leasehold for any single, fixed period of time.
  - The periodic tenancy is a leasehold for a fixed period of time that automatically renews for the same period unless either party has given adequate advance notice of termination. The month-to-month tenancy is the most prevalent such leasehold.
  - The tenancy at will is a leasehold which may be terminated at any moment by either party.
- When a tenant stays in possession after the term expires the tenant is an unlawful possessor. The landlord has the option of treating the tenant as a trespasser or of renewing the leasehold, but some states by statute limit the landlord's remedy to double or triple rent plus other damages.
- A landlord must deliver the *legal right to possession* to the tenant at the beginning of the term. A few states hold that a landlord must also deliver *actual physical possession* to the tenant. Tenants generally have no obligation to take possession.
- Unless the lease is to the contrary, a tenant may assign or sublease his interest.
  - A sublease occurs when the tenant and sublessor intends to create a new tenancy carved out of his own, and that intention is almost always found when the tenant and sublessor retains a reversion in the master lease. The consequence of a sublease is that the sublessor remains in privity of estate and privity of contract with the landlord, while the subtenant is in privity of estate and contract with only the sublessor.
  - An assignment occurs when the tenant and assignee intends to and does transfer his entire lease-hold to another person. After assignment, the assignor remains in privity of contract with the landlord (unless released by the landlord), but is no longer in privity of estate; the assignee is in privity of estate with the landlord but not privity of contract (unless the assignee has assumed the lease obligations).
- While leases commonly restrict the ability to assign or sublease, in commercial leases some courts rule that the landlord may not unreasonably withhold consent.
- A tenant's duties are imposed either by lease or by law. The principal duties are the duty to pay rent, to avoid waste, and to refrain from illegal uses.
- Landlord remedies for tenant breach are derived from the lease or by law. The principal remedy is summary action to recover possession. Upon abandonment by the tenant, a landlord has the option

of accepting the surrender and terminating the lease, reletting for the tenant's account, or simply collecting rent, but some states impose on the landlord an obligation to mitigate damages by seeking to relet abandoned residential premises.

- The important obligations of landlords, mostly imposed by law, are not to interfere with a tenant's quiet enjoyment and, in residential leases in some states, to maintain the premises in habitable condition. Failure to do so enables the tenant to withhold rent or to terminate the lease. Landlords may not evict tenants in retaliation for their assertion of legal rights. An array of federal and state statutes forbid many types of discrimination in the sale or rental of housing.

I. THE NATURE OF LEASES

A. Origins and development: Common law treated the leasehold as a nonfreehold estate. Some say that this was due to the lease's origin as a device to avoid canon law — church law — restrictions against charging interest.

Example: In 1350, Rodrigo, needing money, might borrow a sum of money from Walter, a money lender. But Walter could not charge interest, because church law (backed by the Crown) forbade interest. Walter would receive in exchange for the loan Rodrigo's promise to repay the principal on a future date and possession of some of Rodrigo's land for a term of years. The length of the term would be set to permit Walter to earn enough profits and rents from the land to produce a satisfactory interest rate on the loan.

Because money lenders were thought to be unscrupulous and untrustworthy (consider Shakespeare's portrayal of Shylock in *The Merchant of Venice*) the money lender was not a fit person to perform feudal obligations, and was not permitted to hold seisin. Thus, the estate acquired by the money lender (a term of years) was treated as a nonfreehold estate. The lender only had possession; the owner never parted with title.

B. Dual nature: Estate and contract: The leasehold is an evolving hybrid. It started out as a personal contract, then sometime in the sixteenth century courts began to treat it as more akin to an estate in land. In this century, courts have come to regard the lease (especially the residential lease) as mostly contract. A lease has both aspects: It is a conveyance of a possessory estate in land and it is a contract. This duality affects the way courts decide the rights and obligations of landlords and tenants.

1. **The traditional view: Estate:** In this view, a lease is a conveyance of an estate in land. The tenant has purchased possession of an estate for a term. The responsibility for maintaining the property and the risk of its destruction is upon the tenant. The landlord's obligation is to deliver possession. The tenant has the obligation to pay rent no matter what, because rent is the price for possession and nothing more. The landlord has the right to retake possession only if the tenant defaults in paying the rent. This view is not entirely a relic of the past, but almost no jurisdiction construes a lease exclusively in this manner.

2. **The contemporary view: Contract:** In this view a lease is just another package of bilateral promises that are mutually dependent. If the landlord fails to perform a promise (e.g., to provide access to tennis courts and a swimming pool) the tenant may refuse to perform his promises (e.g., pay rent). The estate view treats these promises as completely independent; the tenant must pay the rent no matter how many promises the landlord breaks. The tenant's remedy is to

sue the landlord for damages. Today, courts are apt to treat residential leases as a contract in most respects, but are less quick to do so with respect to commercial leases. Even in residential leases the leasehold has a property aspect as well as a contractual one. Leases are legal hybrids — they are ***estates*** **and** ***contracts.***

C. **The general requirement of a written lease:** The original Statute of Frauds (enacted in 1677, during Charles II's reign) required all leases for a period of more than 3 years to be in writing in order to be valid. By statute, most American states have made the requirement of a writing apply to all leases except "short-term" ones, usually defined as those for a year or less. An oral lease for longer than the short-term period is void and unenforceable, but if the tenant takes possession anyway a ***tenancy at will*** is created. See II.D, below. Once the tenant pays rent and it is accepted a ***periodic tenancy*** is created, though jurisdictions differ as to the length of the period. See II.C.2, below.

D. **What makes it a lease?** Sometimes it is difficult to tell whether a transaction has created a leasehold or some other interest, like an ***easement, license,*** or ***profit à prendre.*** Easements and licenses are rights to use the land of another, although they differ in some important respects. See Chapter 9. A profit à prendre is the right to take away something fixed to the land of another, such as the right to cut and remove timber, or the right to gather wild blackberries. None of these interests is ***possessory,*** in the sense that they give the holder the right to exclusive possession of the property. The lease, by contrast, gives the leaseholder the right to exclusive possession for the duration of the term, so long as the tenant performs the lease obligations. A lessee has all the legal rights of a possessor and may sue others for invasion of his possessory interest, via ***ejectment*** (to oust the wrongful possessor), ***trespass*** (to recover damages for physical invasion of the property), or ***nuisance*** (to recover damages or to abate nonphysical interference with a possessor's use and enjoyment of property). The easement holder, licensee, or profit holder lacks these powers because they do not have a possessory interest in property.

Example: Landowner executes a "lease" giving Oil Corp. the "right to drill for oil within 2 years and, if oil is discovered, to remove it from the property via pipeline or trucks passing across the property." Though called a lease this is either a fee simple determinable (terminated when either drilling is not timely commenced or oil production ceases) or a profit a prendre (the right to pump oil) coupled with an easement (the right of access to remove oil). States differ on this point but none consider this a leasehold, no matter what the parties call it.

Example: Helen, tired after a day's travel, checks into a hotel and rents a room. No lease is created; Helen holds a license to occupy the room overnight. The hotel does not even give Helen exclusive possession; maids can and do enter her room. But if Helen rented the room on a weekly or monthly basis, a lease might well be created, given the longer duration and the consequent heightened expectation of possession.

II. THE TYPES OF LEASEHOLDS

A. **Introduction:** There are four types of leasehold estates.

B. **Term of years:** The ***term of years*** is a lease for a ***single, fixed term*** of any length. The term must either be set out clearly in the lease (e.g., "for 5 years, ending on July 1, 2002") or by reference to a formula that will produce a fixed calendar date for the beginning and ending of the leasehold. Though called a "term of years," it can be of any length — a month, 6 months, 10 years — so long as the period is fixed.

Example: On July 1 Rosemary leases Salmon House to Don "from today until the end of the current salmon fishing season." If local law provides that the salmon season ends on October 31, a term of years has been created, beginning 12:01 A.M., July 1 and ending at 11:59 P.M. on October 30.

A term of years may be defeasible, either ***determinable*** or ***subject to condition subsequent.***

Example: If Rosemary added to the lease with Don the phrase "so long as Don uses Salmon House as a salmon smokehouse" a ***determinable term of years*** would be created. If the added phrase was "but if Don shall stop using Salmon House as a salmon smokehouse, Rosemary may terminate the lease and retake possession," a ***term of years subject to condition subsequent*** would be created.

1. **Indeterminate term:** Sometimes a lease is for an indeterminate term, as "for the duration of the war." These leases are puzzlers, because at the time nobody knows when the war will end. Courts adhering to the letter of the common law find these leases to create a tenancy at will (terminable by either party), because the ending date cannot be precisely determined. See, e.g., *National Bellas Hess, Inc. v. Kalis,* 191 F. 2d 739 (8th Cir. 1951) (applying Missouri law). Other courts reason that the parties intended to create a term of years because they used an event that neither of them could influence, thus indicating that they wished the leasehold to endure until that future date. See, e.g., *Smith's Transfer & Storage Co. v. Hawkins,* 50 A. 2d 267 (D.C. 1946).

   Example: Bob leases Fairhaven to Kathy "from today until Halley's Comet next appears visible to the naked human eye on Earth." Is this a tenancy for years? There might be some dispute about the exact termination date — when is the first moment that Halley's Comet will become visible? — but we can reliably predict that Halley's Comet will appear in 2062. The better conclusion is to call this a term of years, because it seems clear that the parties intended to create a single, fixed term ending in 2062.

2. **Length of the term:** Common law permitted a term of years of any length, but some states have enacted statutes restricting the length of a leasehold term.

C. **Periodic tenancy:** A ***periodic tenancy*** is a leasehold for a ***recurring period of time,*** such as month to month or year to year. A periodic tenancy continues in existence until either the landlord or tenant gives ***advance notice*** to the other party of termination of the lease. Common law required at least 6 months advance notice to terminate a year-to-year tenancy, and notice equal to the length of the period (but not more than 6 months) for periods of less than a year (e.g., a month's advance notice to terminate a month-to-month tenancy). A periodic tenancy is created by the ***parties' intentions*** or by ***operation of law.***

Example: Otis leases Blackacre to Terry "from year to year, beginning on January 1, 1990." A periodic tenancy — from year to year — is created by the clearly expressed intentions of the parties.

Example: Otis leases Blackacre to Terry "for an annual rent of $12,000, payable in monthly installments of $1,000." This creates a periodic tenancy but the period — month to month or year to year — is none too clear. Common law treated this as year to year, reasoning that a statement of "annual rent" set the period of the tenancy as a year and that monthly payments were a mere "convenience." Without any more evidence as to the parties' intentions, most contemporary courts would treat this as a year-to-year tenancy, especially in a nonresidential lease.

Example: On January 1, 1996, Otis leases Blackacre to Terry from year to year. Terry gives Otis timely notice of termination as of December 31, 1996, but Terry remains in possession on January

1, 1997. Terry is a "holdover," or a tenant at sufferance, and Otis may elect to treat Terry as having renewed his tenancy for another year. This is a new periodic tenancy created by operation of law. See II.E. below.

Example: Otis leases Blackacre to Terry for 100 years, rent payable in monthly installments of $1,000. State law invalidates leases for a term of more than 60 years. Terry takes possession and pays the rent monthly for 5 years, when Otis decides he made a bad deal and notifies Terry that the lease is terminated in 60 days. All courts will treat this as a periodic tenancy, but they will differ as to whether it is year to year or month to month. See II.C.2, below. By operation of law, Terry's occupancy under a void lease created at least a tenancy at will and, also by operation of law, the tender and acceptance of rental payments transformed the leasehold into a periodic tenancy.

1. **Notice necessary to terminate**

   a. **Common law:** Six months advance notice is necessary to terminate a year-to-year tenancy, and notice equal to the length of the period (but not more than 6 months) is necessary for periods of less than a year. Notice is only effective as of the ***end of the period.***

      Example: Olivia leases Blackacre to Tom "from year to year, beginning on January 1, 1995, for an annual rent of $12,000." Tom takes possession and, on July 10, 1995, notifies Olivia that he is terminating the lease "at the end of the year." Tom moves out on December 31, 1995. On January 15, 1996 Olivia notifies Tom that his notice was defective, the periodic tenancy has been renewed, and that he is liable for $12,000 rent for 1996. What are Tom's obligations to Olivia, if any? The notice was defective in order to terminate on December 31, 1995. To do so, Tom must have notified Olivia no later than July 1. At common law, Tom is liable for another $12,000 in rent. Some jurisdictions (and the Restatement 2d of Property, §1.5, comment f) treat Tom's notice as effective 6 months after it was given, or January 10, 1996. In that case, Tom is liable for about $330 in rent. A few states treat a defective notice as no notice at all, so the periodic tenancy will continue until and unless Tom gives proper notice.

   b. **Statutory changes:** Many states have legislated on this subject, typically by reducing the notice period to a single month. A few states (e.g., California, Civ. Code §1946) stipulate that notice is effective 1 month after it is given, regardless of whether that date happens to coincide with the end of a period.

   c. **Modification by agreement:** The parties may shorten or eliminate notice times, but they cannot agree to make them longer than allowed by law.

2. **Fixing the period of periodic tenancies created by operation of law:** The problem is deciding what the period is when a tenant has taken possession under a void lease, usually an oral long-term lease that is void under the Statute of Frauds, but has paid rent which has been accepted. All courts agree that a periodic tenancy results but there are three different views as to the period.

   a. **Year to year:** Most courts conclude that a year to year tenancy results, reasoning that this is closest to what the parties intended.

      Example: Josie orally agrees to lease Seaside to David for a 5-year period, rent to be $1,000 per month. David takes possession and pays the rent for 6 months, then decides that he doesn't like Seaside. He tells Josie he is moving out, does so, and immediately stops

paying rent. Assume that the state in which Seaside is located regards year-to-year tenancies as terminated 6 months after notice is given. The parties intended a term of 5 years; the periodic tenancy that is closest to their intent is a year-to-year tenancy. David is liable for 6 months rent.

b. Period measured by the rent calculation in the void lease: Some courts measure the period by the way the rent is calculated or stated in the void lease.

Example: Refer to the prior example. Suppose David and Josie orally agreed that the rent was "to be $1,000 per month." Because the rent was stated in monthly terms, a month-to-month tenancy was created. David is liable, at most, for a month's rent.

c. Period measured by the way rent is paid: Finally, some courts measure the period by the way the rent is ***actually paid.***

Example: Suppose Josie and David had signed a written lease, under which Josie leased Seaside to David "for a term of 70 years for a rent of $840,000, payable (solely for the convenience of the parties) in monthly installments of $1,000 each." The state in which Seaside is located prohibits leases of longer than 60 years. David takes possession and pays the rent for 2 years. On June 15, Josie notifies him that she is terminating the lease "effective as soon as the law allows." When must David move out? In jurisdictions that measure the period of the periodic tenancy resulting from operation of law by the way rent is actually paid, a month-to-month tenancy has resulted. David must vacate Seaside no later than July 31, unless Seaside's state follows the California rule (see II.C.1.b, above), in which case David must vacate no later than July 15.

D. Tenancy at will: A ***tenancy at will*** is a leasehold for no fixed time or period. It lasts as long as ***both*** parties desire. Termination is bilateral — ***either*** party may terminate it at any time — or by operation of law. It may arise by agreement, though this is uncommon because of the lack of security of the tenure, or by operation of law, usually upon the failure of some other leasehold or intended leasehold.

1. Distinguished from leaseholds unilaterally terminable: A unilaterally terminable leasehold — only one party has the right to terminate — ***cannot be a tenancy at will.*** It is a determinable tenancy.

Example: Jim leases Acorn Farm to Pam "for 2 years, but Pam may terminate sooner if she wishes." A determinable term of years is created. If Jim had leased Acorn Farm to Pam "from year to year, but Pam may terminate whenever she wishes," a determinable periodic tenancy is created. Pam need not give ***advance*** notice to terminate, but Jim must do so. A problem occurs when a lease is both determinable and for an ***uncertain duration.*** If Patrick leases a barn to Kathy "for so long as Kathy desires," what tenancy is created? There are two answers: The older one is that a tenancy at will is created; the more modern (and better) answer is that a determinable leasehold life estate is created.

★**Example — Modern view:** Robert Donovan leased a house to Lou Gerrish for $100 per month from May 1, 1977 until Lou decides to terminate. Robert then died and David Garner, Robert's executor, notified Lou that he was terminating the lease. In order to carry out the parties' intentions the New York Court of Appeals construed this to create a determinable leasehold life estate. Lou alone held the power to terminate the lease before his death. ***Garner v.***

Gerrish, 63 N.Y. 2d 575 (1984). See also *Thompson v. Baxter*, 107 Minn. 122 (1909) (finding a determinable life estate on similar facts).

Example — Older view: Frye leased a house to O'Reilly for "so long as you please for $40 per month." After several years Frye notified O'Reilly that the lease was terminated. Because the lease term was of indefinite duration and tenancies at will are of indefinite duration, the Massachusetts Supreme Judicial Court reasoned that it must be a tenancy at will and so implied a power to terminate on the part of Frye. Little attention was paid to the intentions or expectations of the parties. *O'Reilly v. Frye*, 263 Mass. 318 (1928).

2. **Termination**

   a. **By the parties:** Because a principal feature of the tenancy at will is that it can be terminated by either party, the question here is whether a party has so acted. A landlord terminates by giving notice. A tenant terminates either by giving notice or by abandoning the property. Advance notice was not necessary at common law but many states today require some notice (usually a month) and some require only the landlord to give notice.

   b. **By operation of law:** If either party dies, if the tenant attempts to assign his tenancy, or if the landlord conveys his interest in the property, a tenancy at will is terminated by operation of law. Most states require notice of termination to be given under these circumstances, so the tenancy may continue if both parties desire and, in any case, will last until the end of the required notice period.

E. **Holdovers: Tenancy at sufferance:** Tenants sometimes "hold over" — remain in possession after their right to do so has expired. When this happens a ***tenancy at sufferance*** is created. A tenancy at sufferance is a legal limbo — the tenant has no right to be there but he is not automatically treated as a trespasser either (mostly to avoid triggering adverse possession). For this reason a tenancy at sufferance is not a true tenancy. The landlord has not consented to the tenant's occupation. A tenancy at sufferance only lasts until the landlord exercises one of two options the law makes available: (1) ***eviction*** and ***recovery of damages for the lost possession*** or (2) ***binding the tenant to a new term.*** The landlord must exercise one of these options within a reasonable time.

1. **What constitutes holding over?** At common law a tenant held over if she stayed for the merest tick of the clock past the old term. Excuses, however compelling, were simply not accepted.

   Example: Two days before Halloween Meg, age 89, breaks her hip while moving her household goods out of The Lawn, a cottage she has rented for a year's term, ending October 31. Her son, Ron, continues to move her goods out and care for his elderly mother. But the result is that Meg has not fully vacated The Lawn until noon on November 1. At common law Meg is a holdover tenant. The landlord may elect to bind Meg to another 1-year term.

   The common law ameliorated this harsh rule by grafting onto it the principle that a holdover must be ***voluntary.***

   Example: Tenant stays on because her physician advised her that she is too ill to move. She vacates as soon as she is sufficiently recovered to move. No holdover tenancy resulted because her continued occupancy was involuntary. *Herter v. Mullen*, 159 N.Y. 28 (1899). From this principle the prevailing modern doctrine has evolved: There is ***no holdover*** so long as the ***tenant's continued possession is the product of circumstances beyond the tenant's control.***

On this view, the holdover tenancy is created when the tenant fails to vacate as soon as possible under the exigent circumstances. Modern doctrine would not treat Meg, in the first example, as a holdover tenant. A few courts go even further and find no holdover tenancy even without extenuating circumstances, so long as the tenant's action causes no hardship to the landlord.

Example: Hirschfield's leasehold to his Chicago apartment expired on September 30. He started moving on September 27. By the night of September 30 the only items remaining were the beds and some carpets. Hirschfield's family slept in the apartment that night and removed these last items the following morning. By 10 A.M. the landlord had elected to renew the lease for another year. The Illinois Appellate Court found no tenancy at sufferance, reasoning that Hirschfield's acts could not have caused a reasonable landlord to assume Hirschfield intended to stay for another term, nor did his acts significantly damage the landlord. In this connection the court relied on the fact that the lease stipulated that Hirschfield would be liable for double rent for "the actual time of his occupancy" after midnight on September 30. The landlord got a few hours of double rent, not the right to renew for another year. *Commonwealth Building Corp. v. Hirschfield,* 307 Ill. App. 533 (1940).

2. **Eviction and damages:** A landlord may evict the holdover tenant and recover damages, measured by the reasonable value of the use of the property for the holdover period.

   a. **Eviction:** Every state provides an expeditious (usually summary) procedure for eviction and recovery of possession. Some states permit the landlord to use ***reasonable self-help*** to evict holdovers and recover possession.

   b. **Damages for wrongful possession:** A landlord who opts for eviction may also recover damages for the period of wrongful occupancy. The common law measure of these damages is the fair market value of the occupied premises, plus any special damages (e.g., physical injury to the premises). The original rent is presumptive evidence of the fair market value but that presumption may be rebutted if there is convincing evidence that the fair market value is greater or lesser than the original rent.

3. **Election of a new term:** If a landlord elects to bind the holdover tenant to a new term, a number of issues occur, dealt with in the succeeding subsections. Although permitting the landlord to bind the tenant to a new term may seem harsh, the usual rationale for this rule is that it deters holdovers, and deterrence of holdovers is for the benefit of tenants generally, because a new tenant places a great deal of reliance on the old tenant's timely departure. Nobody wants to sleep in the moving van while waiting for the old tenant to move out.

   a. **Nature of the new leasehold:** Most states treat the new tenancy as a periodic tenancy. Some treat the new tenancy as a term of years for a maximum of 1 year. A very few regard the new tenancy as a tenancy at will, with the tenant liable only for the fair market value of the premises. See, e.g., *Townsend v. Singleton,* 257 S.C. 1 (1971) (interpreting a statute abrogating the common law of holdover tenancies).

   b. **Length of the new term:** Whether a periodic tenancy or a term of years results, courts divide over how to determine the length of the new term. Some states determine the new term's length by the ***way the rent is stated (reserved) in the old lease.***

      Example: Allan holds over and Max, his landlord, elects to renew. The old lease was a term of years for 3 years, with rent stated as $10,000 per year. In a jurisdiction using the old stated rent as the measuring rod for the new term, Allan's new term is 1 year. While some states

use the ***original term*** as the measure of the new term, none will permit the term to be longer than 1 year. In those states Allan's new term would also be 1 year.

c. **Provisions of the new leasehold:** The provisions of the old lease (except for length or anything else inconsistent with the new relationship) apply to the new leasehold. If the landlord notifies the tenant of his election to renew at a higher rent and the tenant makes no objection, the tenant is liable for the higher rent.

Example: Selk remained in possession after expiration of a term of years for 70 days at a rent of $ 1.00. Forty-seven days later the landlord notified Selk that his continued occupancy would cost $300 per month rent. Selk never replied to this letter or to a later, similar one, but remained in possession for 23 months after his original term ended. A Florida appellate court ruled that the rent for the new periodic tenancy was $300 per month. Selk's failure to object to the new rent constituted his implicit agreement to pay the higher rent. *David Properties, Inc. v. Selk,* 151 So. 2d 334 (Fla. App. 1963).

d. **What constitutes election?** The easy case is when a landlord clearly states his election of a remedy. Once the landlord has done so, the ***election is irrevocable*** — the landlord ***cannot change his mind.***

★**Example:** Crechale and Polles leased certain premises to Smith for a 5-year term, ending February 7, 1969. Before expiration of that term, Crechale and Smith discussed a short-term extension of the term to accommodate Smith's relocation. Smith wrote a letter to Crechale confirming his understanding of an oral extension. On Feb. 6, Crechale replied by letter, denying any such extension and demanding that Smith vacate on schedule. Smith stayed on and tendered rent for 1 month, which was accepted by Crechale (thus creating a new periodic tenancy), and then vacated after giving sufficient notice to terminate the new periodic tenancy. At that point Crechale declared that he was electing to renew the old tenancy for a term of years. In ***Crechale & Polles, Inc. v. Smith,*** 295 So. 2d 275 (Miss. 1974), the Mississippi Supreme Court ruled that Crechale's Feb. 6 letter constituted his election "to terminate the lease and to treat [Smith] as [a] trespasser." Crechale's subsequent acceptance of the tendered rent created a new periodic tenancy.

More often, the landlord never clearly states his intentions and election must be inferred from his acts.

Example: Forester leased an apartment to Kilbourne for a term of years. After expiration of the term Kilbourne held over for 2 more years. During that time Kilbourne tendered rent on a monthly basis but Forester never accepted it. Forester sent Kilbourne many letters demanding that she vacate but never did anything more to enforce the demand. Finally, Forester brought suit to recover possession. A Missouri appellate court rejected Kilbourne's contention that, by laches and acquiescence, Forester had elected to treat her as a tenant for a new term. However dilatory Forester had been, he had at least been consistent in never accepting Kilbourne's tendered rent, and had never otherwise manifested an intention to recognize Kilbourne as a tenant for a new term. It is the landlord's intention that counts. *Kilbourne v. Forester,* 464 S.W. 2d 770 (Mo. App. 1970).

e. **When must the landlord elect the remedy?** The landlord must make his election within a ***reasonable time,*** but there are not many decided cases on the question of what period is reasonable. *Kilbourne v. Forester* implicitly found 2 years to be a reasonable time, but that is surely at the outer edges of reasonableness. If the landlord fails to act within a reasonable

time, whatever it is, the tenant's status is unclear. Some of the few cases addressing the issue treat the tenant as a periodic tenant, others treat the tenant as a trespasser, and still others conclude that a tenancy at will is created. The periodic tenancy conclusion punishes the landlord for his sloth; the trespasser conclusion gives no reward to the wrongful occupier but starts the adverse possession clock; and the tenancy at will is a pragmatic compromise. See 1 American Law of Property §3.33.

4. **Statutory alterations:** The common law of holdovers has been altered by statutes, mostly designed to limit the landlord's common law remedies. These statutes take a variety of forms. Some states require that holdover tenants of farm land must be permitted to remain for 6 months to even a year, in order to enable the tenant to harvest crops. See, e.g., *Estate of Thompson v. O'Tool,* 175 N.W. 2d 598 (Iowa 1970). Some statutes prescribe the nature of the new tenancy resulting from landlord election to bind the tenant to a new term, and others provide for penalties for the ***willful holdover.*** The Uniform Residential Landlord & Tenant Act (URLTA), §4.301(c), provides that a willful holdover may be liable for treble damages or 3-months' rent, whichever is greater, plus the landlord's reasonable attorney's fees. Some states have statutes that subject holdover tenants to liability for double or triple rent. These statutes are usually expressly or impliedly limited to the willful holdover tenant, but some states have adopted the double damage remedy as the exclusive remedy for any holdover. See, e.g., *Mississippi State Dept. of Public Welfare v. Howie,* 449 So. 2d 772 (Miss. 1984), which held that Mississippi's double rent statute was the sole remedy for "a tenant's holdover. The common law rule has been abrogated . . . and may [not] be used to impose the renewal of an expired lease."

III. DELIVERY OF POSSESSION

A. Introduction: Delivery of possession is the essence of a leasehold. All agree that the landlord has an implied-in-law obligation to deliver to the tenant the ***legal right to possession,*** but states are divided on the subsidiary question of whether a landlord has an implied obligation to deliver ***actual physical possession*** at the beginning of the lease term. Everyone agrees that there is no implied-in-law obligation of the tenant actually to take possession or to use the premises for any particular purpose. These matters are discussed below.

B. Implied obligation to deliver legal right of possession: A landlord is obligated to deliver to the tenant the ***legal right*** to possess the leased premises. If a third party has a better claim to possession than the landlord, the landlord will not be able to deliver to the tenant the legal right to possess.

Example: Buck, in adverse possession of Blackacre for 5 years (the limitations statute is 10 years), leases Blackacre to Buster. Soon after Buster takes possession of Blackacre, Sophie, the true owner, sues Buster for ejectment and evicts him. Buck has breached his implied obligation to deliver to Buster the legal right to possession.

The obligation to deliver the legal right to possession consists of two promises, implied in law, by the landlord:

- The landlord has the ***power to demise*** — the power to grant to the lessee the interest he purportedly grants under the lease. In the prior example, Buck would have violated this promise the moment the lease was made, because he had no legal right to possession.
- The landlord promises that the tenant will have the ***quiet enjoyment*** of possession — meaning that the landlord promises that the tenant will not be evicted by somebody with

a legally better title to the property than the landlord. In the prior example, Buck breached this promise when Sophie, the true owner, evicted Buster.

1. **Continuing obligation:** The obligation to deliver legal right to possession is a continuing one, as the quiet enjoyment promise makes clear. If at any time during the tenant's possession, someone with ***paramount title*** — a better legal claim to the property than the landlord — interferes with the tenant's possession, the landlord has failed to deliver his promise of legal right to possession.

   Example: Richard owns and leases Charter House to Serena. Prior to the lease, Richard had borrowed money from OmniBank, giving OmniBank a mortgage on Charter House to secure repayment. OmniBank has paramount title, but so long as Richard is not in default on the loan, there will be no interference with Serena's right of possession. But if Richard defaults, OmniBank forecloses on the mortgage and evicts Serena, Richard has breached his continuing obligation to deliver legal right of possession. See *Ganz v. Clark*, 252 N.Y. 99 (1929); *Standard Live Stock Co. v. Pentz*, 204 Cal. 618 (1928).

2. **Waiver by tenant:** A tenant may ***waive*** this obligation ***expressly***, or by virtue of the ***tenant's knowledge*** *at the time he enters into the lease* that there is a paramount title. If the tenant is ignorant of the paramount title and takes possession, he has not waived the landlord's obligation but he has no remedy until and unless the holder of paramount title interferes with his actual possession. By contrast, if the tenant does not know of the paramount title when he signs the lease, but learns of it before he takes possession, the tenant is entitled to repudiate the lease without penalty.

C. **Obligation to deliver actual possession?** The problem here is another facet of a tenant holdover. Does the landlord have an obligation implied in law to deliver ***actual possession*** to the new tenant at the beginning of the term? If he does, the burden of removing the holdover tenant is borne entirely by the landlord and the landlord is liable to the new tenant for damages resulting from delay in placing him in possession. If he does not, the burden of ousting the holdover falls on the new tenant.

★**Example:** Dusch leased premises to Hannan for a 15-year term, beginning on January 1, 1928. When that date arrived the old tenant had not moved out and Hannan was unable to take actual physical possession. The lease contained no explicit term obligating Dusch to deliver physical possession to Hannan at commencement of the lease term. Hannan sought damages attributable to Dusch's violation of an alleged implied-in-law obligation to deliver physical possession. In ***Hannan v. Dusch***, 154 Va. 356 (1930), the Virginia Supreme Court sustained Dusch's demurrer, reasoning that a landlord's obligation was to deliver the *legal right to possession* to the new tenant, not actual physical possession. This rule is often termed the American rule; the obligation to deliver actual physical possession is usually called the English rule.

1. **The English rule:** Under this view (said to be the majority view of American states) the ***landlord has an implied-in-law obligation to deliver actual possession*** to the tenant on the first day of the lease term. See, e.g., *Coe v. Clay*, 130 Eng. Rep. 113 (1829); *Jinks v. Edwards*, 11 Exch. 775 (1856); *Adrian v. Rabinowitz*, 116 N.J.L. 586 (1936); *Herpolsheimer v. Christopher*, 76 Neb. 352 (1907); *King v. Reynolds*, 67 Ala. 229 (1880). The rationale for the English rule is that the lessee "expects to enjoy the property, not a mere chance of a lawsuit." Also, the landlord (especially a large one) is probably more efficient at ousting the holdover because he

is likely to be more familiar with eviction procedures. Finally, a landlord is more apt to know when a holdover problem is likely to occur and can thus avoid the problem by refraining from a lease in advance of vacation.

a. **Tenant remedies:** The tenant may either: (1) ***terminate the lease,*** find other premises, and recover ***damages*** pertinent to this exercise in musical chairs, or (2) ***adhere to the lease, withhold rent*** for the period he is out of possession, and ***recover damages*** related to the lost possession. If the tenant affirms the lease, the measure of damages is the excess of fair market value over the agreed rental for the period of lost possession, plus special damages (e.g., storage costs, temporary quarters). Special damages may, but usually do not, include lost profits. Lost profit claims must be supported by especially clear proof. If the tenant terminates the lease, his damages are measured by the excess of the replacement rent over the agreed rent (assuming equivalent premises) for the lease term, plus special damages (e.g., storage costs, transaction costs associated with the replacement leasehold).

b. **Partial possession:** If the tenant is deprived of only part of the leased premises, the tenant is entitled only to abate a proportionate share of the rent for the period of lost possession. Do not confuse this with the independent phenomena of a landlord's partial eviction of a tenant in possession, which may give the tenant the right to suspend rent entirely, depending on the jurisdiction. See VI.B, below.

c. **Waiver:** Some jurisdictions applying the English rule permit the parties to waive this obligation in the lease. See, e.g., Restatement (2d) of Property, §6.2. Other English rule jurisdictions do not permit waiver. See,e.g., URLTA §1.403. Because leases are also contracts, some jurisdictions that otherwise permit waiver might find a particular purported waiver to be unenforceable as unconscionable (e.g., the waiver is in microscopic type on page 10 of a 15-page lease).

2. **The American rule:** Under this approach, which is the minority rule in the United States, the landlord has no implied obligation to deliver actual possession. The tenant has the legal right to possession; obtaining actual possession is up to the tenant. See ***Hannan v. Dusch,*** 154 Va. 356 (1930); *Snider v. Deban,* 249 Mass. 59 (1924); *Gazzolo v. Chambers,* 73 Ill. 75 (1874). Justifications offered for this rule are: (1) The landlord is not responsible for wrongful possessors after the tenant takes possession so he should not be responsible for those existing at the dawn of the lease term, (2) the lease delivers to the tenant the landlord's possessory rights, so the wrongful possession interferes only with the tenant's rights, and (3) the tenant could have bargained for an express promise of the landlord to deliver actual possession.

   a. **Tenant's remedies:** The tenant has the same rights against the holdover tenant that the landlord would have had, absent the new lease. The incoming tenant can treat the holdover as a trespasser and evict and recover damages, or the incoming tenant can renew the holdover for a new term, receiving the rent from the holdover. See II.E, above. These may not be satisfactory remedies to most incoming tenants, especially in residential leases.

   b. **Landlord's remedies:** The logic of the American rule suggests that the landlord should have no remedies against the holdover tenant, but American rule jurisdictions frequently ignore logic and permit the landlord to elect one of the customary remedies. There is some practical sense in this, because an incoming tenant in an American rule jurisdiction, disgusted with what law serves up to him, is simply apt to disappear.

c. **Modification by agreement:** In American rule jurisdictions the parties are free to create an express obligation on the landlord's part to deliver actual possession. Indeed, one of the rationales for the American rule is that parties may do so. It is obviously a good idea for tenants in American rule jurisdictions to insist on such an express promise from the landlord.

D. **Tenant obligation to take possession:** Tenants have no obligation to take possession or to use the leasehold for a particular purpose, ***unless the lease obligates them to do so.*** Absent such an express promise, the tenant is free to leave the leased space vacant, although he is still obliged to pay the rent. Sometimes this situation may constitute an abandonment of the leasehold by the tenant, with the consequences discussed in V.C, below. This issue can become important where the rent is simply a stated percentage of the tenant's sales at the leased premises.

Example: Byron, owner of a parcel located next to an exit from an interstate highway, leases it to Major Brand Gas, a national refiner and retailer of gasoline, for a term of 15 years at a rent of 3 cents per gallon of gasoline sold at the premises. If Major Brand Gas never occupies the parcel, Byron is an enormous loser. Byron would be extremely foolish to sign such a lease without explicit promises from Major Brand to build a first-class gasoline station, occupy it, and use its best efforts to sell as much gasoline as possible. Cf. *Mercury Investment Co. v. F. W. Woolworth Co.*, 706 P. 2d 523 (1985).

IV. SUBLEASES AND ASSIGNMENTS

A. **Introduction:** An ***assignment*** of a leasehold places the assignee in ***privity of estate*** with the landlord, meaning that the assignee and landlord are liable to each other for performance of the lease obligations that "run" with the leasehold estate — carry over from one estate holder to the next. See IV.B.1.a, below. An assignment of the *landlord's reversion* similarly places the assignee and the tenant in privity of estate. Assignment, by itself, does not destroy ***privity of*** **contract,** which means that the contractual duties created by a lease continue to be personal obligations of the original parties to the lease even after assignment. By contrast, a ***sublease*** by the tenant does **not** ***create privity of estate*** between the landlord and the subtenant. *The subtenant is liable only to the tenant for the sublease obligations, and the subtenant has no claim against the landlord for failure to perform his lease obligations. There is generally no privity of contract, either, because only the tenant and subtenant have a contractual relationship.* Consequently, the critical issue usually is to decide whether any given transfer of a leasehold is an assignment or a sublease.

B. **Assignment:** An assignment is the ***transfer of the party's*** **entire interest** ***under the lease.*** If a tenant retains any interest it is a sublease. See IV.C, below. The methods of deciding whether any given transfer is an assignment or sublease are discussed in IV.D, below. Unless the lease prohibits or conditions assignment, either the landlord or the tenant may freely assign the reversion or leasehold, respectively, that they hold. Most leases either prohibit assignment by the tenant, or require the tenant to obtain the landlord's consent.

1. **Privity of estate:** An assignment places the assignee in privity of estate with the other original party. Privity of estate is rooted in the idea that leaseholds are an estate in land.

Example: Lord leases Blackacre to Tenant, who assigns the leasehold to Newcomer. Lord and Newcomer are now in privity of estate with respect to Blackacre; Lord and Newcomer have the relationship of landlord and tenant.

The consequence of being in privity of estate is that the assignee is obligated to perform all the lease covenants that "run with the estate." See IV.B.1.a, below. Perhaps the most important lease promise that runs with the estate is the promise to pay rent.

Example: The lease between Lord and Tenant provided that Tenant would pay $1,000 per month rent. This promise runs with the estate. Because Newcomer is in privity of estate with respect to Blackacre, Newcomer must perform the promise and pay the rent.

a. Promises that run with the leasehold estate: For a promise to run with the leasehold estate, and thus be enforceable against assignees, the following elements must be present:

i. Intent: The original parties to the lease must intend that the promise bind assignees.

ii. Privity: The assignee must be in ***either*** privity of estate or privity of contract with the party enforcing the promise or against whom the promise is sought to be enforced.

iii. "Touch and concern": The promise must "touch and concern" the assigned estate — either the leasehold (when the tenant assigns) or the reversion (when the landlord assigns). A promise "touches and concerns" an estate when its performance (or non-performance) is integrally connected with the ***use or enjoyment*** of the estate. Any promise has both a ***benefit*** and a ***burden.*** For an assignee to enforce a promise or to have a promise enforced against her, it must be shown that the benefit of the promise, or the burden of the promise, respectively, touches and concerns the assignee's estate.

Example: L1 leases Blackacre to T1, who promises to keep the fences mended. If L1 assigns her reversion to L2, L2 must prove that the benefit of this promise touches and concerns L2's reversion in order to enforce it against T1. If T1 assigns his leasehold to T2, L1 must show that the burden of the promise touches and concerns T2's leasehold in order to enforce it against T2. If L2 seeks to enforce it against T2, L2 must demonstrate that both burden and benefit touch and concern the leasehold and reversion, respectively.

Most of the contentious issues revolve around "touch and concern." Usually, both the benefit and burden of a promise will either touch or concern the relevant estates, or neither will. But sometimes a landlord (or tenant) will extract a promise that benefits other property of the landlord (or tenant), and not the reversion (or leasehold).

Example: Landlord leases Blackacre to Tenant, and Tenant promises not to build a fast food restaurant on Blackacre. Landlord operates Quik Fat, a fast food restaurant located on Whiteacre, a neighboring property. Tenant's leasehold is burdened but Landlord's reversion is not benefited. Rather, the benefit resides in Whiteacre, Landlord's neighboring property.

b. Personal promises don't run: A personal promise does not run with the estate, but the promisor remains obligated to perform it even after assignment, unless he is released from the obligation. See IV.B.2.a, below.

Example: Landlord leases Blackacre to Tenant and Tenant promises to walk Landlord's dog daily. Tenant then assigns her leasehold to Katt, who refuses to walk the dog. The promise is personal to Tenant, does not burden the leasehold (because it does not "touch or concern" the leasehold) and so cannot be enforced against Katt. However, Landlord can enforce the promise against Tenant, even after the assignment.

2. **Privity of contract:** Remember that a lease is also a contract. An assignment does not, by itself, destroy the binding effect of contractual promises as personal obligations.

   Example: Lord leases Blackacre to Tenant, who assigns the leasehold to Newcomer, who fails to pay the rent. Lord may sue Newcomer because Newcomer is in ***privity of estate*** with Lord, but Lord *may also sue Tenant,* because Tenant and Lord remain in ***privity of contract*** with each other. Of course, Lord can only recover once, but Lord has two pockets out of which to satisfy his judgment.

   a. **Release and novation:** To destroy privity of contract it is necessary for the landlord and original tenant to agree to release each other from their contractual promises. A landlord's consent to an assignment and acceptance of rent from the tenant's assignee ***does not constitute a release.*** There must be clear evidence of a landlord's intent to release, usually found in some explicit agreement. This ***express release,*** when coupled with a promise by the assignee to ***assume performance*** of the lease obligations, is called a ***novation.***

      Example: If Newcomer had expressly agreed to assume the obligations of Tenant in the lease, and Lord had expressly agreed to release Tenant from his obligation to perform those promises, a novation would have occurred. Tenant would no longer be in privity of contract with Lord. Thus, because the assignment placed Newcomer in privity of estate with Lord (in substitution of Tenant), Tenant would have no liability to Lord.

   b. **Assumption:** Assumption of performance of the lease obligations can occur without release, a condition that places both the original tenant and the assignee in privity of contract.

      Example: Suppose the instrument of assignment between Tenant and Newcomer contained an explicit consent by Lord to the assignment and an express assumption of the lease obligations by Newcomer. Now both Tenant and Newcomer would be in privity of contract. Tenant remains in privity under the original lease because there has been no release. Newcomer and Lord forged a new contractual relationship, the terms of which are embodied in the lease, by their bilateral promises — Lord's consent to the assignment and Newcomer's promise of assumption.

      In states that recognize the contract notion of ***third party beneficiary,*** an assignee can become in privity of contract with the landlord by an ***express assumption*** of the lease obligations.

      Example: Suppose that the instrument of assignment by which Tenant assigned his leasehold to Newcomer recited that "Newcomer assumes the obligation to perform all of Tenant's duties under the lease." Lord is the third party beneficiary of this promise and thus Lord and Newcomer are in privity of contract.

      Once privity of contract is created by assumption it remains until and unless the contractual obligations are released.

      Example: Newcomer assumes Tenant's lease obligations to Lord and performs them diligently. Then Newcomer assigns the lease to Thrifty, who is now in privity of estate (but not privity of contract) with Lord, because Thrifty does not assume the lease obligations. Thrifty performs, then assigns the lease to Deadbeat, who defaults. Absent any releases, Newcomer and Tenant are both liable for Deadbeat's default, because they are in privity of contract with Lord. Thrifty has no liability: his privity of estate ended with the assignment to

Deadbeat and he was never in privity of contract. See, e.g., *First American Natl. Bank of Nashville v. Chicken System of America, Inc.*, 616 S.W. 2d 156 (Tenn. 1980).

Assumption will *not be implied from the mere fact of assignment,* or from the fact that the instrument of assignment recites that the assignment is "subject to the lease" or "subject to the obligations and covenants of the lease." See 1 American Law of Property §3.61. An express assumption is needed. Once in privity of contract, the assuming tenant remains in privity until released.

3. **Assignor tenant liability:** When a tenant assigns his leasehold and ***is not released from the contract*** he remains liable to the landlord. Upon default, the landlord is free to sue either or both of the original tenant and assignee. If the landlord recovers from the assignor tenant the assignor tenant is ***subrogated*** — succeeds to — the landlord's claims as against the defaulting assignee tenant and the assignor tenant will be entitled to recover from the assignee tenant any amount he pays to landlord on behalf of the assignee's default.

   Example: Tenant assigns his leasehold in Blackacre to Newcomer. Newcomer fails to pay rent for 6 months. Lord sues Tenant and recovers $6,000. Tenant is subrogated to Lord's status as a creditor of Newcomer, which means that Tenant can now pursue Lord's claim against Newcomer and recover the $6,000.

4. **Multiple assignments:** When a leasehold is assigned several times things may appear more complicated but the general rules outlined still apply. Keep in mind the following: An assignee in ***privity of contract*** with the landlord remains liable for the default of subsequent assignees, however remote, unless there has been a release. An assignee in ***privity of estate*** with the landlord is liable only for the default that occurs ***during the period in which there is privity of estate.*** An assignor who has not been released remains in ***privity of contract*** with the landlord and is liable for the default of any assignee.

   Example: Tenant assigns to Newcomer, who assigns to Thrifty, who assigns to Deadbeat. Newcomer commits no default, Thrifty defaults on 1 month's rent of $1,000, and Deadbeat defaults on 5 months' rent. Tenant is liable to Lord for all the defaults ($6,000) because he is in privity of contract and has not been released, but Tenant is entitled by subrogation to recover $1,000 from Thrifty and $5,000 from Deadbeat. Newcomer has no liability, because he was never in privity of contract and no default occurred during his period of privity of estate. Thrifty is liable to Lord for $1,000 because he was only in privity of estate and $1,000 is the measure of his default during that period of privity. For the same reasons, Deadbeat is liable to Lord for $5,000.

C. **Subleases:** A ***sublease*** occurs when the lessee transfers ***anything less than his entire interest in the leasehold,*** thereby retaining a ***reversion.*** A minority of states treat the retention of a ***right of entry*** as sufficient to create a sublease. See IV.D, below. Absent a prohibition in the principal lease, a tenant is free to sublease at will, although many leases prohibit subletting or condition a sublease upon the landlord's approval.

   Example: Owner leases Blackacre to Lessee for a term of 4 years under a lease that says nothing about subletting. A year later, Lessee transfers possession to Subb for a year. A sublease between Lessee and Subb is created, with Lessee as the sublessor and Subb as the sublessee.

   A sublessee has ***neither privity of contract nor privity of estate*** with the principal lessor. A sublessor remains in both privity of contract and privity of estate with his landlord. The sublessor

and sublessee are in privity of contract and privity of estate with respect to their new contract — the sublease.

Example: Owner leased Blackacre to Lessee for a rent of $1,000 per month. Lessee subleased Blackacre to Subb for a rent of $1,500 per month. Lessee remains in privity of estate and privity of contract with Owner. Subb is in neither relationship with Owner, but Subb is in privity of contract and privity of estate with Lessee, with respect to the separate sublease contract. The result is that Owner is entitled to receive $1,000 per month from Lessee and, under the sublease, Lessee is entitled to receive $1,500 per month from Subb.

The fact that the subtenant has no personal liability to the landlord under the principal lease has its negative qualities from the subtenant's perspective.

1. **Tenant default under the principal lease:** If the principal tenant/sublessor defaults on the principal lease the landlord is entitled to terminate the principal lease. Because the sublease is merely a lease of whatever leasehold the principal tenant had, and that leasehold is now over, the subtenant has no further right of possession.

   Example: Suppose that Lessee subleases Blackacre to Subb for 1 year for a rent of $18,000, payable in advance. Lessee collects the $18,000, Subb takes possession, and Lessee fails to pay any rent to Owner under the principal lease. Two months later Owner exercises his right under the principal lease to terminate that lease. Subb has no further right of possession, despite having paid Lessee the year's rental in advance. Subb's remedy is a lawsuit against Lessee for breach of the sublease.

   To prevent such disastrous outcomes, subtenants often insist on paying the tenant/sublessor's rental obligation directly to the landlord of the principal lease, and remitting any excess between the principal lease obligation and the sublease rental to the sublessor.

D. Distinguishing an assignment from a sublease: Courts claim to use two methods to determine whether any given transfer is a sublease or assignment: (1) examining the ***substance*** of the transaction *to determine if the tenant has transferred her entire interest in the leasehold,* and (2) examining the ***intentions of the parties.***

1. **Parties' intentions:** The problem with intentions is that the parties often do not appreciate the legal significance of the two modes — assignment and sublease — and so lack any real intention. Sometimes courts rely on the words the parties use to characterize the transfer, but the words are insignificant if the parties don't understand the legal consequences. If they do appreciate the legal significance the substance will probably support their intentions, making reliance on labels unnecessary.

   ★**Example:** In June 1960, Ernst leased some land to Rogers for 53 weeks under a lease that required Ernst's consent to any assignment or sublease. Rogers took possession, built a "Go-Cart" track on the premises, and then in July 1960 agreed to sell the business to Conditt. In August 1960, Ernst and Rogers signed an agreement by which the term of the lease was extended to July 31, 1962, and Ernst consented to the "subletting" of the premises to Conditt upon the "express condition" that Rogers would remain personally liable for performance of the lease. Rogers signed a statement on the same agreement by which he "sublet the premises" to Conditt and Conditt signed yet another statement on the document by which he "accepted" the "foregoing subletting of the premises." Conditt ceased rent payments in November 1960 and, after the extended term expired, Ernst sued Conditt for the unpaid rent on the theory that

the lease had been assigned from Rogers to Conditt, and thus Conditt was in privity of estate with Ernst. Conditt denied liability to Ernst because the August 1960 document characterized the transaction as a sublease. In ***Ersnt v. Conditt,*** 54 Tenn. App. 328 (1964), a Tennessee appeals court applied the principle that the parties' intentions control this question, and concluded that the parties intended an assignment. The evidence that the court relied on to reach this decision about intentions, however, was much the same as would be used under the common law test of substance: Rogers parted with his entire interest in the lease; Conditt acquired every iota of Rogers's interest and paid the rent directly to Ernst.

Example: Jaber transferred his leasehold to Miller under an instrument entitled "assignment" but which expressly reserved in Jaber the right to re-enter if the "assignee" defaulted. Rent payments were made by the assignee, Miller, to Jaber. The Arkansas Supreme Court mostly ignored the substance of the parties' dealings in professing to ascertain their intentions, but found those intentions exclusively in their chosen nomenclature: "assignment." *Jaber v. Miller,* 219 Ark. 59 (1951).

Courts relying on intentions do look beyond labels, though. If the transfer is for an increased rent, a sublease is usually indicated. If the transfer is for a lump sum, assignment is the usual inference. If the transferee expressly assumes the lease obligations an assignment is the inferred intention.

2. **Substance of the transfer:** Courts that examine the substance of the transfer may well parse the labels the parties place on the transfer but are more likely to examine whether the transferring tenant has reserved a sufficient interest in the leasehold to constitute a sublease.

   a. **Reversion:** The common law rule was that the transfer was an assignment ***unless*** the tenant retained a reversion, no matter how brief its duration.

      Example: Tenant transfers the "remainder of the term of my leasehold, 40 years, except for the very last second of the term." This is enough of a reversion at common law — one second! — to qualify as a sublease.

   b. **Right of re-entry:** A right of re-entry is simply the right to retake possession if the transferee defaults. At common law, this right, which was not a reversion and lacked any certain duration, was not an estate and so not enough to create a sublease.

      Example: Tenant transfers the "remainder of the term of my leasehold, 40 years, but reserves the right to re-enter and retake possession in the event of any default by transferee." The common law view was that Tenant had transferred her entire interest in the leasehold and so an assignment had occurred.

      A significant minority of American states treat the retention by the tenant of a right of reentry, when coupled with a transfer of the remainder of the term, as sufficient to create a sublease. See, e.g., *Dunlap v. Bullard,* 131 Mass. 161 (1881); *Davis v. Vidal,* 105 Tex. 444 (1912); *Hartman Ranch Co. v. Associated Oil Co.,* 10 Cal. 2d 232 (1937). This view is also endorsed by the Restatement (2d) of Property, §15.1, comment i.

3. **Pitfalls of error:** Two common misadventures result from erroneously thinking an assignment is a sublease.

   a. **Double rent:** A transferee who thinks he has a sublease (but actually has an assignment) and pays the rent to the tenant/sublessor will find that he is liable for the same rent to the landlord (assuming the tenant/sublessor pockets the rent). The transferee may recover the

sums paid to the tenant/sublessor if he is solvent. Fortunately, this condition will not persist for long, as the landlord will not likely let too many months go by with unpaid rent.

b. Merger: A tenant who "subleases" for the entire remainder of his term (at a handsome profit) will find that he is denied that profit if he fails to retain a reversion or a right of reentry, assuming that retained right is enough to create a sublease. The transfer is an assignment and the "subtenant's" occupation places him in privity of estate with the landlord, thus extinguishing through merger the intervening purported subleasehold. See *Webb v. Russell*, 3 Term Rep. 393, 100 Eng. Rep. 639 (1789); *Smiley v. Van Winkle*, 6 Cal. 605 (1856).

E. Lease provisions restricting assignment or sublease: Unless a lease expressly limits or prohibits assignment or sublease, a tenant is free to transfer the leasehold by either method. However, most leases do contain such restrictions.

1. Strict construction: Because restrictions on assignment or sublease hinder alienability they are narrowly construed by courts, but are generally valid.

Example: *L* leases Blackacre to *T*, under a lease prohibiting "any assignment by *T*," *T* is free to sublease. If *L* leases to *T* under a lease prohibiting "any sublease by *T*," *T* is free to assign the leasehold.

Express restrictions only apply to ***voluntary inter vivos*** transfers.

Example: *L* leases Blackacre to *T*, under a lease prohibiting "any transfer, whether by assignment or sublease." If *T* dies, devising the unexpired leasehold to his daughter, *D*, the covenant has no effect. The result is the same if *T* dies intestate and *D* takes the leasehold by intestate succession.

Of course, even when an express restriction does apply the landlord may consent to a transfer.

2. Limits on landlord power to deny consent: Common law permitted a landlord to deny consent to a transfer ***for any reason, or for no reason at all.*** That view is under attack.

a. Anti-discrimination laws: Anti-discrimination statutes (see IX.C, below) limit landlord ability to reject prospective tenants, including assignees or sublessees.

b. Implied obligation of reasonableness: A number of states have implied a landlord obligation to ***act reasonably when denying consent to a transfer,*** a position endorsed by the Restatement (2d) of Property, §15.2, and adopted by statute in some states. This obligation is typically limited to ***commercial leases only.***

★**Example:** Ernest Pestana, Inc. was the lessor of 14,000 square feet of hangar space at the San Jose municipal airport, under a master lease that required his consent to any assignment or sublease of the leasehold. Bixler, the tenant, agreed to sell his entire airplane maintenance business to Kendall, including assignment to Kendall of Bixler's leasehold. Kendall was financially stronger and richer than Bixler and was willing to assume the leasehold obligations. Nevertheless, Ernest Pestana, Inc., refused to consent to the assignment unless the rent was increased and "other more onerous terms" were imposed. Kendall sued Ernest Pestana, Inc., claiming that its refusal to consent to assignment was unreasonable and an unlawful restraint on alienation. In ***Kendall v. Ernest Pestana, Inc.,*** 40 Cal. 3d 488 (1985), the California Supreme Court held that in a commercial lease a landlord may withhold consent to transfer only when the landlord has a ***commercially reasonable objection*** to the transfer. See also *Newman v. Hinky-Dinky Omaha Lincoln, Inc.*, 229 Neb. 382 (1988).

However, these jurisdictions typically uphold flat bans on transfers (see, e.g., Calif. Civ. Code §1995.230), and some even uphold lease provisions that *explicitly* give the landlord the right to deny consent arbitrarily. See, e.g., *Julian v. Christopher*, 320 Md. 1 (1990). Moreover, so long as freely negotiated, "termination and recapture" clauses are permissible. Such a clause requires the tenant to notify the landlord of the identity of an intended transferee and the terms of the proposed transfer, gives the landlord the right to then terminate the lease and enter into a new lease with the intended transferee, and explicitly stipulates that any profit that results belongs to the landlord, not the tenant. See, e.g., *Carma Dev. v. Marathon Dev. California, Inc.*, 2 Cal. 4th 342 (1992). Yet, despite this trend toward an implied obligation of reasonableness, some states have rejected it and reaffirmed the traditional common law doctrine. See, e.g., *Merchants Row Corp. v. Merchants Row, Inc.*, 412 Mass. 204 (1992); *First Federal Sav. Bank v. Key Markets, Inc.*, 559 N.E. 2d 600 (Ind. 1990). The rationale for the emerging view is the perception that increased alienability is a practical necessity in our restless society. The rationale for judicial rejection of an implied obligation of reasonableness is that legislatures ought to make this essentially social judgment, and that commercial lessees particularly are usually able to protect themselves in lease negotiations. In residential lease settings, courts have been especially reluctant to hold landlords to the obligation of reasonableness, partly out of fear of a flood of litigation. See, e.g., *Slavin v. Rent Control Bd. of Brookline*, 406 Mass. 458 (1990).

c. **What's reasonable?** Courts apply an ***objective*** test to this question. Landlords may reject transferees of doubtful financial strength or if the transferee's proposed use is not suitable in light of other commercial uses of this or similar property, but landlords may not reject transferees to secure a commercial advantage or because the transferee's proposed use is ethically offensive to the landlord though otherwise reasonable.

Example: Harry, an enormous landlord, rejects Ted, a transferee, because Ted was a tenant in another building owned by Harry, and Harry desired to retain Ted as a tenant. Harry and Ted were at a stalemate in negotiations over a new lease, and Harry's rejection of Ted as a transferee was designed to pressure Ted into accepting Harry's terms. Harry's rejection was not reasonable. See *Krieger v. Helmsley-Spear, Inc.*, 62 N.J. 423 (1973).

Example: Landlord, a religious organization that abhors abortion as a tenet of the faith, refuses to consent to a transfer to a birth control and abortion counseling center, although the center was financially responsible and its use was otherwise suitable. Landlord's rejection was not ***commercially*** reasonable. See *American Book Co. v. Yeshiva Univ. Dev. Found.*, 59 Misc. 2d 31, 297 N.Y.S. 2d 156 (1969).

3. **Landlord waiver:** A landlord may waive lease restrictions on transfer, either expressly or by implication, usually as a result of knowing acceptance of rent from an assignee. An old common law rule, originating in *Dumpor's Case*, 4 Coke 119b, 76 Eng. Rep. 1110 (1578), holds that ***once the landlord has expressly waived a transfer restriction the restriction is destroyed*** **unless he specifically reserves the right to bar future transfers.** Though heavily criticized as nonsensical, and rejected by the Restatement (2d) of Property, §16.1, this rule is still followed by many American jurisdictions. The rule in *Dumpor's Case* is easily avoided, though, by either (1) an express declaration by the landlord, at the time of transfer, that waiver is ***limited to this transfer only,*** or (2) an express statement in the lease that transfer restrictions bind the ***tenant's assignees,*** thus preserving the transfer restrictions as to future assignees.

V. TENANT'S OBLIGATIONS

A. Introduction: A tenant's obligations are defined by the lease, but in the absence of an express lease provision the law presumes the existence of certain duties. The nature of these duties reflects the hybrid nature of leaseholds — both an estate and a contract.

B. Pay the rent: This is the principal obligation. At common law it was an ***independent obligation,*** meaning that the tenant had to pay rent regardless of the landlord's breach of any of his obligations. This view reflected the conception of a leasehold as an estate and the rent as the payment for the estate. In most American jurisdictions today, the rent obligation is ***dependent*** on the landlord's performance of his lease obligations, reflecting the modern conception of the lease as a contract. Upon landlord breach in these jurisdictions, a tenant may terminate and vacate, withhold rent, or abate a portion of the rent. See VII, below. The right to receive the rent is normally part of the landlord's reversion, but can be separately assigned or retained upon any transfer of the reversion.

1. **Amount of rent:** The rent amount is virtually always stipulated in the lease but, if not, the tenant must pay the ***reasonable rental value*** for the occupied property. This same rule applies if the lease is void for some reason, such as noncompliance with applicable housing and building codes.

2. **Accrual:** Unless the lease says otherwise, rent is due on the last day of the term (e.g., at the end of the month in a periodic tenancy from month to month; on the last day of the term in a tenancy for a term of years). Many states have, by statute, changed this rule to provide for apportionment of rent when a lease is terminated in mid-term. A handful of states hold that, for any purpose, rent is apportioned daily throughout the term. See Restatement (2d) of Property, §12.1.

C. Waste avoidance: Given the limited duration of a leasehold estate, the common law imposed on tenants the duty to avoid waste. The duty to avoid permissive, or involuntary, waste (see Chapter 2, V.D.2) is addressed in the ***duty to repair.*** The duty to avoid affirmative, or voluntary, waste (see Chapter 2, V.D.1) is addressed in the ***duty to avoid damage.***

1. **The duty to repair:** Common law required a tenant to keep the premises in good repair, ***ordinary wear and tear excepted,*** but imposed no obligation to make extraordinary or substantial repairs. The common law duty may be altered by agreement in the lease, and many states have modified it by imposing a duty to repair on the landlord, either by statute or an implied-in-law warranty of habitability on the part of the landlord. See VI.C, below.

   a. **Alteration by agreement:** The common law rule allows ordinary deterioration of the premises because the landlord has no repair obligation and the tenant's duty is limited. Thus, leases typically address responsibility for repairing ordinary wear and tear. Except when the result is unconscionable or where prohibited by law (see VII.C, below) the parties may agree to impose the repair obligation however they wish. A typical lease might impose on the landlord the duty to make exterior or structural repairs, with the tenant obligated to make all remaining repairs.

      i. **"General repair" clauses:** A "general repair" clause obligates either tenant or landlord to make all repairs necessary to preserve the property in the same condition as it was at the outset of the lease term. A tenant who is bound by an unqualified general repair clause is traditionally obligated to make ***any and all repairs,*** even including the ***duty to rebuild*** after complete destruction of the premises by acts not of the tenant's fault (e.g., flood, earth-

quake, hurricane, war, riot). See, e.g., *Chambers v. North River Line,* 179 N.C. 199 (1920); *Armstrong v. Maybee,* 17 Wash. 24 (1897). The same rule applies to a landlord bound by an unqualified general repair clause. This rule is eroding: By statute, some states have eliminated the tenant duty to rebuild and judicial decisions are undermining its vitality. See, e.g., *Washington Hydroculture, Inc. v. Payne,* 96 Wash. 2d 322 (1981).

2. **The duty to avoid damage:** Affirmative acts of the tenant that ***substantially damage*** the premises constitute affirmative (voluntary) waste, and are breaches of this duty. To constitute waste the damage must change the appearance, function, or utility of the property, and be "extraordinary in scope and effect, or unusual in expenditure." *Pross v. Excelsior Cleaning & Dyeing Co.,* 179 N.Y.S. 176 (1919).

   Example: Tenant replaced a defective ceiling, added a light fixture and switch, a closet, and a window frame. These changes were not waste, even though the ceiling replacement was substandard. *Rumiche Corp. v. Eisenreich,* 40 N.Y. 2d 174 (1976).

   Although common law courts held that ameliorative waste violated the duty to avoid damage most courts today reach the opposite conclusion, so long as there is no long-term economic loss inflicted on the landlord.

D. Refrain from illegal uses: Tenants may not devote the leasehold premises to illegal uses. At common law, the landlord's remedy and the tenant's continued right to occupation depended on whether the landlord knew of the intended illegal use at the time the leasehold was created.

1. **Landlord knowledge of intended illegal use:** If the landlord actually intended the tenant to make illegal use, or if the landlord simply knew of the tenant's intention to make illegal use, the lease was ***unenforceable at common law.*** While the landlord could not recover rent, he could recover possession because there was no valid leasehold created. This is still good law, with the added wrinkle that the landlord may not even recover possession if eviction constitutes unlawful retaliation. See VII.C, below. See, e.g., *Brown v. Southall Realty Co.,* 237 A. 2d 834 (D.C. App. 1968); Restatement (2d) of Property, §9.1.

2. **Landlord ignorance of illegal use:** At common law, if the landlord was ignorant of the tenant's illegal use, the lease remained ***enforceable.*** Absent an express provision in the lease, the landlord could not terminate, but could only enjoin the illegal use and obtain damages. The preferred view today is to permit the landlord to terminate the lease if she acts while the illegal use is ongoing or within a short time of its cessation. See Restatement (2d) of Property, §12.5.

E. Honesty as to intended purpose: As with all transactions, a tenant has a duty not to misrepresent his intentions. Even if the tenant's use is completely legal, but is utterly inconsistent with his representations, the landlord may terminate the lease because of the misrepresentation.

Example: Landlord leases space to Tenant, on the strength of Tenant's representation that no toxic chemicals will be used on the property. After occupation, Tenant uses the property for stripping chrome plating from metal parts. To do so, Tenant uses a variety of legal, but toxic, chemicals and takes care to employ and dispose of them in compliance with all applicable laws. Landlord may terminate the lease because of the misrepresentation.

F. Duty not to commit nuisance: Any possessor of land, including a tenant, has the obligation not to commit a nuisance — a nontrespass interference with the use and enjoyment by others of their property. Reasonable noise or other activity that is bothersome to other tenants in an apartment

building does not constitute nuisance. Landlords often insert express covenants against noise or other disturbance, but these covenants are construed to prohibit only ***unreasonable noise or disturbance,*** so they add little to the common law duty not to commit nuisance. On nuisance generally, see Chapter 8.

G. Duties from express lease provisions: The lease may impose just about any duty imaginable on a tenant, so long as the duty is not illegal, unconscionable, or otherwise violates public policy. Read the lease carefully!

H. Circumstances excusing tenant of obligations: The common law did not admit of any such excuses. The tenant had purchased a leasehold estate, and any act of a third party preventing the tenant from enjoying the estate was his problem. The tenant still had to perform all of his leasehold obligations, including rent payment.

Example: Tenant leases Blackacre, a large country home, for a term of years. Civil war breaks out during the term and one side destroys Blackacre. Tough luck; the tenant still must pay rent. See, e.g., *Paradine v. Jane,* 82 Eng. Rep. 897 (1647).

Modern law has softened this harsh doctrine by recognizing a number of such excuses, summarized here.

1. **Sole use becomes illegal:** If the tenant has bargained for one specific use, which later becomes illegal, the tenant is excused.

   Example: Landlord and Tenant agree that the leasehold property will be used solely for a brewery. Prohibition arrives. The intended use is now illegal. Tenant is excused from the lease. *Brunswick-Balke Collender Co. v. Seattle Brewing & Malting Co.,* 98 Wash. 12 (1917); Restatement (2d) of Property, §9.2.

2. **Primary use illegal but other uses permitted:** If the tenant has not bargained for a specific use, but the tenant's actual use is now illegal and the premises may ***reasonably*** be used for another purpose by the tenant, the tenant is ***not excused.*** Restatement (2d), §9.2.

3. **Conditional legality of use:** If the ***sole intended use*** may be continued only by ***obtaining a governmental permit*** (typically a conditional use permit or zoning variance) jurisdictions split on whether the tenant or the landlord is obliged to apply for the permit, though most place the burden on the tenant. See, e.g., *Warshawsky v. American Automotive Products Co.,* 12 Ill. App. 2d 178 (1956). All jurisdictions excuse the tenant if the permit is denied.

4. **Destruction of the leasehold property:** Destruction of the property, even by causes outside the tenant's control, was no excuse at common law. This is not true today, unless a tenant foolishly undertakes such an obligation pursuant to an express lease provision. See V.C.1.a.i, above. By statute, most states permit a tenant to terminate if the premises are destroyed or rendered unusable for their intended purpose, unless the destruction is due to tenant negligence or intentional misconduct. See, e.g., *Albert M. Greenfield & Co., Inc. v. Kolea,* 475 Pa. 351 (1976); Restatement (2d) of Property, §5.4.; URLTA §4.106.

5. **Loss by eminent domain:** When governments take leased property by exercising their power of eminent domain the leasehold is automatically terminated. The very idea of a government taking is to seize all private interests in the property. The government must fairly compensate owners of the interests taken, though, so the tenant is entitled to just compensation for the value of the remainder of the leasehold. For eminent domain generally, see Chapter 11.

a. **Amount of compensation:** Governments provide a lump-sum payment for ***all*** the interests taken, so there must be an apportionment of the award between the landlord and the tenant. The tenant is entitled to the fair market value of the remainder of the leasehold minus the rent obligation for that period. A tenant will receive nothing unless he holds an advantageous lease — the fair market value exceeds the rental obligation. A tenant may sometimes receive damages reflecting the cost of relocation or of damage to items, like fixtures, that are not taken by the government but must be severed from the taken leasehold ("severance damages").

6. **Frustration of intended purpose:** In a ***commercial lease only*** a tenant may be excused if (1) ***extreme hardship*** would result from (2) some third party's ***unforeseeable*** action (usually a government) that (3) makes the ***mutually intended purpose of the leasehold*** (4) ***virtually impossible*** to accomplish. This is ***very difficult to prove.*** This concept is ***not*** the same thing as the contract doctrine of impossibility of performance — performance is possible, but accomplishment of the intended purpose is not.

VI. LANDLORD'S REMEDIES

A. **Introduction:** There are a variety of remedies available to a landlord to deal with a tenant's default under the lease. Some are the product of a lease provision, others are provided by statute, and still others are old common law remedies.

B. **Remedies typically derived from lease provisions:** As the remedies discussed in this section illustrate, a landlord can augment his remedies by a well-drafted lease.

1. **Rent acceleration:** A rent acceleration clause makes the rent for the entire balance of the term immediately payable (if the landlord so elects) upon a tenant default under the lease. Because the parties were free to prepay rent for the entire term at the outset, courts find nothing infirm about a rent acceleration clause. See, e.g. Restatement (2d) of Property, §12.1. If a landlord elects to accelerate rent she may not terminate the lease. By accelerating rent the landlord has chosen to enforce an immediate sale of the balance of the lease term. A landlord may not sell the remainder of the term and then take it away from the tenant. For the same reason, a landlord who retakes possession after tenant abandonment may not then elect to accelerate rent.

   a. **Prepaid rent:** If a tenant prepays rent (e.g., pays the last month's rent at inception of the lease, the landlord is entitled to retain the prepaid rent if the tenant terminates without justification before expiration of the lease term. The rationale for this rule is the same as that justifying rent acceleration.

2. **Security deposits:** Almost every lease contains a security deposit clause, under which the tenant deposits a sum of money as security for her performance of the tenant's lease obligations. The landlord is indebted to the tenant and must return the deposit at expiration of the leasehold, less any charges attributable to tenant default, and provide an accounting of the deposit amount. Some states require, by statute, that security deposits bear interest, or be placed in trust or escrow accounts. Other statutes penalize landlords for failure to provide an accounting. Some states make tenants a preferred class of creditor in the event of landlord insolvency.

3. **Liquidated damages:** A lease may provide for liquidated damages but such clauses are not always valid. Generally, the amount of liquidated damages must be reasonably related to the probable amount of damages suffered by the landlord upon tenant default, but those damages

must not be capable of easy determination. This validity rule is, of course, a bit of a "Catch 22." A security deposit may be retained as ***liquidated damages*** only if this test can be met. Lease clauses that provide for increased rent (e.g., double rent) upon default (as well as acceleration) are of doubtful validity. The increased rent is, in effect, a liquidated damage clause and it is unlikely that the probable damages (even if not readily ascertainable) are reasonably related to the increased amount of accelerated rent.

4. **Confession of judgment:** Leases sometimes provide that, upon default, the tenant agrees to waive personal service of process and authorizes someone (perhaps anybody, perhaps a landlord nominee) to confess judgment against him. This permits the landlord to reduce his claim to judgment quickly, cheaply, and ***without notice to the tenant,*** who may well have some defense, because lease covenants are mostly dependent today. Confession of judgment clauses have been widely prohibited by statute and are of doubtful validity even where apparently permitted. See, e.g., URLTA §1.403.

C. **Remedies derived from statute and common law:** Most common law remedies have been codified by statute and altered in that codification. Accordingly, this section treats them as a package.

1. **Eviction:** Because lease covenants were regarded as independent, the common law did not permit a landlord to terminate the lease and evict the tenant upon default, even for nonpayment of rent. The landlord could only sue for the unpaid rent. Today, because lease covenants are generally regarded as dependent, statutes permit a landlord to terminate the lease and evict the tenant for nonpayment of rent, but usually not for breach of most other lease covenants. As a result, most leases contain express provisions permitting the landlord to terminate the lease upon tenant ***default of any lease obligation.*** Of course, even at early common law the landlord had the power to evict the holdover tenant — the tenant who remained unlawfully after expiration of the term.

   a. **Procedural prerequisites for eviction after tenant default:** If the lease provides only that the landlord ***may terminate*** upon tenant default, the landlord has retained a ***right of re-entry*** which must be properly exercised before the landlord becomes entitled to possession and may evict. If, instead, the lease provides that the lease terminates automatically after the landlord notifies the tenant of termination following tenant default, the lease is ***determinable*** and the landlord is entitled to immediate possession, thus hastening eviction. As explained below, this distinction has been partially eroded by statute.

      i. **Right of re-entry:** To perfect the right to eviction, the landlord must notify the tenant of the default and permit the tenant a ***reasonable time to cure the default.*** See Restatement (2d) of Property, §13.1. In some states, the landlord may not be entitled to proceed judicially by a summary proceeding, where the only issue is entitlement to possession. See VI.C.1.b, below. Many states have, by statute, made summary proceedings available to landlords regardless of whether the forfeiture provision in the lease is determinable or confers a right of re-entry.

      ii. **Determinable:** If the lease is determinable the landlord is immediately entitled to possession and may proceed judicially by a summary proceeding.

   b. **Summary proceedings: Unlawful detainer:** The most expeditious judicial eviction remedy is the summary proceeding known variously as ***unlawful detainer*** or ***forcible entry and detainer.*** This remedy is created by statute, and every American state has enacted such a statute.

i. **Notice to quit:** Under a typical statute the landlord is required to give the tenant minimal notice before filing suit (called ***notice to quit,*** and often no more than 3 days). The substance of a notice to quit is that the landlord will terminate the lease and file suit for unlawful detainer if the default (usually nonpayment of rent) is not cured within 3 days.

ii. **Unlawful detainer procedures:** Unlawful detainer suits are entitled to a calendar preference on the court's docket and are speedily concluded. The only issue that is permitted to be contested is ***entitlement to possession.*** Thus, the landlord must prove that the lease has been validly terminated and he is now entitled to possession. This means that the landlord will usually have to prove the fact of tenant default and proper notice to quit. Tenants may defend only on grounds that, if proven, would give the tenant a continued right to possession.

Example: A residential tenant in an unlawful detainer action may defend on the ground that the landlord has violated his implied-in-law obligation to provide habitable premises, on the theory that breach of this obligation abates the rent obligation and that, because no rent is due, the landlord is not entitled to possession. *Jack Spring, Inc. v. Little,* 50 Ill. 2d 351 (1972). On the landlord's implied warranty of habitability, see VII.C, below.

Depending on the state, a jury trial may be available and sometimes may be constitutionally required. See *Pernell v. Southall Realty,* 416 U.S. 363 (1974). Appeals are usually allowed, although a stay of execution of judgment may be conditioned upon posting of adequate security.

c. **Ejectment:** Ejectment was the traditional common law remedy and is still available. It is not used much because it is not a summary proceeding and so not entitled to any calendar preference. Moreover, a tenant in an ejectment action is entitled to plead and prove any affirmative defense or counterclaim she may have, and can implead third parties.

d. **Landlord self-help:** At common law a landlord was entitled to use ***reasonable force*** to oust the tenant himself, but American jurisdictions are badly splintered on this remedy.

i. **No self-help:** A slender minority of states absolutely forbid self-help. In these states, a tenant may recover personal and property damages if ousted nonjudicially by the landlord. See, e.g., *Kassan v. Stout,* 9 Cal. 3d 39 (1973). In these jurisdictions, lease provisions giving the landlord the right to use self-help upon tenant default and termination are void. See, e.g., *Jordan v. Talbot,* 55 Cal. 2d 597 (1961).

★**Example:** Wiley leased premises to Berg for use as a restaurant, under a lease that required Berg to obtain written permission from Wiley to alter the structure, obligated Berg to operate her restaurant lawfully, and gave Wiley the right to retake possession upon default. Berg's restaurant was cited for health code violations and she began to remodel the premises without Wiley's written permission. Wiley notified Berg that if the lease violations were not corrected in 2 weeks he would retake possession. Fifteen days later, the violations having gone uncorrected, Wiley entered the premises and changed the locks. Berg sued Wiley for damages consisting of property damage and lost profits and was awarded $34,500 by a jury. The trial court ruled that Wiley's self-help repossession was "wrongful as a matter of law." In ***Berg v. Wiley,*** 264 N.W. 2d 145 (Minn. 1978), the Minnesota Supreme Court affirmed that ruling, declaring that "the only lawful means to dispossess a tenant who has not abandoned nor voluntarily surrendered but who

claims possession adversely to a landlord's claim of breach of a written lease is by resort to judicial process." The rationale for this "modern rule" is that self-help always carries with it the risk of violence or other breach of the peace. The common law response was that peaceful self-help was valid, but self-help that involved breach of the peace was wrongful. The landlord assumed the risk of breach of the peace by engaging in self-help.

ii. **Reasonably forceful self-help:** At the opposite end of the spectrum are those states that permit landlords to use reasonable force to oust the tenant. See, e.g., *Shorter v. Shelton,* 183 Va. 819 (1945); *Gower v. Waters,* 125 Me. 223 (1926).

iii. **Peaceable self-help:** The common law rule, still observed in many jurisdictions, limits self-help to peaceful ouster. See, e.g., *Rucker v. Wynn,* 212 Ga. App. 69 (1994), involving a commercial lease that explicitly permitted the landlord to exercise self-help upon tenant default. However, some of these jurisdictions define force so broadly that practically no ouster will be considered peaceful, making these states virtually indistinguishable in practice from those that prohibit self-help.

2. **Tenant abandonment:** If a tenant abandons the leasehold premises in the midst of a valid lease term the tenant is regarded as having offered to ***surrender*** the lease. Traditionally, the landlord has one of three options: (1) accept the offered surrender and ***terminate the lease,*** (2) reject the surrender by ***leaving the premises untouched,*** thus preserving the landlord's entitlement to rent as it comes due for the remainder of the term, or (3) ***retake possession and relet the premises*** for the benefit of the tenant. Today, the neatness of these options has broken down: Some jurisdictions prohibit the second option (at least for residential leases), thus forcing the landlord into the first or third options in order to discharge a ***duty to mitigate damages.*** Some states regard the third option (when undertaken voluntarily and under some circumstances) as effecting a surrender.

a. **Termination:** If the landlord elects to terminate the lease after tenant abandonment the tenant is treated as having surrendered the lease. Tenant obligations cease at the moment of termination and surrender, not the moment of abandonment. Similarly, if the landlord elects to terminate, termination becomes the landlord's exclusive remedy. The tenant's liability for unpaid rent accrues to the moment of termination plus damages created by the abandonment.

i. **Damages:** Most of the damage caused by abandonment consists of the transactional costs of finding a new tenant, plus whatever shortfall exists between the lease rentals for the remainder of the surrendered lease and the fair market value of that remainder. At common law the landlord was not entitled to damages resulting from abandonment because the common law regarded the rent obligation as nonexistent until it came due under the lease. This rule is still followed in some jurisdictions. See, e.g., *Jordan v. Nickell,* 253 S.W. 2d 237 (Ky. 1952). Other states apply the contract doctrine of anticipatory repudiation to leases (because leases are contracts as well as estates) and permit the landlord to recover damages when the tenant has made it clear that he is not only abandoning but denies any further lease obligations. See, e.g., *Kanter v. Safran,* 68 So. 2d 553 (Fla. 1953). Damages recoverable from anticipatory repudiation are limited to a period in which such damages can be "reasonably forecast." See, e.g., *Hawkinson v. Johnston,* 122 F. 2d 724 (8th Cir. 1941), in which such damages were limited to a 10-year period even though there were 67 years left in the lease term.

b. Leave the premises untouched: Because a lease is also an estate, the *traditional but now minority view* is that the tenant is free to abandon his unpaid-for property but is still liable for the payments if the landlord elects to leave the premises undisturbed. This rule rejects the idea that the landlord has a duty to mitigate the damages resulting from tenant abandonment. See, e.g., Restatement (2d) of Property, §12.1(3). See, e.g., *Holy Properties v. Kenneth Cole Productions, Inc.*, 87 N.Y. 2d 130 (1995). The justifications for this rule vary: (1) The tenant is in breach and he should not be able to impose duties on the landlord by his misconduct, (2) The tenant bought possession for a term and if he wishes to throw money away by not using his purchase that is his problem, not the landlord's, (3) A duty to relet an abandoned apartment might deprive the landlord of marginal rents by diverting prospective tenants of a vacant but not abandoned apartment to an abandoned one, and (4) The contrary rule encourages abandonment. In *Holy Properties* the New York Court of Appeals thought that commercial expectations about governing law was reason to adhere to this long-held common law principle, regardless of any logical defects it may have.

c. Retake and relet for the tenant: A landlord may retake possession and relet the premises for the tenant's account either ***voluntarily*** or pursuant to a ***duty to mitigate damages*** imposed by law.

i. Voluntary action: If a landlord voluntarily retakes possession and relets on the tenant's account, he must be careful to avoid action that implies acceptance of the offered surrender. In some states, acceptance of surrender is implied by reletting unless the tenant has consented to the reletting. Other states conclude that reletting without notice to the tenant constitutes acceptance of surrender. Still other states regard acceptance of surrender as determined by the landlord's intent, and treat the landlord's acts simply as evidence bearing upon his intent. Virtually all states regard reletting for a term longer than the abandoned term as acceptance of surrender. The importance to the landlord of avoiding acceptance of surrender is that, absent surrender, the rental obligation remains intact. If surrender occurs, the rental obligation ceases, although the landlord might still be able to recover damages equal to the shortfall between the original lease rentals and the relet rentals. See, e.g., *Lennon v. U.S. Theatre Corp.*, 920 F. 2d 996 (D.C. Cir. 1990).

ii. Duty to mitigate damages: Most states now hold that a landlord is not free to do nothing after tenant abandonment, but should be ***held to a duty to mitigate damages caused by the tenant's abandonment.*** See, e.g., *United States Natl. Bank of Oregon v. Homeland, Inc.*, 291 Ore. 374 (1981).

★**Example:** Kridel leased an apartment from Sommer for a 2-year term, beginning May 1, 1972. On May 19, 1972 Kridel wrote Sommer that his impending marriage would not occur and that as a result he had neither a need for the apartment nor the funds to pay the rent. He explicitly offered to surrender the lease and agreed to forfeit the 2-months rent he had prepaid. Sommer did not reply and refused to show the apartment to prospective tenants who were ready, willing, and able to rent it. On September 1, 1973 Sommer finally rented the apartment and sought damages for unpaid rent from Kridel for the period May, 1972 through August, 1973. In ***Sommer v. Kridel,*** 74 N.J. 446 (1977), the New Jersey Supreme Court overruled the prior common law rule and held that a landlord had a duty to mitigate damages once a tenant has abandoned. This rule promotes use of scarce housing resources and avoids deadweight losses. In ***Sommer*** the New Jersey court

imposed the burden of proof on the landlord to show that he had exercised reasonable diligence to relet the apartment and that in doing so he had treated the abandoned apartment as one of his vacant stock. That may be the minority rule. Compare *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.*, 948 S.W. 2d 293 (Tex. 1997) (burden of proof of mitigation or its absence on tenant) with *Snyder v. Ambrose*, 266 Ill. App. 3d 163 (1994) (burden of proof on landlord).

These jurisdictions divide on the question of whether this landlord option should be abolished for ***all leases*** or only for ***residential leases.*** Most of these states limit abolition to residential leases. But see *McGuire v. City of Jersey City*, 125 N.J. 310 (1991).

3. **Seizure of the tenant's personal property:** If a tenant failed to pay the rent, the common law entitled the landlord to seize the tenant's personal property in the leased premises and to hold it until the tenant cured the default. This was called ***distress,*** or ***distraint.*** Some states have abolished distress completely; others have substituted a more limited right, usually requiring the landlord not to breach the peace and sometimes forbidding landlord self-help altogether. See Restatement (2d) of Property, §12.1, statutory note.

   a. **Liens on personal property:** A related remedy, provided by statute, is a lien in favor of the landlord against the tenant's personal property on the leased premises, in order to secure performance of the tenant's obligations. The landlord has no right to seize these goods by himself, and must file suit to enforce the lien.

VII. LANDLORD'S OBLIGATIONS AND TENANT'S REMEDIES

A. Introduction: The landlord's obligations considered here are either implied or imposed by operation of law. These and other obligations can also be imposed by agreement in the lease. The tenant's remedies for breach of these obligations are considered in the context of each obligation.

B. Quiet enjoyment: Every tenant has the right to ***quiet enjoyment*** of the leased premises. A landlord may explicitly promise the tenant quiet enjoyment but it doesn't matter much, because this obligation is also implied in law. One aspect of this obligation — the landlord's obligation to deliver to the tenant the legal right to possession of the premises — was considered in III.B, above. Another aspect of this obligation is considered here: the ***duty of the landlord to refrain from wrongful*** **actual** ***or*** **constructive** ***eviction*** of the tenant. Unlike other lease obligations, common law made the tenant's duty to pay rent conditional upon the landlord's performance of this obligation.

1. **Actual total eviction:** A tenant who has been ***totally ousted from physical possession*** of the leased premises — whether by the landlord or by someone with better title than the landlord — no longer is obligated to pay rent and may elect to terminate the lease.

2. **Actual partial eviction:** The traditional rule is that actual physical ouster of the tenant from ***any part of the premises*** relieves the tenant of the obligation to pay ***any rent at all*** until and unless the tenant is restored to possession of the entire leasehold property. This is true even if the tenant remains in possession of the rest of the property.

   Example: Landlord permits a brick wall to encroach upon Tenant's leased property, ousting Tenant of a small strip of land. Tenant's rent obligation is suspended until the wall is removed, restoring him to full possession. *Smith v. McEnany*, 170 Mass. 26 (1897).

The preferred view of academics is to permit only ***partial abatement*** of rent in cases of actual partial eviction and to give the tenant the further option of termination or suit for damages. Restatement (2d) of Property, §6.1.

a. **By a third party under paramount title:** If actual partial eviction occurs by a third party holding paramount title, the tenant's rent obligation is only ***partially abated.*** This makes sense only because of recording acts (see Chapter 6) that effectively define paramount title as a claim of which the tenant has actual or constructive knowledge. If the tenant knew about the better title, or with reasonable diligence should have known about it, the landlord ought not be punished for the tenant's assumption of a known risk.

3. **Constructive eviction:** If the landlord ***substantially interferes*** with the tenant's use and enjoyment of the leased property — so much so that the intended purposes of the tenant's occupation is frustrated — a ***constructive eviction*** has occurred. Eviction is constructive, rather than actual, because the tenant has ***not been physically ousted;*** instead, the utility of physical possession has been virtually destroyed. The tenant may terminate the lease, move out, and thereafter will be excused from any further lease obligations.

Example: If the owner of high-rise office building promises but fails to provide heat, air conditioning, or elevator service after normal working hours a constructive eviction has occurred, not a partial actual eviction. See, e.g., *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124 (1959); *Barash v. Penn. Terminal Real Estate Corp.*, 26 N.Y. 2d 77 (1970). There are three elements to constructive eviction: (1) ***wrongful act or failure of the landlord,*** (2) ***substantial and material deprivation of the tenant's beneficial use and enjoyment of the premises,*** and (3) ***complete vacation of the premises*** by the tenant.

a. **Landlord's wrongful action:** The ***landlord*** must act wrongfully, ***not a third party.*** If the alleged wrongful act is the landlord's failure to act, the landlord must be under a duty to act.

Example: Landlord refuses to provide heat on weekends, even though the lease expressly obligates Landlord to provide heat "at all times." Landlord is under a duty to act; his failure to act is wrongful.

If a third party causes the interference it is usually not constructive eviction. This is normally true even if the third party is another tenant. "The general, but not universal, rule . . . is that a landlord is not chargeable because one tenant is causing annoyance to another, even where the annoying conduct would be a breach of the landlord's covenant of quiet enjoyment if the landlord were the miscreant." *Blackett v. Olanoff,* 371 Mass. 714 (1977). However, a landlord is responsible for tenant actions that constitute a ***nuisance*** or which occur in ***common areas*** under the control of the landlord. Some courts have held that actions of a tenant may be attributable to the landlord if the landlord could control them and the "disturbing condition was the natural and probable consequence" of landlord action.

Example: Landlord maintained a residential apartment building and then leased adjacent space to a nightclub, under a lease that obligated the nightclub to conduct operations so as not to disturb the residential tenants. Nightclub's entertainment was so loud and prolonged that residential tenants could not sleep and even had difficulty conversing within their apartments. Because Landlord retained the power to control Nightclub's conduct, introduced the problem, and the result was a natural and probable consequence of Landlord's action, Nightclub's action was deemed to be Landlord's. *Blackett v. Olanoff,* 371 Mass. 714 (1977).

Example: Tenant leased space in a shopping mall to sell patio furniture. Landlord promised Tenant that it would take action to abate the "[l]oud music, screams, shouts and yells" from Body Electric, an adjacent workout salon. The interference "caused walls to vibrate" and prevented normal business operations. Landlord's failure to act on his promise was wrongful, and it was no defense that Tenant had agreed in the lease that Landlord would neither be liable for its failure to perform its obligations nor for actions of other tenants. *Barton v. Mitchell Co.*, 507 So. 2d 148 (Fla. App. 1987).

Some courts go so far as to reason that because the landlord has the *power* to control his tenants he has a *duty* to control them in order to preserve the quiet enjoyment to which tenants are entitled. See *Bocchini v. Gorn Management Co.*, 69 Md. App. 1 (1986).

b. Substantial interference with tenant use and enjoyment: The rule is easy to state: The tenant must be so "essentially deprived of the beneficial enjoyment of the leased premises [that] they are rendered unsuitable for occupancy for the purposes for which they are leased." *Barton v. Mitchell Co.* Application is more difficult. Courts try to be objective, taking into account the duration and severity of the interference, its foreseeability, and the ease or difficulty of abatement.

★**Example:** Cooper leased office space on the bottom floor of a building. Landlord maintained an adjacent driveway in such a manner that after every rainstorm Cooper's space would be inundated with water running off the driveway. The problem waxed and waned, but eventually became so repeated and severe that she could not conduct normal business at the premises and had to rent space in a hotel for a sales meeting. Cooper was sufficiently deprived of her use and enjoyment of the premises to constitute constructive eviction. A single flooding would probably not have been sufficient. Cooper did not waive her claim of constructive eviction by remaining in possession for an unreasonably long time, because after each flooding incident she was assured by the landlord's agent that the problem would be corrected, and the landlord did attempt to fix the problem, albeit unsuccessfully. ***Reste Realty Corp. v. Cooper,*** 53 N.J. 444 (1969). Cooper did not know of the problem before signing the lease. If she had known, she would have been deemed to have waived any constructive eviction claim arising from that problem.

c. Complete vacation of the premises: A tenant may not remain in possession and still press a constructive eviction claim. The tenant must completely vacate the premises within a reasonable time after the interference. A "reasonable time" depends on all the circumstances.

★**Example:** In ***Reste Realty Corp. v. Cooper,*** the tenant remained in possession through a succession of floods, but was led to believe that the problem might be corrected. She left for good after the last big flood and it was apparent that the problem would not be fixed. That was reasonable.

However, if the tenant moves out and a court later determines that there was no constructive eviction, the tenant has abandoned the leasehold and is very likely liable for unpaid rent or damages from anticipatory repudiation. See VI.C.2, above. One solution is to permit the tenant to bring an action for declaratory relief, prior to vacating the premises, to establish whether it would be constructive eviction if the tenant actually vacates. Cf. *Charles E. Burt, Inc. v. Seven Grand Corp.*, 340 Mass. 124 (1959) (dicta). Another solution is the Restatement position that a tenant ought to have the option of vacation and termination (at the tenant's risk that there is no constructive eviction) or remain in possession and receive damages or rent abatement or both. Restatement (2d) of Property. §6.1.

d. Tenant remedies after vacation: The tenant's rent liability stops and the lease is terminated upon justified vacation of the premises. The tenant is also entitled to recover damages caused by the constructive eviction.

C. Warranty of habitability: The traditional rule is that a landlord has no implied obligation to warrant that property is suitable for the intended purposes of the tenant, so long as the tenant "has a reasonable opportunity of examining the property and judging for himself as to its qualities." *Anderson Drive-In Theatre v. Kirkpatrick,* 123 Ind. App. 388 (1953). Under the traditional view a landlord has such an obligation only if he expressly makes such a warranty; otherwise, "the rule of caveat emptor applies." Id. This rule has partially broken down.

1. Implied warranty of habitability: General: The modern trend is to imply into every residential lease a warranty of habitability, but this is still a minority view. The majority rule is typified by *Miles v. Shauntee,* 664 S.W. 2d 512 (Ky. 1983), in which the Kentucky Supreme Court rejected the idea that a warranty could be implied by the existence of housing codes: "It is for the legislature to create rights and duties nonexistent under the common law . . . .No implied warranty of habitability exists under Kentucky law." The Restatement phrases this emerging duty as a warranty of suitability for residential use. Restatement (2d) of Property, §5.1. Under either label it is really an implied-in-law obligation of the landlord to provide premises that are fit for human inhabitation, both at the inception of the lease and continuing throughout the lease term. This obligation consists of ***two separate obligations:*** (1) An "implied warranty of habitability" that properly refers to the warranty implied at ***inception of the lease*** and (2) an implied ***continuing duty of repair.*** Neither courts nor commentators make this distinction with any regularity; in practice, both are lumped together as the implied warranty of habitability.

a. Illegal lease: A lease of premises that the landlord knows is not habitable and in violation of local housing codes at the inception of the lease is an illegal, unenforceable lease, the result of which is that the tenant is a tenant at sufferance and the landlord may only recover the "reasonable" rental value of the premises. See *Brown v. Southall Realty Co.,* 237 A. 2d 834 (D.C. 1968). By contrast, a lease of property that degenerates during the term into an uninhabitable condition is valid though in breach of the implied warranty of habitability.

2. Implied warranty of habitability: Rationale: The implied warranty of habitability is defended on several grounds: (1) implied warranties of quality and fitness are a commonplace feature of contract law and, because leases are contracts, should be a feature of landlord-tenant law; (2) urban tenants lack the skills necessary to repair uninhabitable premises and the judgment necessary to detect such premises; (3) an implied warranty of habitability is necessary to redress the unequal bargaining power of rich landlords and poor tenants; and (4) an implied warranty will encourage compliance with local housing codes.

★**Example:** Hilder rented an apartment in Rutland, Vermont, from St. Peter. The apartment was filthy, lacked a locking front door, had plumbing that leaked water through the walls and ceilings causing chunks of plaster to fall onto a child's crib, had inoperable electrical outlets and switches, and had a broken buried sewer line that produced raw sewage in the basement which emitted intolerable odors and caused an inoperable toilet that remained clogged with feces and other waste even after repeated flushing with pails of water. In ***Hilder v. St. Peter,*** 144 Vt. 150 (1984), the Vermont Supreme Court held that these conditions resulted in breach of the implied warranty of habitability. See also *Javins v. First Natl. Realty Corp.,* 428 F. 2d 1071 (D.C. Cir. 1970).

3. **Implied warranty of habitability: Criticism:** The implied warranty is often criticized on economic grounds. If implied warranties achieve their intended effect by forcing landlords to improve the condition of leased premises the result will be to reduce the supply of low-income housing and raise its price. See Richard Posner, Economic Analysis of the Law, §16.6 (4th ed., 1992), for a complete demonstration of this conclusion. The standard remedy for breach of the implied warranty of habitability is to abate the rent obligation, but "[f]rom the standpoint of protecting poor people [this] is particularly pernicious." Id. It raises landlords' costs (thus increasing rental rates in times of low vacancy) and reduces the supply of rental housing because landlords have an additional incentive either to withdraw from the market by converting their property to some other use (e.g. commercial or conversion to condominiums), or to improve the housing to the point that it is no longer affordable by the poor. The entire movement toward implied warranties of habitability has been marked by a belief that it aids the poor, but critics contend that perhaps this may be another example of the road to Hell being paved with good intentions.

4. **Scope of the implied warranty of habitability:** The implied warranty is generally limited to residential leases, but there are a few cases applying it to small-scale commercial tenants. See, e.g., *Davidow v. Inwood North Professional Group,* 747 S.W. 2d 373 (Tex. 1988). The measure of "habitability" is usually the standards set by the local housing code, because the acknowledged objective of proponents of the implied warranty is to spur compliance with such codes. However, minor violations of housing codes that do not immediately affect habitability do not trigger the landlord's implied duty to repair the premises. Nor is the landlord in breach until he has been ***notified of the uninhabitable condition and given a reasonable opportunity to correct the problem.***

★**Example:** After Hilder had rented her Vermont apartment from St. Peter, she repeatedly drew its manifold defects to the attention of St. Peter, but he did nothing to correct the problems which persisted for at least 9 months. ***Hilder v. St. Peter,*** 144 Vt. 150 (1984). See also *King v. Moorehead,* 495 S.W. 2d 65 (Mo. App. 1973).

5. **Tenant's remedies for landlord breach of the implied warranty of habitability:** Upon breach, and after notice to the landlord, the tenant's rent obligation is suspended and the tenant has the following remedies.

   a. **Terminate and leave:** The tenant may terminate the lease, vacate the premises, and recover damages (usually relocation costs plus the excess of replacement rentals over the lease rentals for the balance of the term).

   b. **Stay and withhold rent:** The tenant may remain in possession and withhold rent, pending landlord correction of the defects. Restatement (2d) of Property, §11.3, provides that a tenant must notify the landlord of exercise of this remedy and deposit rent into an escrow account.

   c. **Stay and repair:** The tenant may remain in possession and use a reasonable amount of the rent to make repairs sufficient to bring the premises into habitable condition. *Marini v. Ireland,* 56 N.J. 130 (1970). Some states have codified this remedy in statutory "repair and deduct" provisions that specify how much rent may be used for repair purposes and how frequently this remedy may be invoked. See, e.g., Cal. Civ. Code §1942.

   d. **Stay and recover damages:** The tenant may remain in possession and recover ***damages in the form of a rent abatement or deduction*** plus, in some jurisdictions, damages for ***discomfort and annoyance.*** See, e.g., ***Hilder v. St. Peter,*** 144 Vt. 150 (1984). There are three different measures of the amount of damages in the form of a rent deduction.

i. **Value as warranted:** The tenant is entitled to the difference between the value of the premises ***as warranted*** (i.e., in habitable condition) and the value of the premises ***as is*** (i.e., in uninhabitable condition), up to the amount of the stated rent. The stated rent is rebuttably presumed to be the value as warranted. In essence, this method causes the stated rent to be reduced to actual value, which may be zero. This seems to be the prevailing method. See, e.g., ***Hilder v. St. Peter,*** 144 Vt. 150 (1984); *Berzito v. Gambino,* 63 N.J. 460 (1973).

Example: George leases an uninhabitable apartment to Amy for $150 a month. Amy proves that the value of the apartment if it were habitable is $200 a month, rebutting the presumption that stated rent equals value as warranted. The apartment's value "as is" is $100 a month. Amy is entitled to the difference between the last two values, or $100 a month, deducted from the stated rent of $150 a month, leaving Amy with a rent obligation of $50 a month. If the value "as warranted" had been $275 a month, Amy's damages would have been $175 a month, or more than the stated rent, but Amy would be entitled only to a complete abatement of rent.

ii. **Value as-is:** The tenant is entitled to the difference between the ***stated rent*** and the ***actual fair value*** of the premises in their uninhabitable condition. See, e.g., *Kline v. Burns,* 111 N.H. 87 (1971). If the stated rent accurately reflects the fair value of the premises in their dilapidated state, damages are nil. Of course, in that situation the tenant is not paying for more than he receives.

Example: George leases the same dilapidated apartment to Amy for $150 a month, and its actual value is $100 a month. Amy is entitled to damages in the form of a rent reduction of $50 a month, leaving her with a rent obligation of $100 a month. If the actual value of the apartment in its sorry state was $150 a month, Amy would not have been damaged.

iii. **Proportionate reduction:** The tenant's rent obligation is reduced to a percentage of the stated rent. The percentage is determined as follows: (1) compute the fair market value of the premises ***as warranted*** (habitable); (2) compute the value ***as is*** (uninhabitable); (3) compute the percentage relationship of actual value to warranted value; and (4) apply that percentage to the stated rent. Restatement (2d) of Property, §11.1 adopts this method.

Example: George leases the same substandard apartment to Amy for $150 a month. Its value as warranted (habitable) is $200 a month and its value as is (uninhabitable) is $100 a month, or 50 percent of the habitable value. Amy is entitled to damages in the form of a rent reduction of 50 percent of the stated rent, or $75 a month, leaving her with a rent obligation of $75 a month.

e. **Stay and defend:** The tenant can remain in possession and plead and prove the landlord's breach of the implied warranty as a ***complete defense*** to an eviction action ***based on the tenant's failure to pay rent.*** This is a complete defense because, after breach and notice to the landlord of the breach, there is ***no further rent obligation.*** See, e.g., ***Hilder v. St. Peter,*** 144 Vt. 150 (1984). ***Note:*** If the landlord is seeking to evict the tenant because the term has expired and the tenant is a holdover, this is ***not a defense.*** It is a defense only to a landlord's claim of possession founded on failure to pay rent.

f. **Punitive damages:** In circumstances involving willful, wanton, and fraudulent conduct on the part of the landlord a tenant may be entitled to recover punitive damages.

★**Example:** St. Peter, the landlord in ***Hilder v. St. Peter,*** falsely told Hilder that he would refund her security deposit if she cleaned the apartment (which she did) and told Hilder that he would furnish the heat even though the electrical furnace was wired through Hilder's electric meter (for which she was responsible to the utility). St. Peter also promised to fix the many defects but did absolutely nothing. The Vermont Supreme Court concluded that "[w]hen a landlord, after receiving notice of a defect, fails to repair the facility that is essential to the health and safety of his or her tenant, an award of punitive damages is proper." ***Hilder v. St Peter,*** 144 Vt. 150 (1984).

6. **Waiver by tenant:** Courts uniformly hold that a tenant may not waive the landlord's obligation to provide habitable premises. Some courts hold that the implied warranty of habitability may not be waived under any circumstances. See ***Hilder v. St. Peter,*** 144 Vt. 150 (1984). The Restatement (2d) of Property, §5.6, permits waiver of the landlord's obligations only to the extent such waiver is neither unconscionable or against public policy. The URLTA, §2.104, permits a limited imposition of a duty to repair on the tenant, but not elimination of the landlord's implied obligation to comply with housing codes.

7. **Statutory codification:** A number of states have enacted statutes that codify these rules, usually with some modifications that increase the breadth of tenant remedies. See, e.g., URLTA §2.104 (imposing specific landlord duties), §4.103 (repair and deduct remedy), §4.104 (permitting the tenant to obtain emergency services, such as heat, light, and even substitute housing by deducting its cost from rent), and §4.105 (permitting the tenant to offset her expenses incurred against landlord rent claims in summary eviction proceedings).

8. **The retaliatory eviction doctrine:** The traditional rule was that, so long as a landlord is entitled to possession, the landlord's ***motivation*** for evicting the tenant is ***irrelevant.*** Today, most jurisdictions hold that a landlord may not evict a tenant, even if he is otherwise entitled to do so, if the landlord seeks to evict the tenant in ***retaliation*** for the tenant's reporting of housing code violations to government authorities. See, e.g., *Dickhut v. Norton,* 45 Wis. 2d 389 (1970); *Edwards v. Habib,* 397 F. 2d 687 (D.C. Cir. 1968). This position is often codified by statute. See, e.g., URLTA §5.101; Restatement (2d) of Property, §§14.8, 14.9 and commentary thereto. The URLTA extends the retaliatory eviction doctrine to instances of tenant invocation of the implied warranty of habitability and it is likely that this position will be adopted by courts even in non-URLTA jurisdictions. At least one state, New Jersey, has moved beyond retaliatory eviction to provide that a landlord may "evict a tenant at the end of the lease term only for "good cause.'" Rabin, 69 Corn. L. Rev. 517, 534-535, citing N.J. Stat. Ann. §2A:18-61.1.

   a. **Rationale:** The rationale for the retaliatory eviction doctrine is that, without it, landlords will simply refuse to renew periodic tenancies (usually month to month) of tenants who have been so bold as to report substandard condition to government enforcement officials. To ensure the effective operation of housing codes, it is argued, landlords must be prevented from retaliating against tenants who report these violations of law.

   b. **Proof of retaliatory motive:** The tenant has the burden of proving retaliatory motivation. By statute, some states provide that retaliatory motive is presumed if the landlord terminates the lease, raises rent, or decreases services within some period (typically 90 to 180 days)

after the tenant has complained of housing code violations. In those states, the landlord has the burden of proving that his motive is not retaliatory. An alternative approach is to permit the landlord to evict after repairs have been made (action likely initiated by tenant complaint), but to impose on the landlord the burden of proving that he afforded the tenant a "reasonable opportunity to procure other housing." *Building Monitoring Systems, Inc. v. Paxton,* 905 P. 2d 1215 (Utah 1995).

c. **Available only to tenant not in default:** The retaliatory eviction defense is available only to a tenant ***not in default.*** Recall that a tenant who is withholding rent after landlord breach of the implied warranty of habitability is not in default.

d. **Eviction after retaliatory motive found:** A landlord who has been found to have sought a retaliatory eviction is not forever barred from eviction. If the landlord can later prove that there are good business reasons for eviction he is entitled to evict.

e. **Indirect eviction.** A landlord may not seek to evict a tenant ***indirectly*** in retaliation for the tenant's reporting of housing code violations. Indirect eviction can take a variety of forms, but typically consists of draconian reductions in service (e.g., a utility cutoff) or dramatic increases in rent that are designed to drive the tenant away. Such actions are treated as a form of retaliatory eviction.

D. Tort liability of landlords: This issue is a specialized application of the ordinary tort doctrine of negligence. Negligence is conduct that deviates from the standard of care — what a reasonable person would do in similar circumstances. Every person has a duty to use ordinary care to avoid foreseeable harm to others. Except for a few exceptions, the common law provided that landlords had no duty to make the leased premises safe for tenants or their guests. The tenant took the property as it was. If there were dangerous aspects to the premises that could be expected to injure others (e.g., a beam protruding into a dark doorway at head height) the tenant had the duty of correcting the condition and was liable to others for injury caused by his failure to do so. Today, the duty of landlords to maintain leased premises in a fashion that avoids foreseeable injury to others is increasing. This section deals with this phenomenon, but does not attempt to deal with all facets of the law of negligence. Your Torts course is the place for that.

1. **An aside on tort theory:** The law of torts developed on the principle of ***fault*** — people ought to be held responsible for their individual failures but nothing more. In the last half of the twentieth century American courts began to conceive of tort law as a device to ***share the cost of personal injury.*** Accordingly, the fault principle has been eroded (e.g., strict liability torts). In this area, a minority of courts seem willing to impose greater duties (and ultimately tort liabilities) on landlords because they believe that the (sometimes) extremely high cost of personal injury judgments will be borne by all tenants as a class through higher liability insurance premiums paid by landlords and passed on in higher rents. This rests on two assumptions: (1) liability insurance is endlessly available in sufficient amounts to share the costs of accidents widely, and (2) personal injury awards will fairly reflect the fault of tortfeasors and the true value of the injuries suffered. These assumptions may not be accurate in a world where tort law is no longer based entirely on fault. Nevertheless, expansion of duties and consequent tort liability continues.

2. **Pre-existing dangerous conditions:** The common law recognized the following exceptions to the general rule that a landlord had no tort liability to the tenant or his guests for dangerous conditions existing on the leased premises at the inception of the lease.

a. **Latent defects:** Because only the landlord would know (if anyone did) of a concealed defect, common law imposed on the landlord a duty to warn the tenant of their existence and the specifics of the defects. If the landlord did so and the tenant occupied anyway, the landlord had no liability to either the tenant or his guests. The tenant assumed the risk and acquired a duty to correct the condition.

b. **Public use:** A landlord is liable to the public for injuries occasioned by a defect ***existing at inception of the lease*** which is ***known to the landlord,*** if the premises are ***intended for use by members of the public,*** the landlord ***knows or should know that the tenant will probably not correct the defect*** before admitting the public, and the landlord has ***failed to use ordinary care to correct the defect.*** The term *public use* usually means use by any members of the public, though some courts interpret this more narrowly, confining it to cases where a great many members of the public are invited (e.g., a theater).

3. **Conditions occurring during the lease term:** A landlord generally has no liability for dangerous conditions that occur after the tenant has taken possession. A landlord can voluntarily assume such a duty, though, by undertaking repairs. If the repairs do not comport with the duty of ordinary care and skill, the landlord will be liable for resulting injuries.

4. **Common areas:** A landlord has a duty to exercise reasonable care over common areas that remain under his control. This duty extends to taking reasonable precautions to prevent criminal activity by third parties that injures tenants. See, e.g., *Kline v. 1500 Mass. Ave. Apt. Corp.,* 439 F. 2d 477 (1970).

5. **Landlord covenant to repair:** The common law rule was that a landlord assumed no tort duty of care by agreeing to repair leased premises. This view is rejected by most American jurisdictions today, as well as the Restatement (2d) of Torts, §357, and the Restatement (2d) of Property, §17.5.

6. **Statutory or judicially created duty of landlord to repair:** Landlords may be under a duty to repair that flows from a statute, like a housing code or a codified version of the implied warranty of habitability, or by virtue of a judicially created implied warranty of habitability. Failure to conform to a ***statutory duty*** may be treated as ***negligence*** **per se** or merely as ***evidence of negligence.*** Failure to make repairs sufficient to cure breach of the implied warranty of habitability may result in tort liability if the landlord was negligent in correcting the defect — he knew or should have known of the problem and failed to correct it within a reasonable time. See, e.g., *Dwyer v. Skyline Apartments, Inc.,* 123 N.J. Super 48, *aff'd* 63 N.J. 577 (1973).

7. **Strict liability:** California adopted and then rejected a rule of strict liability for personal injuries resulting from latent defects in leased property. See *Becker v. IRM Corp.,* 38 Cal. 3d 454 (1985), overturned by *Peterson v. Superior Court (Paribas),* 10 Cal. 4th 1185 (1995). An Indiana appellate court has hinted that the now-rejected California rule of strict liability might apply in the case of "professional landlords." See *Johnson v. Scandia Associates, Inc.,* 641 N.E. 2d 51 (Ind. App. 1994). Louisiana has a statutory rule of strict liability for defects in existence at inception of the lease term. Otherwise, no other jurisdiction seems to have followed California's experiment in strict liability.

8. **No special rules for landlords:** Perhaps fewer than ten American jurisdictions have rejected the categorical rules summarized above in favor of a rule that treats landlords like everybody else. In this approach, a landlord is liable to the tenant or third parties for injuries occurring on

the leased premises if the landlord failed to "act as a reasonable person under all the circumstances." *Sargent v. Ross,* 113 N.H. 388 (1973). The common law categories are treated as factors to be taken into consideration, but not used as rigid rules to define liability. See also *Pagelsdorf v. Safeco Insurance Co.,* 91 Wis. 2d 734 (1979).

9. **Exculpatory clauses:** An exculpatory clause in a lease is an attempt to relieve the landlord of any liability he might otherwise have to the tenant for personal injuries or property damage caused by defective conditions in the leased premises or common areas. Exculpatory clauses are generally ***valid,*** but some courts refuse to enforce them in ***residential leases,*** either because of supposed unequal bargaining power or because they are thought to increase the risk of personal injury. See, e.g., *Henrioulle v. Marin Ventures, Inc.,* 20 Cal. 3d 512 (1978); *Cardona v. Eden Realty Co.,* 118 N.J. Super. 381 (1972); *Cappaert v. Junker,* 413 So. 2d 378 (Miss. 1982); *McCutcheon v. United Homes Corp.,* 79 Wash. 2d 443 (1971). But see *O'Callaghan v. Waller & Beckwith Realty Co.,* 15 Ill. 2d 436 (1958) (upholding an exculpatory clause on the theory that landlords lack monopoly power). A later case decided by Illinois's intermediate appeals court, *Strauch v. Charles Apartments Co.,* 1 Ill. App. 3d 57 (1971), holds that exculpatory clauses are not automatically valid, but that the tenant has an opportunity to prove sufficiently unequal bargaining power to void the clause. Some states have voided exculpatory clauses by statute, usually with respect to residential leases but sometimes including commercial leases, too. See Restatement (2d) of Property, §17.3, statutory note. URLTA §1.403 voids exculpatory clauses in residential eases only. Except where voided by statute, exculpatory clauses are virtually always valid in commercial leases.

VIII. FIXTURES

A. Introduction: Tenants often attach personal property — ***chattels*** — to the leasehold premises. Who owns the chattels upon termination of the lease — landlord or tenant?

B. Fixtures: Fixtures belong to the landlord. Common law defined a fixture as any chattel ***permanently affixed*** to the leased property, a definition that merely shifted the focus to defining "permanent" and "affixed." The modern approach is to define "fixture" by examining the ***tenant's intent*** through such objective measures as how it is attached, what sort of chattel it is, and the damage that removal would cause. The last factor — ***removal damage*** — is often dispositive; if the removal damage is not substantial the chattel is not likely to be a fixture.

Example: Tenant removed a large pipe organ at the end of the lease term. To do so, tenant removed and restored part of a brick wall to the building. The damage was ***not irreparable,*** and after restoration (at tenant expense) the premises were in substantially their original condition. The Washington Supreme Court ruled that the pipe organ was not a fixture. *Ballard v. Alaska Theater Co.,* 93 Wash. 655 (1916).

1. **Trade fixtures:** Despite the general rule, a tenant is permitted to remove and retain ownership of trade fixtures — attached items of personal property used in carrying on a trade or business, broadly defined.

   Example: Tenant, a bookseller, bolts bookshelves to the wall and floor for display of the inventory. Though the shelves are as "permanently affixed" as is practical, courts regard them as trade fixtures and permit their removal at the end of the lease term.

C. **Attached chattels, but not fixtures:** If a tenant attaches a chattel to the property, but it is ***not a fixture*** (e.g., a bookcase secured to the wall to prevent earthquake damage) it belongs to the tenant ***unless the tenant leaves it behind at the end of the lease term.*** Such chattels belong to the landlord because the tenant has effectively abandoned them.

IX. SOCIAL REGULATIONS OF LEASEHOLDS

A. **Introduction:** Many of the issues discussed so far in this chapter involve "social regulation" of leaseholds, but this section deals with two particular areas of regulation that are avowedly for the accomplishment of larger social objectives.

B. **Rent control:** Rent control laws have been adopted in many places, usually at the local level. Rent control consists of price controls (set at below-market rates), usually augmented by limitations on a landlord's ability to evict tenants at the end of the lease term (thus curbing the landlord's ability to lease to a new tenant at market rates).

1. **Criticisms:** Rent controls are often criticized as unconstitutional takings of property without just compensation and as economically inefficient.

a. **Taking:** Some argue that rent control amounts to a governmental seizure of the landlord's reversion followed by its transfer to the tenant in place, coupled with an obligation delegated to the tenant to compensate the landlord for the seizure at a below-market rate. See Richard Epstein, Takings (1985). By this reasoning, rent control laws ought to be violations of the constitutional requirement that private property may not be taken for public use without payment of just compensation, but the Supreme Court has rejected that argument. See *Pennell v. City of San Jose,* 485 U.S. 1 (1988). But if the permitted rents are set so low that the landlord is deprived of a ***reasonable rate of return on his investment*** a taking has occurred. See generally Chapter 11.

b. **Economic inefficiency:** Rent controls and other similar limits placed on landlords are often criticized on the economic ground that they produce an inefficient allocation of housing resources.

★**Example:** Chicago enacted an ordinance that codified the implied warranty of habitability, required interest payments on tenant security deposits, permitted tenants to deduct the cost of minor repairs from rent and to withhold rent in an amount equal to the damages inflicted by a landlord's violation of a lease term. In ***Chicago Board of Realtors, Inc. v. City of Chicago,*** 819 F. 2d 732 (7th Cir. 1987), the ordinance was upheld against a constitutional attack, but Judges Posner and Easterbrook, two premier advocates of economic analysis in law, concurred separately, expressing the policy view that such requirements benefit in-place tenants at the expense of would-be tenants, provide an incentive for landlords to skimp on maintenance, deter the construction of new rental housing, benefit landlords in neighboring jurisdictions that lack rent controls or similar regulations, and produce an inefficient allocation of residential living space.

2. **Defenses:** Defenders of rent control usually deny the validity of the efficiency arguments (even though virtually all economists agree that rent control produces inefficient resource allocation) or contend that other factors are more important than efficiency. These other factors are often said to be keeping economically vulnerable (usually elderly or poor) tenants in place

with a relatively fixed portion of their income going to housing, but the effect of rent control is rarely, if ever, this confined.

C. **Anti-discrimination statutes:** The common law gave unlimited freedom to a property owner to decide to whom he wished to sell or lease his property. Today, that freedom is circumscribed by federal, state, and local statutes that prohibit discrimination in the ***sale*** or ***rental*** of real property on the basis of race, sex, ethnicity, national origin, age, religion, and under some state and local laws, sexual orientation. The major federal statutes are considered here.

1. **42 USC §1982: The 1866 Civil Rights Act:** During Reconstruction the 1866 Civil Rights Act was enacted, providing in part that "All citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property." This provision is now codified at 42 USC §1982. Its intent was to place newly emancipated black Americans on the same footing as white Americans with respect to property rights. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), the Supreme Court held that this provision applied to private conduct as well as state action, and that Congress had power under §2 of the Thirteenth Amendment to regulate this private behavior. Thus, 42 USC §1982 ***prohibits private discrimination on the basis of race or ethnicity with respect to sales or rentals of real property.*** Violators are subject to injunction and liable for damages.

2. **Fair housing act:** Title VIII of the 1968 Civil Rights Act is the Fair Housing Act, 42 USC §§3601-3619, 3631. In its original form it prohibited private discrimination in the sale or rental of residential housing on the basis of race, color, religion, or national origin. It has since been amended to forbid discrimination against people with handicaps, people with children (except in "seniors only" developments), and on the basis of sex. The definition of *handicap* includes a physical or mental impairment that "substantially limits [at least one] major life activit[y]," but specifically excludes drug addiction or cross-dressing. This handicap definition is not as broad as that under the Americans with Disabilities Act of 1991.

   a. **Exemptions:** There are several important exemptions to the discrimination ban of the Fair Housing Act.

      i. **Sale or lease by owner of a single-family dwelling:** A person who does not own more than three single-family residences may discriminate on otherwise forbidden grounds in the sale or lease of his single-family residence so long as he neither uses a broker nor advertises in a manner that reveals his discriminatory intent. See 42 USC §3603(b)(l).

      ii. **Owner-occupied rental housing of four units or less:** In the debates concerning adoption of the Fair Housing Act, certain members of Congress worried about the application of the law to "Mrs. Murphy's boardinghouse" — small owner-occupied rental housing. Out of concern that these situations might be sufficiently intimate to implicate free association rights, Congress adopted this exemption, which permits a landlord to discriminate on otherwise forbidden grounds in the rental of residential housing so long as the landlord is an owner and occupant of the house or apartment building and it consists of four units or less. See 42 USC §3603(b)(2). However, such a person may not advertise in a manner that reveals his discriminatory intent. See 42 USC §3603(b)(1).

   b. **Remedies:** Violators are subject to injunction, compensatory, and punitive damages. Jurisdiction over Fair Housing Act claims is vested in the federal courts.

3. **Comparison of 42 USC §1982 and Fair Housing Act:** The Fair Housing Act forbids discrimination on more grounds, but it only applies to residential housing, and admits of some exemptions. 42 USC §1982 applies to all types of property but only forbids private racial or ethnic discrimination, and has no exemptions to the transactions to which it applies.

4. **Proof of forbidden discrimination:** Under either 42 USC §1982 or the Fair Housing Act a presumptive case of forbidden discrimination is made out if the landlord's or seller's practices produce a forbidden ***discriminatory effect.*** The burden then shifts to the landlord or seller to prove that he was not, in fact, motivated by forbidden grounds. This is mostly a matter of offering convincing alternative reasons for rejection and benign explanations for the discriminatory effect. If, however, a forbidden ground is even one of many motivations, prohibited discrimination is proven.

5. **State and local laws:** There are a variety of state and local laws that address discrimination in the sale or rental of real property. Most apply to residential property. While the forbidden grounds of discrimination vary, almost all forbid discrimination on the basis of race, ethnicity, or national origin; most include religion and sex; some add age, marital status, having children, or physical handicap to the forbidden categories. A few include sexual orientation. These statutes differ widely in their enforcement mechanisms (some involve administrative complaint and investigation; others permit private lawsuits directly against alleged violators) and available remedies.

Exam Tips on LEASEHOLD ESTATES

- An ambiguous lease invites issues of characterization (periodic, at will, or term of years), and these issues can be easily combined with a holdover problem in which the landlord makes an election to renew. You will have to decide what the initial lease was in order to decide what type of lease was created by the landlord's election.

- Issues of transfer of a leasehold are very attractive test candidates. Many consequences flow from whether the lessee's transfer accomplishes an assignment or a sublease. Be certain you understand the differences between privity of contract and privity of estate and be able to apply those differences to a fact pattern filled with multiple transfers. Be alert to the possibility of a landlord's unreasonable refusal to consent to transfer. Not all states impose an obligation of reasonableness on landlords, and almost none do so with respect to residential leases. If you are imposing such an obligation where courts usually do not, you must make a good policy argument for your conclusion.

- Residential leases raise a number of possible issues. If the facts pose an issue of landlord self-help in recovering possession, be prepared to argue the policy merits of permitting or preventing self-help. If the tenant has abandoned before the end of the term, pay attention to facts that indicate the nature of the landlord's election, and don't forget that the modern trend (though by no means

universally accepted) is to impose a duty on the landlord to mitigate damages. Landlord breach of the implied warranty of habitability raises a number of possible remedies on the part of the tenant. Pay attention to facts that suggest which remedy might be of most advantage to the tenant. Remember that quiet enjoyment must involve some breach of a landlord duty; this can be tricky when the interference comes from another tenant. Look for facts suggesting that the landlord has a duty to control such tenant behavior. This problem might also involve a nuisance issue, or a question of tort liability of a landlord.

PRINCIPLES OF PROPERTY LAW

Sixth Edition

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Chapter 9

LANDLORD AND TENANT LAW

Table of Sections

SUMMARY

§ 9.1 Types of Landlord–Tenant Estates

1. The types of landlord-tenant estates are:

a. Term for years, which is typical for commercial leases and frequent for residential tenancies;

b. Periodic tenancy, being year-to-year, month-to-month, week-to-week. At common law, a periodic tenancy for year-to-year is terminable by either party by giving six months notice. The other periodic tenancies can be terminated by either party giving the other a notice to terminate equal to the term. Today, many states have shortened the time period in which to terminate a tenancy from year-to-year.

c. Tenancy at will, being at the will of either tenant or landlord, can be terminated by either party without notice; and

d. Tenancy at sufferance, which is no tenancy at all but a mere naked possession of land without right.

2. In order to qualify as a tenancy or estate for a term for years, the term of the tenancy must have a definite and specific beginning and ending time or date. If a specific date cannot be found for the estate to end, it is not a term for years.

3. The word "years" as used in the phrase, "term for years," is only a name and does not mean the term must be for one or more years. Any definite leasehold period indicates an "estate for years," such as, one year, one month, six weeks, ninety days, half a year, January 31st, 2000 to August 4, 2000, or June 30, 2000 to June 30, 2001.

4. If a term for years in ineffectively created, say, for example, because the lease fails to meet the requirements of the Statute of Frauds, either a periodic tenancy or a tenant at will arises. If the former, the period is either fixed by the period when rent is payable or reserved under the terms of the lease. Some courts might hold that a tenancy at will arises by operation of law but this estate is disfavored because of the absence of any notice to terminate it.

5. A term for years at common law was a chattel real and personal property; if the owner of the estate died intestate, the estate passed as any other personalty to the deceased tenant's personal representative. While it is an estate in real property, it is not real property. Thus, it was not an estate subject to dower.

The creation of a term for years is a conveyance of land. Therefore, no contractual provisions must necessarily be included in the conveyance. Thus, in each of the following instances B receives a term for years: (1), O, the owner of Blackacre in fee simple, conveys to B for ten years with no reservation of rent and with no contract provision therein; or (2), O, the owner of Blackacre in fee simple, conveys "to B for 10 years, then to C and his heirs forever." However, because almost all leases for years actually include contractual provisions as well as conveyancing language, an analysis of any lease will disclose both: (a) privity of estate, the tenant being owner of a term for years with reversion in the landlord; and (b) privity of contract, by which each party to the lease undertakes personal obligations arising out of promises set forth in the lease. These two privities will have important consequences in the law of assignment and sublet.

6. Every leasehold includes the following elements:

a. an estate in the tenant;

b. a reversion in the landlord;

c. exclusive possession and control of the land in the tenant; and

d. generally, a contract between the parties.

Privity of estate arises whenever, (a), (b) and (c) are present. Privity of contract requires a contract between the parties.

7. A lease is conceptually different from a license. With a lease exclusive possession of the real property must lodge in the

tenant; in a license the possession remains in the licensor and the licensee has a mere privilege of being on the land without being treated as a trespasser.

8. A term for years may be created subject to a special limitation, right of re-entry for condition broken, or an executory limitation.

§ 9.2 The Duty to Deliver and Take Possession

1. A landlord impliedly warrants that the tenant will have a legal right to possession of the premises at the beginning of the term.

2. There is a conflict of authority as to whether the landlord also has an obligation to deliver actual possession of the premises to the tenant at the beginning of the term.

a. Under the "American" view, the landlord does not have an obligation to deliver actual possession, but under the "English" view she does.

b. There is substantial authority for both positions in the United States, but modern policy favors the "English" position.[1]

3. Either the new tenant or the landlord may evict a former tenant who wrongfully holds over into the term of the new tenant.

4. While ordinarily a tenant does not have a correlative duty to take possession, in certain cases courts will impose such a duty on the tenant if necessary to protect the landlord's interest in the property or assure landlord receives the benefits under the lease.

§ 9.3 The Warranty of Fitness or Suitability for a Particular Purpose

1. Traditionally, the landlord did not impliedly warrant that the leased premises were suitable for any particular purpose. Thus, the landlord was not liable for dangerous conditions existing on the leased premises. Normally, the doctrine of caveat emptor prevailed and tenant took possession "as is."

2. A landlord may be liable in tort to the tenant, the tenant's guests, licensees, and invitees, if at the commencement of the lease there is a dangerous condition which the landlord knows or should know about, and the discovery of which would not likely occur by the tenant exercising due care.

3. Even before the modern trend of extensive protection for residential tenants, in many jurisdictions a landlord of a completely

1. Restatement, Second, Property (Landlord and Tenant) § 6.2, Comment (a). See also, Unif. Res. Land & Ten. Act § 4.102.

furnished dwelling for a short period of time impliedly warranted the fitness of the premises and the furnishings. Thus, if injury resulted from defects therein, the landlord was liable. Furthermore, if the premises were not fit for habitation, the tenant could rescind the lease or seek damages.

4. Today, many jurisdictions have abrogated the landlord's tort immunity in favor of a caveat vendor (lessor) approach. The landlord in these states may now be held liable in tort to the tenant, the tenant's guests, licensees, and invitees on either a theory of negligence or breach of an implied warranty of habitability.

5. Under the common law and in the absence of a statute or a covenant in the lease, the landlord is under no duty to repair the leased premises. Most states, however, have changed the common-law rule by statute or judicial decision, at least as respects residential leases. Today, landlords ordinarily have an ongoing duty to repair.

6. Although the landlord may be under no duty to repair at common law, if the landlord undertook to repair and did so negligently, the landlord was liable in tort for resulting injuries.

§ 9.4 The Tenant's Duty to Repair and Maintain the Premises

1. Unless the tenant covenants to make repairs, the tenants's obligation with respect to maintenance is governed by the law of waste. A tenant is liable for permissive as well as voluntary waste, and thus is under an obligation to make repairs.

2. Where the subject matter of the lease is improved land, as distinguished from a lease of a part of a building, the tenant, at common law, remains liable under his lease and is obligated to pay rent although the building or buildings are destroyed by fire, flood or other casualty. This common-law rule, however, can be abrogated by a contrary lease provision and, in most states, is abrogated by statute or case law.

§ 9.5 Illegality and Frustration of Purpose

1. If land and improvements are leased for a particular purpose and that purpose cannot be accomplished because of a structural defect or other violations of law which prevents the use of the building for any purpose authorized under the lease, the tenant may rescind or avoid the lease. Under these circumstances the lease is considered illegal, and neither party can enforce it.

2. When the only use intended is legal and plausible at the inception of the lease but later becomes illegal or impossible be-

cause of a change of law, a typical "frustration of purpose" situation, the following principles apply:

a. If the lease permits the tenant to use the premises for only a single purpose, a later prohibition of law against such use will, according to the prevailing view, terminate the contract and relieve the tenant of any obligations thereunder.

b. If the business of the tenant is simply made less profitable by a law, rule, regulation or order, the tenant is not relieved of the obligations under the lease.

c. Further, in some jurisdictions, even when there is complete or almost complete frustration of purpose, the obligation to pay rent is not relieved.[2]

§ 9.6 Eminent Domain

1. Condemnation of the leased premises in their entirety terminates the relation of landlord and tenant and relieves the tenant of any further obligation to pay rent under the lease.

2. In the case of a partial taking under eminent domain, whether of a part of the physical premises or of all the premises for a part of the term, in the absence of a lease provision to the contrary, the relationship of landlord and tenant continues and the tenant remains liable to pay the rent reserved without any abatement.

§ 9.7 The Covenant of Quiet Enjoyment

1. A covenant of quiet enjoyment is implied in every lease. The covenant is a promise on the part of the landlord that neither landlord nor anyone with either a superior title or a title derivative of the landlord will wrongfully interfere with the tenant's use and enjoyment of the leased property.

2. A wrongful actual eviction by the landlord breaches the covenant of quiet enjoyment and relieves the tenant of the obligation to pay rent.

3. An eviction by the landlord may be constructive as well as actual. A constructive eviction can occur whenever the landlord fails to perform a duty that the landlord owes the tenant, and as a result of that failure, there is a substantial interference with the tenant's use and enjoyment of the leased premises. The landlord's duty can arise under the terms of the lease or be implied by law. A constructive eviction results from conduct or neglect by the landlord. However, in order to claim a constructive eviction, the tenant

2. See generally Restatement, Second, Property (Landlord and Tenant) § 9.2, Reporter's Note.

must first give the landlord notice of the interference and a reasonable time to correct. If the landlord's breach continues, the tenant must actually vacate the premises within a reasonable time. If the tenant fails to vacate the premises within a reasonable time, the tenant is deemed to have waived any claim of constructive eviction.

§ 9.8 Illegality and the Implied Warranty of Habitability

1. Since the mid–1970s there has been an increasing disenchantment with traditional landlord-tenant concepts in the area of residential leases, particularly in the case of indigent tenants and sub-standard dwellings. Among the most commonly agreed shortcomings of traditional landlord-tenant concepts are:

a. The theory of independent covenants in leases, that is that the failure of either party to perform a promise in the lease does not excuse the other party from performance;[3]

b. The lack of implied covenants such as that of habitability and fitness;

c. The doctrine of caveat emptor; and

d. The theory of freedom of contract and the assumption that the landlords and tenants have equal bargaining power.

2. Recent landlord-tenant litigation has been chiefly concerned with the following issues:

a. Must the landlord deliver and/or maintain the premises in an "habitable" condition?

b. If the premises are uninhabitable, must the tenant nevertheless pay rent?

c. Can a tenant be subjected to a rent increase or eviction in retaliation for tenant's complaints to civil authorities[4] about the condition of the premises? and

d. Must a tenant accept and comply with various unconscionable or onerous terms of a lease?

3. Recent cases and statutes in some states recognize that a tenant has a right to inform proper government authorities of

3. Under the doctrine of independent covenants, the landlord's failure to make promised repairs did not excuse the tenant from paying rent. Each promise was independent. Likewise the tenant's failure to pay rent entitled the landlord to sue for the rent but not for possession. The parties could negotiate otherwise as is standard today in all leases.

4. Retaliatory eviction refers to the dispossession of a tenant in revenge for tenant's attempt to better housing conditions by employing statutory remedies, court action or reporting to housing authorities.

violations of the law and that the tenant may not be injured or punished by anyone for having taken advantage of that right. Likewise tenants cannot be retaliated against for asserting their implied warranty rights as a defense in an action for possession for non-payment of rent. While generally a landlord may evict a periodic tenant or tenant at will for any reason, the landlord is not free to evict in retaliation for the tenant's report of housing code violations or asserting an implied warranty defense. For this purpose an eviction also includes a failure to renew a periodic tenancy that would otherwise automatically renew. Landlords may also be barred from increasing rent in retaliation of a tenant's taking advantage of his rights under the implied warranty.

4. Traditionally, if a tenant attempted to recover damages by withholding all or some rent, the landlord could use a summary dispossession action to evict the tenant. Many jurisdictions now hold that if a landlord fails to make repairs and replacements of vital facilities necessary to maintain the premises in a livable condition, the tenant may resort to self-help. If the tenant gives timely and adequate notice to the landlord, giving the latter an unexercised opportunity to repair, the tenant may repair and deduct the cost from future rents.

5. Most states, today, by statute or case law, imply a warranty of habitability that the premises are habitable and/or complies with the provisions of the local housing codes. While a warranty, standing alone, does not necessarily imply a duty to repair to satisfy the terms of the warranty, those courts that imply the warranty further imply a covenant that the landlord will maintain (repair) the premises to assure that throughout the term the premises meet the warranty. Furthermore, by adopting the notion of dependency of lease covenants, these courts also hold that during the period the warranty is breached, the obligation to pay rent is suspended, in whole or in part, depending upon the nature of the breach. Thus, the covenant by a tenant to pay rent and the express or implied covenant of a landlord to maintain the leased premises in a habitable condition are mutually dependent.

In order to constitute a breach of the implied warranty of habitability, generally the defect must be of a nature and kind as to render the premises unsafe, unsanitary, or unfit for residential purposes. The extent of the landlord's obligation is often measured by applicable housing codes, health codes or judicially defined notions of habitability.

6. The modern trend is to view the residential lease as a contract rather than a conveyance. Therefore, in case of a breach of the implied warranty of habitability, damages, reformation or re-

scission are available remedies.[5] Some courts have also held that specific performance is an available remedy. Specific performance may be a tenant's most important remedy, particularly if alternative residential housing at the rent the landlord and tenant bargained for is not available to the tenant.

7. In an action by a landlord for unpaid rent, a tenant may use the breach of the warranty as a defense even if the tenant has not vacated the premises. If the landlord sues for unpaid rent and the court concludes that the premises are wholly uninhabitable, the obligation to pay rent is suspended, presumably until such time as the landlord makes the premises habitable. If only a portion of the premises is uninhabitable, then only a portion of the rent is suspended. The amount of rent due, in such case, might be determined by reference to the property's fair rental value or by apportioning the rent in the appropriate manner by reference to that portion of the premises that is habitable. Most, but not all, courts have held that the implied warranty cannot be waived by the parties.

8. If the landlord and tenant enter into a lease of premises that are uninhabitable at the time the lease term commences, the lease may be illegal if, under local law, it is specifically made illegal to rent premises that are uninhabitable. In this case, the lease is null and void. If the tenant, notwithstanding the illegality of the lease, actually enters into possession of the property, the landlord may not recover rent from the tenant and the landlord may not evict the tenant. In some jurisdictions, however, the tenant may be held liable for the reasonable rental value of the premises in its present condition under the doctrine of quasi-contract.

9. Exculpatory clauses, or provisions by which a landlord seeks to be relieved of liability for the consequences of his own negligence, in the absence of statute, have met with varying degrees of approval and disapproval. The judicial response generally depends on numerous factors such as the breadth of the exculpatory provision, the declared public policy of the state, and special circumstances such as the adequacy of the supply of rental property. The trend, however, is toward strict construction so as to impose liability, and even explicit disapproval of exculpatory clauses in residential leases. The Uniform Residential Landlord and Tenant Act contains provisions which facilitates invalidating these clauses.

10. Recently enacted Residential Landlord and Tenant Acts codify many aspects of the residential landlord-tenant relationship, substitute modern contractual principles for archaic conveyancing concepts, and strike a balance between the rights and obligations of the respective parties. These acts, which standardize to a large

5. Lemle v. Breeden, 51 Hawaii 426, 51 Hawaii 478, 462 P.2d 470, (1969).

degree all residential leases, either expressly or by implication, incorporate many of the previously mentioned innovations. The implication or imposition of a warranty of habitability, the recognition of retaliation as a defense to eviction, the utilization of the doctrine of apportionment and abatement of rent, the application of the concept of unconscionability, and the requirement of good faith on the part of both parties are common features.

11. Good faith is imposed in the performance or enforcement of rental agreements which come within the jurisdiction of a Uniform Residential Landlord and Tenant Act. Defined as "honesty in fact," good faith can be used by a court to prevent a landlord from unduly harassing a tenant, or conversely, against a tenant who refuses to allow a landlord reasonable access to examine or repair the premises.

12. A concept of unconscionability is encompassed within the Uniform Residential Landlord and Tenant Acts. Upon a finding of unconscionability, a court may:

a. Refuse to enforce the entire rental agreement;

b. Enforce the remainder of the agreement without the unconscionable provision; or

c. Limit the application of any objectionable provision so as to avoid any unconscionable result.

13. The Uniform Residential Landlord and Tenant Act provides that a tenant may terminate the rental agreement if the landlord fails to comply with applicable housing codes, statutory duties, or otherwise breaches material provisions of the agreement. In case such failure is due to causes beyond the control of the landlord and the landlord seriously attempts to comply, the statute may permit modification of the agreement as follows:

a. if the landlord's failure to comply renders the residential unit uninhabitable and the tenant vacates, the tenant shall not be liable for rent during that period of uninhabitability.

b. if the tenant remains in occupancy and only part of the residential unit is untenantable, the rent for the period of noncompliance shall be reduced in proportion to the loss of rental value.

14. Under the Uniform Act, the landlord generally is required to account for his claim to any part of the security deposit within a stated period of time after the lease is terminated. If the landlord fails to comply with these requirements, the landlord becomes subject to penalties ranging from forfeiture of any claim to punitive damages for wrongful withholding of the funds.

15. The landlord is generally required to pay interest under modern acts on any deposit retained for a stated period, and, in addition, may be required to hold the funds in trust for the tenant and thus be prohibited from commingling them.

16. Generally, a landlord is under no implied duty to protect the tenants against the intentional torts or crimes of third persons in the common areas of an apartment complex. However, some courts impose a duty upon the landlord to take reasonable means to protect tenants in particular cases because of the inability of the tenants to protect themselves, the landlord's control, the tenant's reliance on security measures which were allowed to degenerate, or the foreseeability of the landlord of such activity.

17. While the implied warranty of habitability does not apply to commercial leases, courts are beginning to develop an analogous doctrine known as the "implied warranty of suitability." This is a warranty that the leased premises are suitable for their intended commercial purpose. Thus, the leased premises are warranted to be free of latent defects in the portion of the facility vital to the use of the premises at the inception of the lease and that the essential facilities will continue to be suitable throughout the term of the lease.

§ 9.9 Abandonment by Tenant: Remedies of Landlord; Security Deposits

1. When a tenant wrongfully abandons the premises and renounces the lease, in the absence of statutes or lease provisions to the contrary, the landlord may:

a. accept a surrender of the leasehold and relieve the tenant of all further liability;

b. retake possession on behalf of the tenant for the purpose of mitigating damages;

c. do nothing and sue for rent as it comes due in some jurisdictions, but others require the landlord to mitigate damages;

d. treat the tenant's conduct as an anticipatory breach of contract, accept a surrender of the premises, and sue for damages, present and prospective.

2. Advance rental payments may not be recovered by a defaulting tenant.

3. A security deposit in the absence of a lease provision or statute to the contrary creates a debtor-creditor relationship. The landlord is obligated to return a security deposit, less actual damages, to the tenant at the end of the lease. A number of statutes

require landlords to provide tenants with an itemization of damages when the landlord withholds all, or a portion of, the security deposit upon termination of the lease.

4. Penalty provisions in leases are generally void and unenforceable. On the other hand, lease provisions for liquidated damages, in the absence of a statute to the contrary, are valid. Whether a particular lease provision constitutes a valid provision for liquidated damages or an invalid penalty is for the court to decide.

5. In those jurisdictions which continue to follow the common-law rule that the landlord does not have a duty to mitigate damages, the landlord may let the premises lie idle and sue the tenant for rent as it becomes due. But in a growing number of jurisdictions, courts or statutes require the landlord to make reasonable efforts to re-rent in order to mitigate damages.

§ 9.10 Assignment and Sublet

1. In a landlord-tenant relation there is always privity of estate.

2. For a covenant to "run with the land" in a landlord-tenant relation three elements must co-exist:

a. there must be a covenant,

b. there must be an intention that the covenant run with the land, and

c. the covenant must touch and concern the land.

3. The covenant touches and concerns the land if the legal effect of the enforcement of the covenant is either:

a. to enhance the use or utility of or make more valuable the leasehold or the reversion, or

b. to curtail the use or utility of or make less valuable the leasehold or the reversion.

4. The covenant may run either with:

a. the leasehold which is land for this purpose, although technically it is personal property, or

b. the reversion.

5. An assignee of a covenant running with the land:

a. is not liable for a breach of the covenant which occurs before she becomes assignee of the land.

b. is liable only for a breach of the covenant which occurs while she owns the estate in the land.

c. is not liable for a breach of the covenant which occurs after she has assigned the estate in the land.

6. A lease may prohibit a tenant from making an assignment or a sublease. These prohibitions are regarded as reasonable restraints on alienation but as restraints they are strictly construed. Thus, a prohibition against an assignment does not imply a prohibition against a sublet and vice versa. Under the common law if a landlord permitted a tenant to assign a lease even though the lease prohibited an assignment, the landlord's assent was deemed to be a waiver of the restraint and it no longer applied to the assignee.[6] This rule has been rejected in many American jurisdictions.[7]

7. Under the common law if the lease prohibits the tenant from assigning and/or subletting the premises without the landlord's consent, the landlord was free to withhold consent for any reason whatsoever.[8] This rule is perceived to be unduly harsh and many courts hold that landlord's consent may not be unreasonably withheld[9] or withheld only where landlord has a commercially reasonable objection to the assignment or sublet.[10]

§ 9.11 The Holdover Tenant

1. When a tenant holds over after the termination of a lease, the landlord has a choice of several remedies: (1) the landlord may treat the tenant as a trespasser, evict him, and recover damages for the wrongful hold over; (2) at common law and in most states the landlord may treat the tenant as a periodic tenant on the same terms as the prior lease insofar as they are applicable; (3) the landlord may demand double rent in accordance with statutory provisions in some states; or (4) the landlord may notify the tenant that continued occupancy will be on such terms as the landlord then specifies, including an increased rental, and if the tenant remains, the tenant impliedly agrees to these new terms.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 9.1 Types of Landlord-Tenant Estates

PROBLEM 9.1 [Reserved]

PROBLEM 9.2: L signed a written instrument, bearing the title "lease" at its top under which it was agreed that T might

6. The Rule in Dumpor's Case, 4 Coke (1603), 119, Smith's Leading Cases (8th Ed.) 95.

7. See Childs v. Warner Brothers Southern Theatres, 200 N.C. 333, 156 S.E. 923 (1931) (restrictions against assignment or subleasing operate against subsequent assignees).

8. See, e.g., B & R Oil Co., Inc. v. Ray's Mobile Homes, Inc., 139 Vt. 122, 422 A.2d 1267 (1980).

9. See Restatement of Property, Second § 15.2(2) (1977).

10. Kendall v. Ernest Pestana, Inc., 40 Cal.3d 488, 220 Cal.Rptr. 818, 709 P.2d 837 (1985). For the distinction between assignments and sublets and the effect on the landlord's right to rent, see Problem 9.28 and accompanying text.

occupy a room in L's home. The room had an outside as well as inside entrance. T's term of occupancy was to be from September 15, 2000 to March 15, 2001. It was agreed that T should eat no meals on the premises and that L would be responsible for T's bed being made every day and his room being cleaned not less than once per week. L and T also agreed that T should have the exclusive use of a bathroom connected to the room. The amount which T agreed to pay for the use of the room, called "rent" in the written instrument, was $500 per month. T was not in default in any way when L evicted T on January 15, 2001. T sues L in ejectment to recover possession of the room. May T succeed?

Applicable Law: No estate for years or other tenancy is created and no relationship of landlord and tenant exists unless (a) the term created has a definite time of beginning and definite date for ending, (b) exclusive possession and control for the term are given to the tenant, and (c) the reversion is retained by the landlord.

Answer and Analysis

This problem raises a question of fact concerning the intention of the parties, which ultimately must be determined by the trier of fact under proper instructions from the court. The agreement would seem to be an ordinary lodging contract by which one person is permitted to occupy a room in the house of another. These agreements usually do not create a landlord-tenant relationship but only that of licensor and licensee with a contractual obligation on the part of the occupant to pay for the use of the occupied area.

But there are at least three items in this instrument which might well be considered evidence of an intention to create a landlord-tenant relationship. The instrument is labeled a "lease." The payment to be made from T to L is called "rent." The term for occupancy has a definite beginning, September 15, 2000, and a definite date for termination, March 15, 2001. While these items alone are not controlling, they must be considered.

There is no landlord-tenant relationship unless the owner delivers to the occupant the exclusive possession of the premises to be occupied. The room was part of L's house. It could be entered from inside as well as outside the house. L retained the right to enter the room to make the bed and clean the occupied area. This is inconsistent with exclusive possession on T's part.

This kind of arrangement is usually found to constitute a lodging contract which provides primarily for use of the room and facilities. No interest is created in the land, the actual and exclusive possession does not pass to the occupant, and the possession

remains in the landowner. While there is privity of contract there is no privity of estate, and the occupant, as to the land itself, is only a licensee. Furthermore, the license is revocable at the will of the owner of the premises even though the owner may be liable to the occupant for breach of contract.

PROBLEM 9.3: L orally agreed that T might take possession of Blackacre on March 1, 2000 and hold the same exclusively as a tenant for a period of 10 years thereafter at a rental calculated at $2400 per year to be paid at the rate of $200 per month. Under the local Statute of Frauds no lease for a period of more than one year is enforceable unless some memorandum of it is in writing and signed by the party to be charged. Six months after T took possession of Blackacre L gave T notice to quit the premises even though T was not in default of any provision in the lease. When T refused to quit L sues to eject him. May L succeed?

Applicable Law: If a lease for a term for years fails to be effective because of the Statute of Frauds, the tenant becomes a tenant at will. Subsequent events such as payment of rent for a year of a fraction thereof may indicate an implied intention to transform the tenancy at will into a periodic tenancy from year-to-year or month-to-month or week to week.

Answer and Analysis

L may not sue T for possession. This oral lease for 10 years is not valid and is not enforceable. But T took possession of Blackacre with L's consent and is not a trespasser. If a lease is not valid under the Statute of Frauds and the tenant goes into possession, the tenant is in any event at least a tenant at will.

A tenancy at will is, of course, based on an implied intention of the parties. But it is not unreasonable to find an implied intention under the circumstances of this case to have a valid lease from year-to-year. The rental was calculated on an annual basis even though the rent was to be paid monthly. T has already occupied and had possession of Blackacre for a period of half a year. T was not in default, which must mean that T has paid at least six months rent and L has accepted this rent. Under these circumstances it would seem that the tenancy at will which existed upon T's taking possession has been transformed by the subsequent events into a periodic tenancy that is binding upon both parties.[11] If this is true, then T may remain in possession notwithstanding L's

11. Under the circumstances a court might also conclude that a month-to-month rather than a year-to-year tenancy was created. This conclusion could be based upon the fact that while rent was reserved on an annual basis it was payable on a monthly basis and that the payment period is more closely aligned with the parties' intent regarding the duration of the period tenancy.

notice to quit for at least the balance of the year, and L's action must fail.[12]

The outcome may vary under local statutes. For example, Section 1.402 of the Uniform Residential Landlord Tenant Act provides that acceptance of rent by a landlord from a tenant who enters under a rental agreement that has not been signed by the landlord gives the unsigned agreement the same effect as if it had been signed. However, if the agreement provides for a term longer than one year, it is effective only for one year.

PROBLEM 9.4: L and T enter a lease of Blackacre to commence on February 1, 2000. No express term is provided for in the lease although the lease provides that rent shall be paid annually on February 1 of each year. Without giving T any prior notice, on July 10, 2001 L notifies T to vacate the premises within thirty days. At the end of the period T is still in possession. If L sues T for possession, who wins?

Applicable Law: The term of the lease is an essential element of agreement. The term must be determined either expressly or impliedly from the terms of the lease. If the lease is silent on the duration of the term, ordinarily the term will be periodic and the nature of the period determined by reference to when rent is paid or for which it is reserved.

Answer and Analysis

If L sues T for possession, T wins since no notice of termination was served upon T. The duration of a lease term is an essential element of a lease agreement. Where the term is not set forth expressly, as in this case, it may be determined impliedly by reference to the period for which rent is either reserved or paid. In this problem that period is the same.

Since the lease provided no ending date it is clear the lease is not for a term for years. Rather it is a periodic tenancy for year-to-year. At common law this tenancy is terminable only upon giving six months notice. In the absence of such notice, the lease was not properly terminated.

In the case of a term for years no notice to terminate is required because notice is already provided for in the lease. In the case of a periodic tenancy, since no notice is set forth in the lease, subsequent notice is required. The purpose of notice is to give the party upon whom notice is served the opportunity either to find a suitable new tenant or suitable new space. Notice provides order in the landlord-tenant marketplace and minimizes economic and other

12. See Davis v. Lovick, 226 N.C. 252, 37 S.E.2d 680 (1946).

disruptions that can otherwise occur because of the termination of the tenancy.

If the Uniform Landlord and Tenant Residential Act applied to the problem, T would have a month-to-month tenancy and 60 days notice would have been required to terminate. Section 1.401 appears to have abrogated the periodic tenancy for year-to-year. It provides that, if no definite term is set forth in the lease, the tenancy is week-to-week in the case of a roomer who pays weekly rent, and in all other cases month-to-month. Under that Act, 60 days written notice is necessary to terminate a month-to-month tenancy.[13]

§ 9.2 The Duty to Deliver and Take Possession

PROBLEM 9.5: L, leased Blackacre to T for a 10 year period, March 1, 2000 to March 1, 2010. When this lease was made Blackacre was occupied by tenant D whose term expired at midnight on February 28, 2000. D wrongfully held over his term and remained in continuous possession of Blackacre. There was no express agreement in the lease that L agreed to deliver possession of Blackacre to T on March 1, 2000, nor for quiet enjoyment thereof by T. On March 3, 2000, T commenced two actions in court: (a) one against L for breach of contract for not delivering possession of Blackacre to T on March 1st; and (b) the other against D to eject D from Blackacre. May T succeed in either action?

Applicable Law: A landlord impliedly covenants that the lease gives the tenant the legal right to possess the leased premises and that as between the parties the tenant shall have quiet enjoyment of the premises. However, there is a conflict among the jurisdictions as to whether the lessor also impliedly covenants to put the tenant into actual possession on the first day of the term. Either the landlord or the new tenant may evict a holdover tenant.

Answer and Analysis

Whether T can succeed against L depends upon the jurisdiction. The suit against L must be based on an alleged implied contract by L to put T in actual possession at the beginning of the term. Under the so-called "English" rule which is applied in many American cases there is an implied duty on the part of the landlord to put the tenant into actual possession.[14] The "American" rule is

13. Unif. Res. Land. & Ten. Act § 4.301(b).

14. The English rule is adopted by both the Uniform Residential Landlord and Tenant Act and the Restatement of Property, Second. See also, Adrian v. Rabinowitz, 116 N.J.L. 586, 186 A. 29 (1936) (adopting the English rule as ef-

to the contrary.[15]

All the cases agree that the landlord impliedly gives the tenant a legal right to the possession of the leased premises, and thus assures the tenant that there is no legal obstacle to the enforcement of that right. But that is not the question. The question is whether the landlord has impliedly agreed to enforce this right against a trespasser or a holdover tenant.

In support of the "American" rule it is argued that although T would not knowingly have purchased a lawsuit by having to run the risk of suing D, it is also true that T could have protected himself against that possibility by an express provision in the lease. If, the argument goes, T fails to do so, should the law impose on the landlord the burden of holding the tenant harmless because of the wrongful conduct of the tenant who has held over? It is also argue that L is not responsible for the wrongful acts of the holdover tenant.

Arguments in favor of imposing on the landlord the duty of delivering actual possession are that this is what the tenant has presumably bargained for, that the landlord is in a better position to know the status of the property and whether any possessor is there rightfully, that the tenant will obtain less than his bargain if he has to pay the costs of ousting the wrongful possessor, and that the landlord is in a more economically efficient position to evict a tenant who wrongfully holds over.

Modern policy favors this "English" rule. As to the eviction of the holdover tenant, either L or T may bring the action. As between T on the one side and the holdover tenant, D, on the other, it is clear that T has a right to eject D. D is a typical tenant at sufferance having a bare possession with no right at all. When L leased to T there was a conveyance of an estate in the leased land and with it went the right of immediate possession. T had the right to enforce this right against D and against anyone else without title paramount to that of L.

Under the English rule a landlord is obligated to transfer possession to the tenant on the first day of the lease and T can sue for damages or termination if the landlord breaches that obligation. The landlord makes no implied promises that the tenant's use and enjoyment of the premises thereafter will not be interfered with by a wrongdoer. Thus, if D entered the leased property after March 1,

fecting the common expectations of the parties; for breach tenant is entitled to the difference between the fair rental value of the premises and the reserved rent unless the parties otherwise agreed); Restatement, Second, Property (Landlord and Tenant) § 6.2, Comment and Reporter's note.

15. See, Hannan v. Dusch, 154 Va. 356, 153 S.E. 824 (1930); Cheshire v. Thurston, 70 Ariz. 299, 219 P.2d 1043 (1950).

2000 with no authority from L to do so, L would have no responsibility to evict D and T would have no cause of action against L.

On the other hand, under the implied covenant of quiet enjoyment, the landlord impliedly covenants that neither the landlord nor anyone claiming a title to the property that is derivative of the landlord will wrongfully interfere with the tenant's use and enjoyment of the property. Similarly, the tenant has an action against the landlord if someone with a superior title to the landlord interferes with the tenant's use and enjoyment of the property.

PROBLEM 9.6: L leased a service station to T for a five-year term commencing on April 1, 2000 and ending on March 31, 2005. A local ordinance provided that any service station not open for business for ninety consecutive days would be deemed abandoned. It further provided for demolition of such stations unless within specified periods the station was reopened or converted to an approved alternate business. T failed to enter Blackacre and to operate the service station until July 5, 2000. On July 10, the local authorities ordered the property be demolished on the grounds that it had been abandoned. L brought an action against T for damage incurred by T's failure to preserve the nonconforming use of Blackacre. Might L succeed in this action?

Applicable Law: Generally, a lessee does not have a correlative duty to take possession of leased premises at the commencement of the tenancy unless otherwise agreed in the lease. A lessee is not obligated to operate a particular business on the leased premises unless some special circumstance can be found to establish that a duty to continue operations exist.[16] Loss of a commercial use of leased premises cannot constitute waste.[17]

Answer and Analysis

It is not likely that L would succeed in this action unless the lease itself imposed a duty on T to take timely possession of Blackacre.

Where a local zoning ordinance "grandfathers in" a property owner's nonconforming use of property, a landlord who leases that property would obviously have a great interest in assuring that the tenant continue that use to avoid losing the benefit of the exemption. Such landlords would be well advised to include a specific clause in a lease requiring the tenant to take actual possession of the property. Absent such a clause, however, courts are most reluctant to imply a duty on the tenant to take actual possession.

16. See, Stevens v. Mobil Oil Corp., 412 F.Supp. 809 (E.D.Mich.1976), aff'd 577 F.2d 743 (6th Cir.1978).

17. Id.

Even, where both parties know at the time the lease is executed that a zoning ordinance has already been enacted prior to the execution of the lease and the premise is being operated as a nonconforming use, the lessee does not have such a duty to take possession without specific agreement in the lease.[18]

Arguably, a percentage lease where the rent is, in whole or in part, based on the volume of sales, could be construed as imposing a duty on the tenant to take possession, particularly if the rent fixed in the lease was "minimal."

§ 9.3 The Warranty of Fitness or Suitability for a Particular Purpose

PROBLEM 9.7: L leased T an unimproved parcel of real estate knowing that T intended to erect a drive-in movie theater on the property. No warranties of suitability were included in the lease. After the commencement of the lease T determined that the land was not suitable to support the weight of the movie screen. T then vacated the premises and L sued T for unpaid rent. T defended on the ground that L should have disclosed that the land was unsuitable for T's intended use. Apparently L knew that the leased premises were boggy but had no knowledge that it would not support the weight of a drive-in movie screen. Will that defense succeed?

Applicable Law: At common law the landlord did not impliedly warrant that the land was suitable for a particular purpose. However, if the landlord knew of the tenant's particular needs and also knew of latent defects on the land which would make the land unsuitable for the tenant's purposes, a landlord who failed to disclose the latent defects might be liable for damages incurred by the tenant.

Answer and Analysis

The defense will not succeed. At common law there is no implied warranty that the leased premises are suitable for a particular purpose. Absent this warranty or fraud, the tenant must investigate the premises to determine whether it is suitable for the tenant's purposes. A prospective tenant cannot rely upon the prospective landlord's representations as to the quality of the land where the prospective tenant had a reasonable opportunity to inspect and judge whether the land was suitable for the tenant's intended purposes. Further, if the tenant were to claim that the landlord fraudulently concealed the nature of the land, at common

18. See, Powell v. Socony Mobil Oil Co., 113 Ohio App. 507, 179 N.E.2d 82 (1960).

law the tenant would also have to establish that the landlord was under some duty to disclose. This duty does not generally arise absent a showing of material representations constituting fraud or the presence of some fiduciary relationship between the parties.[19]

The Restatement of Property, Second, adopts the rule that the landlord covenants that residential property is suitable for residential purposes[20] but expressly takes no position whether a similar rule applies with respect to commercial premises.

PROBLEM 9.8: L, the owner of a multilevel building, executed a written lease of designated space to T for 5 years at a stipulated rent. T was going to use the premises as a jewelry store. T's specific business purpose was made clear to L both in the contract negotiations and in the lease. Six months after the store opened a burglary occurred in which entry was made through the ceiling of the vault area, which ceiling was also the floor of the second story of the building. A mechanical equipment room was located over the jewelry store, and the floor of this room formed the ceiling of the jewelry store. This design allowed easy entry into the vault from above. May T recover against L?

Applicable Law: Landlords have a duty to inform prospective commercial tenants of conditions which might render the premises unsuitable for the tenant's particular commercial use. Thus, failure to disclose a weak ceiling as a possible means of access for purposes of burglary rendered the landlord liable. Further, the duty to disclose such conditions is so basic that liability may be imposed despite an exculpatory clause.

Answer and Analysis

In a growing number of jurisdictions, the answer is yes. Under traditional property law concepts there would not exist any cause of action since the doctrine of caveat emptor, or in this case, caveat lessee, would be strictly applied. L has no duty to inform about or repair any undesirable conditions at common law. However, many modern courts hold that L is under a basic duty to inform the prospective tenant of the conditions of the premises which might affect their suitability for the intended use. L breached this basic duty when L failed to inform T of the special ceiling condition. The particular needs of commercial tenants often require the leased

19. Anderson Drive-In Theatre v. Kirkpatrick, 123 Ind.App. 388, 110 N.E.2d 506 (1953). In Stroup v. Conant, 268 Or. 292, 520 P.2d 337 (1974) landlord was permitted to avoid a lease when the tenant fraudulently represented that the premises would be used for selling gifts and novelties and the tenant actually used the premises to operate an adult bookstore.

20. Restatement of Property, Second, § 5.1.

premises to have specific attributes.[21] Therefore, the duty of disclaiming any condition which might reasonably be undesirable from the tenant's point of view is basic. Further, because the duty to disclose under these circumstances is basic and the ultimate consequences foreseeable, liability may be imposed in spite of a broad exculpatory clause.[22]

PROBLEM 9.9: L leased a three-room commercial office to T for a term of three years. Under the lease, L promised to provide air conditioning, electricity, hot water, janitorial and security services and 10 parking spaces for T's clients. Shortly after moving into the office, T began experiencing problems with the building. The air conditioning stopped working temporally during the working hours. The roof leaked whenever it rained. For some weeks, T went without electricity and hot water. The parking spaces was never available for T's clients, because they were always filled with garbage. Following T's failure to pay rent for March, L sued T for possession for nonpayment of rent. Can L prevail in this action?

Applicable Law: Under the traditional common-law rules, L's breach of L's duty to repair entitled T to damages, not the right to withhold rent. Today, courts are likely to find that there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose.[23] Under this warranty the landlord covenants that, at the outset of the lease, there are no latent defects vital to the contemplated commercial use of the premises and that this suitable condition will continue until the end of the lease.

Answer and Analysis

Probably not, although this would clearly depend on whether the jurisdiction adopts an implied warranty of suitability or adheres to the traditional common-law rule which would effectively have forced T to move from the premises and then claim constructive eviction as a defense to nonpayment of rent.

21. See Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373 (Tex.1988) (landlord impliedly warrants that commercial premises are suitable for their intended commercial purpose and that premises are free of latent defects that are vital to the intended use; furthermore, landlord warrants that essential facilities will remain in a suitable condition throughout the duration of the tenancy.)

22. Vermes v. American Dist. Tel. Co., 312 Minn. 33, 251 N.W.2d 101 (1977).

23. Davidow v. Inwood North Professional Group—Phase I, 747 S.W.2d 373 (Tex.1988). *See also*, Reste Realty Corp. v. Cooper, 53 N.J. 444, 251 A.2d 268, 33 A.L.R.3d 1341 (1969); Earl Millikin, Inc. v. Allen, 21 Wis.2d 497, 124 N.W.2d 651 (1963).

As discussed below, most courts today have adopted the implied warranty of habitability with respect to residential leases but have not extended that warranty to commercial leases. On the other hand, some courts have adopted the somewhat analogous doctrine—the implied warranty of suitability. A commercial tenant desires to lease premises suitable for its intended commercial use and a commercial landlord impliedly represents that the premises are in fact suitable for that use and will remain in a suitable condition.[24] By analogy to the implied warranty of habitability, the commercial tenant's obligation to pay rent and the landlord's implied warranty of suitability are mutually dependent.[25] Therefore, if the commercial premises are not suitable for the intended use, the obligation to pay rent ceases.

The Restatement (Second) of Property § 5.1 provides various remedies available to the tenants where the landlord breached his obligations making the leased property not suitable for the contemplated 'residential' use. This section does not apply to the commercial leases, however, the reporter's note to this section reads that:

> The rule of this section is not extended to commercial leases. The failure to so extend it is not to be taken as any indication that it should or should not be so extended.... The Reporter is of the opinion that the rule of this section should be extended to nonresidential property. The small commercial tenant particularly needs its protection.

PROBLEM 9.10: L leased a fully furnished apartment to T for 30 days. Among the furnishings was a double decker bed. Access to the upper bunk was by ladder which hooked over the side board of the upper deck. The hooks on the end of the ladder were secured by 3/4 inch screws, which were too small for this purpose. T ascended the ladder for the purpose of making the bed. The screws securing the hooks on the end of the ladder came loose, the ladder fell, and with it the tenant, T, who was injured. T sues L. May T recover?

Applicable Law: At common law, a lessor generally does not impliedly warrant that the leased premises are fit for the purpose for which they are leased. However, even at common law an exception has been made where the lease is of a fully furnished dwelling unit for only a short time, and the furnishings are considered the principal subject of the lease.

Answer and Analysis

Yes. The general common-law rule is that the landlord does not impliedly warrant that the leased premises are fit for the purpose

24. *See,* Davidow v. Inwood North Professional Group, *id.*

25. *Id.*

for which they are leased. However, even before the recent development of the implied warranty of habitability, many cases made an exception to such "no warranty" rules when the lease was for a very short time, the dwelling unit was fully furnished, and when it was considered that the furnishings and equipment constituted the principal subject of the lease. Under these circumstances it is held that the lessor impliedly covenants that the premises and the equipment are fit for the purposes for which they are apparently intended.[26] The common-law rule implying a warranty of suitability in furnished premises for a short term has been adopted by Section 5.1 of the Restatement of Property, Second, and extended as well to all residential premises. Similarly, this rule has been codified in the Uniform Residential Landlord and Tenant Act.[27]

PROBLEM 9.11: L owned a two-story building in which the first floor was rented and used as a grocery store and the second floor was divided into two apartments. Both apartments were served by an inside stairway and the back apartment was served by an outside stairway of wooden construction which was built sometime prior to 1923. In July 2000, L rented the back apartment to T. There was no covenant to repair by L. The outside stairway was leased as part of the back apartment and was not used in common by the other tenant. On October 3, 2000, T's invitee P, fell to the ground and suffered injuries when one of the treads gave way while P was using the back stairway. P sues L for damages for P's injury. May P recover?

Applicable Law: This case applies the following general common-law principles concerning the liability of the lessor for dangerous condition of the leased premises: (1) The lessor is not liable for injury from the dangerous condition of the leased premises because the lessee acquires the leasehold under the doctrine of caveat emptor. (2) If there is a hidden defect in the premises which is known or should be known to the lessor and would not be disclosed to the tenant exercising due care, and that defect causes the injury, then the lessor is liable for violating a duty to warn of the hidden danger. (3) If the lessee can recover from the lessor, then so can the invitee or business guest of the lessee.

Answer and Analysis

It depends. Under the common law, in the absence of a written agreement, the lessor is under no obligation to make repairs to the

26. See also, Ingalls v. Hobbs, 156 Mass. 348, 31 N.E. 286 (1892) (tenant can rescind lease of furnished dwelling for short term where premises were uninhabitable).

27. See Unif. Res. Land. & Ten. Act, § 2.104.

premises resulting from damage or deterioration after the start of the lease. The lessor has no responsibility to persons on the land for conditions arising after the lease begins. But the lessor is obliged to disclose to the lessee concealed and dangerous conditions existing when the possession is transferred and which are known to the lessor.

Today, some courts require that the lessor have actual knowledge of the existence of the condition before the lessor has a duty to disclose it. But the majority hold that it is sufficient if the lessor has information which could lead a reasonable person to suspect that the danger exists, and that the lessor must at least disclose the information to the lessee. Since the lessor in these cases was negligent in not correcting the dangerous situation or making the lessee aware of the dangerous condition, liability is imposed.

Here, if L knew or should have known that the stairs were in a state of disrepair, L had a duty to correct the situation or to warn the tenant and L would be liable for injuries sustained by P. Even if L did not have actual knowledge of the danger, L would still be liable if L had information which would lead a reasonable person to suspect that the danger existed. Today, in many states, statutes impose a duty upon lessors to maintain leased premises in a state of repair. If L breaches that duty, L is liable for resulting injuries. This is especially true with respect to multi-unit apartment houses.

PROBLEM 9.12: L occupies the ground floor of a two-story apartment building which L owns. The second floor of the building, which is serviced by an outside stairway, is occupied by T, who is the regular baby sitter for P's four-year-old daughter. While in the control of T, the child falls to her death from the outside stairway. There is no apparent cause for the fall except that the stairway is dangerously steep and the railing is insufficient to prevent the child from falling over the side. P sues L in tort for the death of the child. May P recover?

Applicable Law: The modern trend is to impose liability on the landlord for injuries occurring on the leased premises under general principles of tort law or, in the case of residential leasing, for breach of an implied warranty of habitability.

Answer and Analysis

Increasingly, yes. Under the common law, the landlord was generally held immune from tort liability. This immunity was subject to a few strictly construed exceptions. The landlord would be held liable if: (1) there was a hidden and undisclosed defect or danger known only to the landlord; (2) the particular dangerous area was a common area over which the landlord had exclusive control; or (3) the landlord had negligently repaired the premises.

Thus, in this case as well as under the common law, L would not be held liable because there was no hidden defect, no common area under the exclusive control of the landlord, and no negligent repairs by the landlord.

However, the trend of modern authorities has been to abolish the landlord's tort immunity and to hold the landlord liable on either a theory of negligence or breach of implied warranty of habitability. Thus, in those jurisdictions, the landlord now has the affirmative duty of repairing and maintaining the premises in a non-dangerous manner. Thus, L's failure to provide a more protective railing and a safer angle of descent could subject him to liability for the death of the child.[28]

PROBLEM 9.13: L leased T an apartment on a month-to-month basis. The lease was oral. T remained in possession for seven years. Just before the end of that period, the plaster in the ceiling began to crack and bulge. Although L had no legal obligation to do so, L repaired and re-plastered the ceiling causing it to appear safe when, in fact, it was not. Shortly after the repairs, and while T was asleep in bed, the plaster suddenly became loose and fell on T, causing injuries. T sued L for damages. May T recover?

Applicable Law: Under the common law, there is no duty on the part of the lessor to make repairs on the leased premises. However, if the lessor undertakes to repair and does so negligently, and injury results, the lessor is liable in tort.

Answer and Analysis

Yes. Under the common law, L is under no duty to make repairs during the continuance of the lease, unless, of course, the parties contract otherwise. Nevertheless, if the landlord undertakes to make repairs, the landlord must make them in a non-negligent manner. In the instant case, the landlord did make the repairs and the evidence would warrant a finding that they were negligently made. Thus, the landlord is liable.[29]

Note: Landlord's Strict Liability

Today, most jurisdictions hold landlords liable in tort for injuries suffered by tenants or invitees on the leased premises. In most cases this liability is based on negligence. But a small number of decisions have gone further and have imposed strict liability, or liability without

28. See Sargent v. Ross, 113 N.H. 388, 308 A.2d 528 (1973); Restatement, Second, Property (Landlord and Tenant) § 17.1, and Reporter's Note to Introductory Note to Ch.17.

29. See Janofsky v. Garland, 42 Cal. App.2d 655, 109 P.2d 750 (1941).

regard to fault.[30] Strict liability generally proceeds under a warranty theory: the implied warranty of habitability includes a warranty protecting the tenant from a defective product, absence of negligence notwithstanding. The rationale of strict liability is that landlords are generally in a better position than tenants to make repairs to structures that are likely to be dangerous.[31] Further, the landlord may be in a better position to spread risks or insure against them—just as the manufacturer of defective products is. The latter rationale may apply to the landlord who owns hundreds of similar apartments. Whether it applies to the small landlord who owns only one or two is dubious.

§ 9.4 The Tenant's Duty to Repair and Maintain the Premises

PROBLEM 9.14: L leased a furnished house to T for five years. Towards the end of the second year of the term, a violent windstorm blew off two shingles from the roof of the house. T noticed a little rain leak through the roof where the shingles had been blown off, but no damage was done to the house at that time. Two weeks later, after T had ample time to repair the roof but had failed to do so, a violent rain caused water to leak through the hole in the roof causing serious and extensive damage to the valuable oak floors in the rooms below. L sues T for damage to his floors. May L recover?

Applicable Law: A tenant is liable for permissive waste, which means the tenant must make ordinary repairs to prevent serious injury to the leased premises.

Answer and Analysis

At common law, the landlord had no obligation to repair the premises during the lease term unless the landlord covenanted to make repairs by the terms of the lease. The tenant took the premises "as is." This rule developed at a time when leaseholds were principally of undeveloped real estate or improved premises where the structure was of little value.

Upon termination of the lease, the tenant was obligated to return the premises to the landlord in the same condition as the tenant received them, ordinary wear and tear excepted. The tenant was under no duty to prevent the natural depreciation of structures on the leased premises. On the other hand, the tenant was bound to make ordinary repairs on the leased property that would avoid

30. E.g., Becker v. IRM Corp., 38 Cal.3d 454, 213 Cal.Rptr. 213, 698 P.2d 116 (1985); Gaspard v. Pargas of Eunice, Inc., 527 So.2d 28 (La.App.1988) (interpreting Louisiana statute to impose strict liability on landlords for injures to tenants caused by defective premises). But see Dwyer v. Skyline Apartments, Inc., 123 N.J.Super. 48, 301 A.2d 463 (App.Div.1973), affirmed, 63 N.J. 577, 311 A.2d 1 (1973) (rejecting strict liability).

31. See Nolan & Ursin, Strict Tort Liability of Landlords: *Becker v. IRM Corp.* in Context, 23 San Diego L. Rev. 125 (1986).

serious injury from the elements. The tenant had to "treat the premises in such a way that no substantial injury would be done to the property during the tenancy."[32] It would seem the replacing of the two shingles (of which T had knowledge), to prevent the serious injury to the floors would properly be classified as ordinary repairs and that T should be liable for such permissive waste.[33] There is, however, a question of when L can sue. Since T is obligated to return the premises at the end of the term in the same condition as the tenant received them, T's obligation may not be breached until it is known following the end of the term that T did not make the necessary repairs. Accordingly, any suit by L before the end of the term may be premature.

The "no duty" to repair rule has been changed by statute and case law in most jurisdictions with respect to residential property. Thus, in jurisdictions that imply a warranty of habitability, the landlord has a duty to make necessary repairs to assure compliance with that warranty. Shifting the repair obligation to L might affect whether L is liable for the damage.[34]

§ 9.5 Illegality and Frustration of Purpose

PROBLEM 9.15: L leased a building to T for a period of five years at a designated rental payable monthly. At the end of the first two years the building was completely destroyed by fire. T moved to another building and refused to pay rent to L. There was no provision in the lease excusing the payment of rent by T in the event the building was destroyed by fire. L sues T for rent under the lease. May she recover?

Applicable Law: Under the traditional common-law rule, the tenant was liable to pay rent even though the property was totally destroyed by fire or other casualty. This common-law rule is obsolete today and the tenant would be relieved of liability for payment of rent after the building was destroyed by fire.

Answer and Analysis

At common law the obligation to pay rent was not suspended merely because the leased premises were destroyed by fire. The

32. Kennedy v. Kidd, 557 P.2d 467 (Okl.App.1976).

33. See Townshend v. Moore, 33 N.J.L. 284 (Sup.Ct. 1869); Suydam v. Jackson, 54 N.Y. 450 (1873), as to T's duty to make repairs required for tenantability. A tenant who makes alterations to the leased premises without the landlord's consent may also be committing waste. While landlord may enjoin the tenant from making the alterations and sue for damages, landlord may not engage in acts of self help, such as locking tenant out of the premises, to prevent tenant from making the alterations. See Berg v. Wiley, 264 N.W.2d 145 (Minn.1978).

34. Restatement of Property, Second, § 17.6. See § 9.8, infra.

common law reasoned as follows: T made a promise to pay rent monthly. The payment of rent was not expressly conditioned upon T's ability to continue to receive the benefit of the leased premises. Thus, the obligation to pay rent was not suspended or terminated merely because the premises were destroyed by fire. But the common-law rule no longer prevails.[35] Rather, an accidental destruction of the leased premises excuses the tenant from the obligation to pay rent absent express contractual provisions to the contrary.[36]

PROBLEM 9.16: L leased a building to T for nine years on the condition that it be used only as a restaurant and night club. After the payment of the first month's rent of $300, T applied for a restaurant and night club license. The department of licenses refused to issue T a license because the building did not comply with the fire code. T sues L for recovery of the rent paid and L counterclaims for past due rent. Who recovers?

Applicable Law: When the granting of the license does not rest on discretion, but rather on an ordinance which made such a contemplated use illegal, and there are no other uses for which the property can be used under the conditions of the lease, then the tenant is not liable under the lease and is entitled to any paid-in rents because of the complete failure of consideration.

Answer and Analysis

T does. Usually, when there is a lease which restricts the use of the property, and such use depends upon obtaining a license, the tenant assumes the risk of obtaining the license. Even though the tenant fails to obtain the license, the tenant remains liable under the lease. The reason for this rule is that ordinarily the granting or withholding of the license rests on the discretion of the licensing official and the tenant assumes the risk. If the tenant takes a lease without conditions under such circumstances, and binds himself absolutely for the payment of the rent, the courts will not relieve the tenant from the contract.

By contrast, where the granting of the license does not rest on discretion but rather on an ordinance which made such a contemplated use illegal, and under the lease the property can be used for nothing else, then the tenant is not liable under the lease and is entitled to recover rents already paid. In short, where the exclusive intended purpose is illegal, neither party can enforce the lease against the other.[37]

35. See Albert M. Greenfield & Co., Inc. v. Kolea, 475 Pa. 351, 380 A.2d 758 (1977) (accidental destruction of premises by fire excuses tenant from the obligation to pay rent).

36. Id.

37. See Restatement of Property, Second, § 9.1.

PROBLEM 9.17: L leased Blackacre to T for 10 years with an express stipulation that the premises could be used only for the sale of liquor. Subsequent to the execution of the lease the 18th Amendment to the U.S. Constitution was enacted making it illegal to sell liquor. T refused to pay the rent and L sues T for such rent. May L recover?

Applicable Law: In most modern jurisdictions, when complete frustration or nearly complete frustration of business purpose occurs due to unanticipated events occurring after the term of the lease began, the tenant can terminate the contract and be relieved of any further obligations under it. This view is contrary to the traditional common-law rule which holds that in the absence of a specific stipulation in the lease to the contrary, the tenant remains liable under the lease.

Answer and Analysis

In the majority of cases today the landlord will be unable to recover where there is total or almost total frustration of purpose. The courts look for a way to avoid the harsh result of the traditional common-law rule which would not have excused the tenant from the continued payment of rent. Here, the lease had an express stipulation that only liquor could be sold on the premises. When this became impossible because of a change in the law, complete frustration of purpose occurred, and many courts will allow the tenant to terminate the lease.[38]

Under the traditional view, the tenant would remain liable under the lease although the tenant can no longer carry on the liquor business on the leased premises. Under this rule, while T is in substance deprived of the beneficial use of the land, T still owns an estate in Blackacre and the risk of loss generally follows the ownership. Also, under the facts, the ownership of the estate for years and the contract to pay rent are not rendered illegal by the 18th amendment.

Suppose the lease did not prohibit the tenant from using the premises for other purposes although the landlord expected and the tenant clearly intended to use the premises for the sale of liquor. In this case the tenant's intended use clearly is frustrated, but the tenant is not prohibited from engaging in an alternative use. The problem is that the tenant economically may not be in as good a position to maximize the use of the land by resort to another occupation. Could the tenant rescind the lease? The Restatement of Property, Second, adopts the rule that only if the tenant would suffer extreme hardship could the tenant rescind the lease in this

38. Restatement of Property, Second, § 9.2.

case where the supervening action was unforeseeable.[39] Furthermore, even if the tenant would suffer extreme hardship, the tenant cannot rescind the lease unless the landlord knew at the time the lease was executed of the tenant's intended use.[40]

§ 9.6 Eminent Domain

PROBLEM 9.18: L leased Blackacre to T for 10 years. After three years of the term had expired, Blackacre was condemned for temporary use by the military. L and T were each paid just compensation in the proceeding for their respective injuries. Since T could no longer occupy the premises, T refused to pay rent. L sues T for the rent according to the terms of the lease. May L recover?

Applicable Law: When only a part of the leased premises are condemned, either in time or space, under the traditional view the landlord-tenant relationship continues and the tenant is liable to pay the rent. On the other hand, if the entire fee is condemned, then the interests of both parties are extinguished and the tenant is no longer liable for rent.

Answer and Analysis

The traditional answer is yes. Every lease involves two distinct elements, (a) privity of contract under which T has agreed to pay rent, and (b) privity of estate under which T has a term for years and L has a reversionary interest to which is attached the right to the rent as an express or implied covenant running with the land. When Blackacre was condemned for temporary use, what was "taken?" Probably little more than T's right of possession as long as needed for military purposes. This period of time might be far less than the balance of the lease term. Of course, it might be longer. At any rate, if the condemning authority should surrender the premises during the term of the lease, the right of exclusive possession would revert to T for the balance of the term, and the relationship of landlord and tenant would remain unaffected.

Both landlord and tenant would also be entitled to receive the value of their respective condemned interest. T, having been paid for what was carved out of T's estate for years through the condemnation proceedings, should pay L in full for the leasehold.

Suppose only part of the leased space had been condemned. In that case, T could continue to occupy the rest of the premises and the relation of landlord and tenant would still exist. T must continue to pay rent on the whole. However, T will be entitled to share in the condemnation award.

39. See Restatement of Property, Second, § 9.2, comment.

40. Lloyd v. Murphy, 25 Cal.2d 48, 153 P.2d 47 (1944).

The only case in which condemnation proceedings relieve T of the obligation to pay rent is where the condemner takes the entire fee in the leased property. In that case, the payment of just compensation would necessarily include full payment for the fee simple, including the values of both the leasehold and the reversion. Both interests would be completely extinguished as such in the hands of the condemner and there could no longer be a relationship of landlord and tenant. Privity of estate would have disappeared by merger, and any contractual obligations would seem to have been fully performed by the fact that landlord and tenant have both been fully paid for their interests.

In condemnation proceedings where a landlord-tenant relationship exists and the condemner takes only part of the property, whether in time or space, the tenant remains liable for the rent; but if the entire fee simple is taken and the estates of both tenant and landlord are extinguished by merger and each is compensated in full for her entire interest, the tenant is no longer liable for the rent.[41]

While the Restatement of Property, Second, is generally in accord with the traditional common-law principle where the entire property is taken by eminent domain, in the case of only a partial taking, the lease also is terminated if "the taking significantly interferes with the use contemplated by the parties."[42] If there is no significant interference, the tenant is entitled to a reduction in the amount of rent.[43]

§ 9.7 The Covenant of Quiet Enjoyment

PROBLEM 9.19: L leased Blackacre to T for a period of ten years at a monthly rent of $500. X wrongfully entered Blackacre and remained in possession for two months. During that two-month period, T pays no rent. L sues T for the $1000 rent for the two months during which X had possession of Blackacre. May L recover?

Applicable Law: The landlord covenants that neither the landlord nor anyone with a paramount title will interfere with the tenant's use and enjoyment of the premises. The withholding of possession of leased premises from the tenant by the lessor or eviction of the tenant by one having paramount title

41. See Leonard v. Autocar Sales & Serv. Co., 392 Ill. 182, 64 N.E.2d 477, 163 A.L.R. 670 (1945); Commonwealth of Kentucky, Dept. of Highways v. Sherrod, 367 S.W.2d 844 (Ky.1963), involving a partial taking; Powell, § 247[2], criticizing the rule of no abatement in partial takings; Restatement, Second, Property (Landlord and Tenant) § 8.1, favoring rent abatement in partial takings.

42. Restatement of Property, Second § 8.1(a).

43. Restatement of Property, Second, § 8.1(b).

suspends or extinguishes rent and gives the tenant the right to terminate the lease. On the other hand, an eviction by the wrongful acts of a third person does not release the tenant from the obligation to pay rent.

Answer and Analysis

Yes. If L withholds possession of Blackacre or had one having paramount title taken possession from the tenant, T may have the right to terminate the lease. However, a lessor does not assume responsibility for the wrongful acts of third persons in evicting a tenant from the leased premises. For such a wrongful interference, the tenant has her proper remedies. The tenant can sue the wrongdoer for possession or damages. The tenant, however, cannot refuse to pay rent since the obligation to pay rent is not suspended or extinguished. The lease conveys to the tenant an estate in the land. The responsibility for payment of rent is based upon the ownership of that estate and the promises set forth in the lease.

PROBLEM 9.20: L leased space in a high rise building to T for two years for the purpose of retailing jewelry. The lease specifically provided that L would supply elevator service in the building. Furthermore, L covenanted not to lease any other room on the same floor to any other person retailing jewelry. T took possession and began operating the business. Thereafter, L leased space on the same floor to X covering the same term as T's lease. X covenanted that X would not sell jewelry in the leased premises. However, X violated this covenant and made a specialty of selling pearls in the leased space.

Shortly after T started business, the elevator stopped working. L has failed to repair it, notwithstanding T's frequent complaints and references to the lease obligations. T finally notified L that if the elevator were not fixed within one week T would vacate the premises and rescind the lease. The week expired and the elevator was not repaired. T vacated the premises and advised L that T would rescind the lease. L sues T for rent. May L recover?

Applicable Law: A landlord impliedly covenants that neither the landlord nor anyone claiming under the landlord or anyone who has a claim superior to the landlord will substantially interfere with the tenant's use and enjoyment of the premises. This is known as the "covenant of quiet enjoyment" and, if not expressed in the lease, it is implied. If the covenant is breached and the tenant, within a reasonable time, vacates the premises after first providing the landlord a reasonable time to remedy the interference, the tenant can rescind the lease and claim constructive eviction as a defense to the landlord's subsequent

action to recover unpaid rent. Thus, to assert a constructive eviction defense tenant must establish that the landlord breached the covenant and that tenant subsequently vacated the premises within a reasonable time after first giving landlord a reasonable opportunity to correct the interference.

Answer and Analysis

No. It was a vital and important part of the lease that T was not to have a competitor in the sale of jewelry in the same building. The fact that L put a provision in X's lease that X would not sell jewelry in the building was not sufficient compliance with L's express covenant in the lease. The burden was on L to enforce the provision for T's benefit. Otherwise form would prevail over substance. The violation of the express provision of the lease that L would not lease any other room in the building to one specializing in the sale of jewelry entitled T to rescind the lease. Therefore, T is not liable to L for the rent provided for in the lease.[44]

Under these facts, L also has violated the implied covenant of quiet enjoyment as well as the express covenant not to lease any room in the same building to another tenant who would specialize in the sale of jewelry, a vital element in the leasehold from T's standpoint. On both these counts—constructive eviction and breach of an express covenant—T has a good defense to the payment of rent.

L leased T a term for years and impliedly covenanted that T should have exclusive possession and quiet enjoyment of the leased premises. Furthermore, L promised to provide elevator service to the leased premises. By failing to provide that service to T, L has made it impossible for T to use and enjoy the premises. L could not have been more effective in interfering with T's enjoyment of the premises had L actually evicted T from the premises. It is immaterial that L did not have an actual intent to oust T. In these circumstances, L is accountable for the natural and probable consequences of her acts. If T had covenanted to maintain the elevator, then T's failure to do so would not have permitted T to rescind the lease. This illustrates that in order for T to claim a constructive eviction, L must have breached some duty, other than the duty created by the covenant of quiet enjoyment, that L owed to T. Because of this rule, when the duty to make repairs was on the

44. See Westland Housing Corp. v. Scott, 312 Mass. 375, 44 N.E.2d 959 (1942); University Club of Chicago v. Deakin, 265 Ill. 257, 106 N.E. 790, L.R.A. 1915C, 854 (1914). Occasionally, such covenants against competition are found to be unenforceable because they violate state or federal antitrust laws, but the trend is to find them legal. See In re Tysons Corner Regional Shopping Center, 86 F.T.C. 921 (1975) (noncompetition covenant violated antitrust law); Polk Bros., Inc. v. Forest City Enterp., 776 F.2d 185 (7th Cir.1985) (noncompetition covenant did not violate antitrust law).

tenant, as was the case at the common law absent an express lease provision to the contrary, tenants could not readily claim a constructive eviction when the interference with their use and enjoyment of the premises was occasioned by disrepairs they were required to correct.

In this case, the duty was to provide elevator service. In many cases, L's duty is implied. For example, suppose T rents an apartment and subsequently L leases another apartment in the same building to X, who uses that apartment to engage in illegal activities, which are a nuisance per se. In all likelihood, the law implies a duty upon L to keep the premises free of a nuisance and, if L fails to do so and the nuisance substantially interferes with T's use and enjoyment, T can vacate and claim a constructive eviction.[45]

In order to successfully claim a constructive eviction, T must give L an reasonable opportunity to correct the interference, and then must vacate the premises within a reasonable time if L fails to correct. The obligation to vacate was consistent with the notion of there being a substantial interference with T's use and enjoyment. If T failed to vacate, that effectively was evidence of either insubstantiality or waiver. However, the obligation to vacate could impose a hardship on T if T had no place to go. T might avoid that hardship by bringing a declaratory judgment action seeking an order that if T were to vacate, T could defend any later action for rent on the ground of constructive eviction.[46]

In the case of residences, modern courts also have recognized that the constructive eviction doctrine may not be sufficient to assure that tenants as a class receive the benefit of their bargain to rent habitable premises. Tenants may not receive that benefit if the requirement that they vacate leaves them with the option of either renting other uninhabitable premises or no premises at all in a tight market. Further, the obligation to vacate throws the entire risk of uncertainty in the litigation process upon the tenant: the tenant who vacates, takes new premises and later receives a judicial determination that she was not constructively evicted from the first premises, will have to pay rent on both leases. Modern courts have recognized that constructive eviction may not be a sufficient remedy and have fashioned a new one—the implied warranty of habitability.

45. See, e.g., Phyfe v. Dale, 72 Misc. 383, 130 N.Y.S. 231 (1911). See also Blackett v. Olanoff, 371 Mass. 714, 358 N.E.2d 817 (1977) (landlord constructively evicts tenant for failing to curtail a nuisance caused by other tenants who engage in making loud music and permitting patrons to engage in noisy activities which substantially interfere with tenant's use and enjoyment of the leased premises).

46. See Charles E. Burt, Inc. v. Seven Grand Corp., 340 Mass. 124, 163 N.E.2d 4 (1959).

§ 9.8 Illegality and the Implied Warranty of Habitability

PROBLEM 9.21: T rented an apartment from L which at the time of contract exhibited various housing code violations including broken railings, cracked ceilings, shattered windows, obstructed commodes and insufficient ceiling height in the basement. L knew that the condition of the apartment was in violation of the local housing code, which in part provided that:

"No person shall rent any habitation unless such habitation is in a clean, safe and sanitary condition, in repair, and free from rodents or vermin."

After T took possession, L refused to make the necessary repairs, and T withheld rent. L now sues for possession of the apartment and for past rent due. May L recover?

Applicable Law: When a local ordinance makes it illegal to rent premises known by the landlord to be uninhabitable, the courts may declare the lease void. In this case, the landlord may not bring any suit for rent or possession based upon the breach of the lease. However, the landlord may collect in quasi-contract for the reasonable rental value of the apartment, if any, while occupied by the tenant.

Answer and Analysis

No. When an apartment is rented with serious housing code violations which are known to the parties at the time of contract, the lease can be declared illegal and void *ab initio* if governing statutes or ordinances make it illegal to rent apartments with housing code violations. In general, an illegal contract is void and confers no right upon the wrongdoer. Thus, the landlord may neither bring an action for past due rent nor for possession. This results in the creation of either a tenancy at will or periodic tenancy.[47]

Although the landlord may not bring suit based upon the illegal contract, some courts grant the landlord the right to recover the property's reasonable rental value during the period of occupancy.[48]

Suppose landlord sues tenant for possession for nonpayment of rent and the tenant successfully defends that suit on the ground that the lease was illegal. If, as a result of that defense, tenant becomes a month-to-month tenant, can the landlord subsequently terminate that tenancy on the ground that the tenant had previously and successfully pled the defense of illegality? Some courts have held that the defense of retaliatory eviction protects tenants who

47. Brown v. Southall Realty Co., 237 A.2d 834 (D.C.App.1968).

48. William J. Davis, Inc. v. Slade, 271 A.2d 412 (D.C.App.1970).

protest housing code violations through the defense of illegality. Thus, when a lease is declared to be illegal because of housing code violations existing at the time of contract, the landlord may not sue on the lease, may only recover in quasi-contract the property's reasonable rental value, and may not evict the tenant (or fail to renew any resulting tenancy at will or periodic tenancy) in retaliation.[49]

PROBLEM 9.22: T rented a three room apartment in a multi-family building. When T signed the rental agreement, the apartment was habitable and acceptable to T. But over time the building deteriorated through no fault of T. The structure was materially damaged, rodent and insect infestation became evident, heat and hot water were not provided, and garbage was not collected on a regular basis. Upon being notified of these conditions, L refused to take the necessary corrective measure to repair the premises. Because other suitable housing was unavailable, T remained on the premises but stopped paying rent. L now brings suit for the past due rent. T counterclaims that L has violated applicable building and housing codes. May L recover?

Applicable Law: Under the common law, a landlord was under no duty to make any repairs once the tenant had commenced occupancy. But the modern trend is to impose an implied warranty of habitability on the landlord's part. By recognizing the modern lease to be a contract instead of solely creating an interest in land, courts have recognized contractual remedies for the landlord's failure to supply a habitable residence.

Answer and Analysis

In most jurisdictions the answer is no. At least, the landlord may not recover rent. At common law and in the absence of an express covenant or statute, the landlord had no duty to make any repairs once the tenant had commenced occupancy. But this no-repair rule has been substantially modified or completely rejected by many courts.[50]

The complexities of the modern landlord-tenant relationship have caused courts to reject totally the doctrine of caveat emptor

49. Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C.Cir.1972).

50. However, not by all courts. See P.H. Inv. v. Oliver, 778 P.2d 11 (Utah App.1989) (refusing to recognize an implied warranty of habitability; court found this to be a matter for the state legislature). See also Bradley v. Wachovia Bank & Trust Co., N.A., 90 N.C.App. 581, 369 S.E.2d 86 (1988) (standard for implied warranty of habitability imposes no higher obligation on landlord than a reasonable duty to inspect the premises).

and create an implied warranty of habitability.[51] Under the common law, a lease was equivalent to a sale of the premises for a term. Since it was primarily the land and its use which was the subject of the lease, both the landlord and the tenant possessed equal knowledge as to the qualities of the land. Furthermore, tenants were often regarded as more capable of making necessary repairs, if not financially than at least manually. This equality of knowledge or ability to make repairs, however, generally does not apply as to modern multi-family dwellings. Further, the tenant is no longer primarily interested in the land, but rather in the right to enjoy the premises for living purposes. The tenant in effect seeks a contractual package of goods and services and not a mere interest in the real estate.

The court's modern treatment of the lease as a contract rather than solely as an interest in land stems from many practical aspects of the modern landlord-tenant relationship. First, the prospective tenant lacks the requisite knowledge and skills for determining an apartment's condition, compliance with building codes, or the existence of latent defects. Furthermore, even if the tenant had the knowledge, skill and financial capability to make the necessary repairs, the increasing complexity of modern dwellings would require access to equipment and areas in the building in the control of the landlord. Additionally, the courts have found an inequality of bargaining power between the parties as evidenced by standardized leases, shortages of available adequate housing, and racial and class discrimination.

Thus, many courts have found an implied warranty of habitability and fitness in the residential landlord-tenant relationship analogous to the warranty of merchantability in products liability cases. This warranty runs from the first day of the lease to the last. When housing codes establish a duty on the landlord to provide habitable tenements, it has been held that these codes form the standards for the implied warranty of habitability. In addition to the warranty, the courts further imply a covenant on the landlord's part to repair the premises to assure that they comply with the terms of warranty. Contractual remedies are available to the tenant for breaches of the warranty as defined by case law or by housing code guidelines.

In order to constitute a breach of the warranty of habitability, the defect must be of such a nature as to render the premises unsafe or unfit for habitation or to be in substantial noncompliance with the applicable housing codes. Unlike the common-law rules surrounding the concept of constructive eviction, in order for the tenant to rely upon the warranty, it is not necessary for the tenant

51. In some states, the warranty can arise by statute.

to vacate the premises. Since the covenant of the tenant to pay rent and the implied covenant of the landlord to maintain the leased premises in a habitable condition are viewed as mutually dependent, the tenant may raise a breach of the warranty of habitability as a defense to the landlord's action for unpaid rent. However, although the tenant may not have to pay all past rent due, the tenant may still remain liable for the reasonable rental value of the premises in its deteriorated condition.[52]

The implied warranty of habitability has been endorsed by both the Restatement and by the Commissioners on Uniform State Laws. Under the Restatement rule, the landlord effectively covenants that the premises are suitable for residential use.[53] For a breach of that promise, the tenant can terminate the lease and obtain equitable or legal relief including damages, rent abatement, rent withholding or the right to apply rents towards the repair of the premises.[54] Specific performance is not expressly authorized although it is not specifically precluded. The Reporter's Note to the section states only that "courts have rarely ordered specific performance of an obligation to repair."[55]

The implied warranty also is reflected in Section 2.104 of the Uniform Residential Landlord Tenant Act. It provides, among other things, that the landlord is obligated to "comply with the requirements of applicable building and housing codes materially affecting health and safety" and shall "make all repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition." If the landlord fails to comply with Section 2.104 and the noncompliance materially affects health and safety, the tenant may terminate the lease, seek damages, or make repairs and deduct them from future rent in the manner provided in that act.[56] Again, specific performance is not specifically listed as an available remedy.

Although neither the Restatement nor the Uniform Act specifically mentions specific performance as an available remedy, that

52. See, e.g., Javins v. First Nat. Realty Corp., 428 F.2d 1071 (D.C.Cir.1970); Pugh v. Holmes, 486 Pa. 272, 405 A.2d 897 (1979); Hilder v. St. Peter, 144 Vt. 150, 478 A.2d 202 (1984) (in addition to finding an implied warranty of habitability, the court also held that for breach of that warranty landlord could be held liable for tenant's discomfort and annoyance arising from the breach.) But see Coleman v. Rotana, Inc., 778 S.W.2d 867 (Tex.App. 1989) (insufficient parking places to comply with city zoning regulations did not violate any implied warranty of suitability).

53. Restatement of Property, Second § 5.1.

54. See Restatement of Property, Second, §§ 10.1 (lease termination), 10.2 (damages); 11.1 (rent abatement); 11.2 (repair and deduct) and 11.3 (rent withholding).

55. Restatement of Property, Second, § 5.1 (Reporter's Note 6).

56. Unif. Res. Land. & Ten. Act, § 4.101.

remedy has been expressly approved by some courts that have considered what remedies should be available for breach of the implied warranty of habitability.[57]

All courts would agree that if the apartment becomes completely uninhabitable, the obligation to pay rent terminates. However, if the apartment is only partially uninhabitable, there are differences in the jurisdictions regarding the manner of computing damages. In some states, tenant is entitled to damages (or rent reduction) in an amount equal to the difference between the promised rent and the property's fair rental value in the partially uninhabitable condition. Other jurisdictions would reduce the rent by a percentage which equals the percentage of lost use. Thus, if only 70% of the premises is inhabitable, then only 70% of the rent is due.

In a few jurisdictions courts have recognized the possibility that in negotiating the lease tenant may actually have struck a beneficial bargain such that the promised rent was actually less than the fair rental value of the property as warranted.[58] For example, suppose landlord leases a fully habitable apartment to tenant for $500 even though the apartment's fair rental value was $600. Subsequently the apartment becomes partially uninhabitable and its then fair market value if $350. If tenant vacates and stops paying rent, tenant is entitled to recover $100 from landlord on the theory that tenant has lost the benefit of his good bargain by that amount. If, on the other hand, tenant remains in possession and pays $500 rent, tenant is entitled to damages of $250. This represent $100 for the lost good bargain and $150 for the excessive rent paid for the partially uninhabitable apartment. In many cases, of course, tenant will not have struck such a favorable bargain and promised rent and the as warranted value will be the same. In such case, tenant recovers damages or obtains a rent reduction only in an amount equal to the difference between the promised rent and the property's fair rental value as partially uninhabitable.

PROBLEM 9.23: T rented a two bedroom apartment from L on a month-to-month basis. The apartment was kept in poor repair, exhibiting numerous housing, health and building code violations: the walls were cracked and structurally defective, the ceilings leaked from visible holes, the elevator shaft in the hallway remained open, and the basement incinerator was in faulty repair. After making several demands on L to make the necessary repairs, T reported the conditions to the appropriate local governmental authorities.

57. See, *Javins*, supra note 52; *Pugh*, supra note 52; George Washington University v. Weintraub, 458 A.2d 43 (D.C.App.1983).

58. Mease v. Fox, 200 N.W.2d 791 (Iowa 1972).

Shortly after L learned of these actions, L served T with a 30 day notice to quit for the purpose of terminating the month-to-month tenancy. T failed to vacate the premises at the end of the 30 days. In L's summary proceedings action to evict T, can T successfully plead the defense of retaliatory eviction?

Applicable Law: Generally, a landlord may terminate a month-to-month tenancy for any legal reason or for no reason at all. However, the landlord may not evict a tenant in retaliation for the tenant's having reported housing code violations to governmental authorities or otherwise seeking to utilize the implied warranty of habitability.

Answer and Analysis

Yes. Although the general rule is that upon proper notice a landlord may terminate a month-to-month tenancy for any legal reason, or for no reason at all, many courts have held that a landlord is not free to terminate a month-to-month tenancy in retaliation for having reported housing code violations to the appropriate authorities. In establishing housing code regulations, the legislature or local governing bodies intended to secure safe and sanitary living accommodations for tenants. The system of regulations and governmental investigation is predicated upon the initiative of private citizens. Permitting retaliatory eviction of the tenant for reporting housing code violations would frustrate the effectiveness of the legislation. If a tenant in substandard housing is prevented from reporting code violations because of the practical threat of eviction or termination, better housing and living conditions remain merely an illusory legislative promise. Thus, legislative intent and landlord-tenant realities dictate the existence of the retaliatory eviction defense.

Under typical judge-made or statutory rules governing retaliatory eviction, the tenant must show that:

(1) a condition existed which in fact did violate the housing code,

(2) the landlord knew that the tenant had reported the condition to the enforcement authorities, and

(3) the landlord, for the sole purpose of retaliation, sought to terminate the tenancy.

Although the landlord may not evict the tenant for retaliatory purposes, once the illegal purpose is dissipated, the landlord, in the absence of contract, may terminate the tenancy for any other reason or may raise the rents.[59]

59. See Edwards v. Habib, 397 F.2d 687 (D.C.Cir.1968), cert. denied 393 U.S. 1016, 89 S.Ct. 618, 21 L.Ed.2d 560 (1969); Dickhut v. Norton, 45 Wis.2d

Both the Restatement and the Uniform Residential Landlord and Tenant Act approve of the retaliatory eviction defense.[60] Under the Restatement view, the defense is available if, among other things, "the landlord is primarily motivated in ... [terminating the tenancy] because the tenant, either alone or through his participation in a lawful organization of tenants, has complained about a violation by the landlord of a protective housing statute."[61] Motivation is primarily a factual question. In addressing the most difficult question of when a retaliatory motive has been dissipated the comments state:

> The fact that the landlord is motivated equally by several reasons, only one of which is the tenant's complaint about a violation ... is not enough to establish retaliatory action. The burden of proving that the landlord's exercise of his rights is retaliatory is on the tenant. The burden of going forward with evidence to establish that his primary motivation is not retaliatory shifts to the landlord after the tenant establishes that the exercise by the landlord of his rights was discriminatory and followed at the first opportunity after conduct of the tenant. The ultimate burden of proof, however, remains with the tenant. The following factors, among others, tend to establish that the landlord's primary motivation was not retaliatory: (a) the landlord's decision was a reasonable exercise of business judgment; (b) the landlord in good faith desires to dispose of the entire leased property free of all tenants; (c) the landlord in good faith desires to make a different use of the leased property; (d) the landlord lacks the financial ability to repair the leased property and therefore, in good faith, wishes to have it free of any tenant; (e) the landlord was unaware of the tenant's activities; (f) the landlord did not act at the first opportunity after he learned of the tenant's conduct; and (g) the landlord's act was not discriminatory.

The Uniform Act applies to cases where the tenant has made complaints to local housing authorities as well as where the tenant has complained to the landlord of a violation of the warranty. Under it, "evidence of a complaint within [1] year before the alleged act of retaliation creates a presumption that the landlord's conduct was retaliatory."[62]

389, 173 N.W.2d 297 (1970), requiring the tenant to prove the defense by clear and convincing evidence; and Robinson v. Diamond Housing Corp., 463 F.2d 853 (D.C.Cir.1972), indicating the difficulty that such a "blemished" landlord may encounter in ultimately evicting the tenant.

60. Restatement of Property, Second, §§ 14.8; 14.9; Unif. Res. Land. & Ten. Act, § 5.101.

61. Restatement of Property, Second, § 14.8(4).

62. URLTA § 5.101(b).

PROBLEM 9.24: T rented a plush apartment in Gilded Towers from L, relying upon representations of adequate security. Gilded Towers, which consists of four apartment buildings in a wealthy suburban community, provides 24–hour security guard service for the protection of its tenants. One evening, at approximately 8:00 pm, T was approached in the foyer of the apartment building by two gunmen who demanded T's jewelry. When T resisted, T was brutally beaten and robbed. It was later revealed that on the night of the attack, the security guard was absent from the premises. T now sues L for the injuries T incurred. May T recover?

Applicable Law: Under the common law, a landlord was under no duty to protect tenants against the intentional torts and criminal acts of third persons. Many court today imply this duty in certain circumstances. The implied duty may stem from a special relationship existing between the landlord and tenant, an implied warranty of protection, the foreseeability of criminal acts and the reasonable ability to take protective measures, or the deterioration of relied on security programs.

Answer and Analysis

Traditionally the answer is no, but several recent decisions disagree. Generally, there is no duty to protect another against the intentional torts and criminal acts of third persons. This common-law rule has been applied by a majority of the courts to the landlord-tenant relationship, even when security precautions were voluntarily provided by the landlord.[63]

Some courts, however, have imposed upon the landlord a duty of protecting residential tenants. One theory for imposing such a duty analogizes landlord-and-tenants to innkeeper-and-guests. Under the common law, the innkeeper owed a duty to protect his guests from the criminal acts of third persons due to the existence of a "special relationship." This special relationship doctrine has been extended by some courts to include the modern day tenant. On the theory that the modern tenant has rented a package of goods and services, a few courts have recognized an implied contractual obligation on the part of the landlord to provide those protective measures which are within his reasonable capacity.

Other courts have found liability in tort based upon (1) the inability of tenants to adequately protect themselves against intruders, (2) the landlord's exclusive control of the common areas and the areas of access to the apartment complex, (3) the tenant's reliance upon, but the subsequent degeneration of, security features

63. See Gulf Reston, Inc. v. Rogers, 215 Va. 155, 207 S.E.2d 841 (1974); Goldberg v. Housing Auth. of Newark, 38 N.J. 578, 186 A.2d 291 (1962).

existing at the time of rental, and (4) the foreseeability of or the landlord's actual knowledge of criminal activities within the apartment complex. Thus, although many courts still follow the strict rule that the landlord is not responsible for the criminal acts of third persons, there is a modern trend toward imposing liability on the part of the apartment landlord under certain circumstances.

§ 9.9 Abandonment by Tenant: Remedies of Landlord; Security Deposits

PROBLEM 9.25: During the term of a lease, T wrongfully abandoned the premises, returned the key to L, and stated that she no longer wished to use the premises and was giving up her interest in the lease. What are L's rights and liabilities?

Applicable Law: On wrongful abandonment and renunciation by T, L may: (1) accept a surrender of the leasehold and relieve T of all further liability; (2) retake possession of the premises for the purpose of mitigating damages; (3) do nothing and sue for rent as it comes due in a majority of jurisdictions, but a growing minority require the landlord to mitigate damages; or (4) sue immediately for damages on the basis of anticipatory breach of contract.

Answer and Analysis

When a tenant wrongfully abandons the leased premises, the landlord can:

(1) Treat the tenant's abandonment as an offer of surrender and accept that surrender. By this election, the landlord agrees to a termination of the lease and relieves the tenant from any further liability. A landlord might elect this option if the present fair rental value of the premises is higher than the rent payable by the tenant. This will permit the landlord to relet the premises to another at a higher rental.

(2) The landlord may notify the tenant that the landlord does not accept a surrender of the leasehold but that the landlord will relet on behalf of the tenant for the purpose of mitigating tenant's damages. When the landlord pursues this course of action, the tenant is held liable for the difference between the promised rent stipulated in the lease agreement and the amount recoverable from a reletting. The tenant is also liable for any special damages. The majority of jurisdictions permit the landlord to mitigate damages but do not require the landlord to do so. Under this procedure, a final accounting and settlement of claims between the landlord and tenant must await the end of the lease term.

The landlord who takes this option runs the risk that the act of reletting the premises may be considered an acceptance of the

surrender and termination of the lease. In order to avoid that possibility, there will often be an exchange of correspondence between the landlord and tenant in which landlord states that the landlord is reletting for the account of the defaulting tenant and not for landlord's own account. But a growing minority of courts favor requiring the landlord to mitigate damages by making a reasonable effort to relet the premises to a new tenant.[64]

(3) The landlord may do nothing and sue the tenant as each installment of rent matures, or sue for the whole when it becomes due. Under this course of action, the leasehold estate and the concomitant obligations continue unaffected by the tenant's abandonment. A landlord who exercises this option runs two risks. First, vacant premises are more subject to vandalism and higher insurance premiums. Thus, the potential for risk to the premises is greater. Second, by waiting to sue for past due rents, the landlord runs the risk that at the time the suit is commenced, the tenant cannot be found, is no longer subject to the court's jurisdiction, or is judgment proof. In any event, courts and legislatures in several jurisdictions have obliged landlords to make a reasonable effort to relet the premises in order to mitigate damages caused by the defaulting tenant.

(4) The landlord may regard the tenant's breach as an anticipatory breach of contract, resume possession of the premises, and sue immediately for full damages, present and prospective. This remedy recognizes that the lease is a contract as well as a conveyance, and the right to recover damages is unaffected by the existence or non-existence of the leasehold estate. The measure of damages is the difference, reduced to present worth, between the rent fixed in the lease and the present fair rental value of the premises for the remainder of the term, together with such special damages as may have resulted from the breach. Under this course of action, the leasehold estate is surrendered, and the landlord recovers damages, not rent.[65] This option should be attractive where the present value of the unpaid rents is higher than the property's fair rental value.

PROBLEM 9.26: L leased to T a hotel for a five year term for a total rental of $169,000. The lease required a deposit of $33,000 by T as "security for the performance of all the terms of the lease as well as security for the rent." The lease also provided that if the lease were canceled through T's fault, the deposit would be retained by the lessor as agreed upon liquidated damages, that in such event no part of the fund should

64. See § 9.10.

65. See Kanter v. Safran, 68 So.2d 553 (Fla.1953), subsequent proceedings, 82 So.2d 508 (Fla.1955), 99 So.2d 706 (Fla.1958); Sagamore Corp. v. Willcutt, 120 Conn. 315, 180 A. 464 (1935).

be returned to the tenant, but that if actual damages should exceed the deposit, then the landlord should recover such actual damages including past due rent at the time of vacating the premises by the tenant.

In the second year of the lease, T notified L that T was going to abandon the premises, return the keys to the landlord, and no longer operate the hotel. L notified T that he would not accept a surrender of the estate but that L would resume possession and control of the premises as agent of T for the purpose of mitigating damages. Thereafter the parties met, took inventory of the personal property, and L accepted the keys from T. L then operated the hotel for about a year when he entered into a new lease with A. After the new lease was signed, and before the original lease would have expired, T sued L to recover T's $33,000 deposit. May T recover?

Applicable Law: The proper characterization of a deposit made by T at the inception of a lease to insure performance is a question for the court. Advance rentals cannot be recovered by a defaulting tenant. Valid provisions for liquidated damages are generally upheld, but if the court construes the provision as a penalty, it will not be enforced. In case the deposit is security as such, or invalid as a penalty, the landlord in either case is entitled to recover his provable damages.

Answer and Analysis

T may not recover the "security deposit" immediately. However, after the period when the original lease would have expired, T may recover the balance of the deposit after the landlord deducts the damages or losses suffered as a result of T's breach of the lease.

Upon T's default, and in the absence of lease provisions to the contrary, L has the choice of several remedies insofar as the continuation or surrender of the leasehold estate is concerned. In this case, L initially pursued the remedy of reletting on behalf of T for the purpose of mitigating damages. Assuming that nothing thereafter transpired which would amount to an abandonment of that course of action, and that L's conduct did not operate as an acceptance of T's surrender by operation of law, L can continue to hold T liable for rents as they become due.[66]

The proper characterization of a deposit made by T on entering into a lease is important in determining the rights of the parties in

66. In some jurisdictions, the fact that L makes some repairs or even alterations before reletting, or that L relets for a period of time extending beyond the original lease period, or that in reletting L includes premises not in the original lease, may justify the conclusion that L accepted the surrender of the premises and thus terminated the lease.

respect to that deposit. There are a number of possible characterizations.

The deposit might be an advance rental. Rent becomes due in accordance with the terms of the lease, and provisions for payment of rent in advance are valid and enforceable. If the deposit is an advance rental payment, the landlord is entitled to the payment when made, and further, a defaulting tenant is not entitled to recover advance payments of rent. In this case, although the problem did not so state, the deposit was to be returned to the tenant in the last year of the lease but not as rent. Further, the lease referred to it as security and liquidated damages, not as rent. Clearly, therefore, the deposit was not an advance rental payment.

The deposit might be simply security to protect the landlord against the tenant's defaults. A simple security deposit would entitle the landlord to retain the deposit until the lease expires, at which time the landlord is obligated to return the deposit but may deduct damages or other sums owed by the tenant. In particular cases, the deposit might secure physical damages to the premises, rental payments or other obligations of the tenant. In the absence of a statute to the contrary (such statutes are becoming rather common in the case of apartments) or prevailing lease provisions, a security deposit creates only a debtor-creditor relationship, and does not require the landlord to place it in escrow or a trust account or pay interest on the account to the tenant. In the present case, the lease did refer to the deposit as security, but if the lease were not surrendered, it would seem that the tenant would not be able to recover until the termination date fixed in the lease.

The deposit might be a penalty. Provisions in leases designed simply to induce performance generally are considered against public policy and are not enforceable. The deposit will likely be construed as a penalty if it provides for a forfeiture without regard to the probably losses or damages of the non-breaching party. The fact that the parties do not label the provision for a deposit a penalty is, of course, not controlling. The proper characterization of the provision is within the province of the court.

Finally, the deposit might be a bona fide provision for liquidated damages. In the absence of a statute to the contrary, the courts generally assert that provisions for liquidated damages are valid and will be enforced.[67] Again, of course, the label that the

67. Compare Ricker v. Rombough, 120 Cal.App.2d Supp. 912, 261 P.2d 328 (1953) (provision in lease for rent acceleration unenforceable as liquidated damages agreement when damages are easily ascertainable; likewise, not enforceable as penalty); with Fifty States Management Corp. v. Pioneer Auto Parks, Inc., 46 N.Y.2d 573, 415 N.Y.S.2d 800, 389 N.E.2d 113 (1979) (upholding validity of rent acceleration clause upon tenant's default in the payment of monthly rent where there was no claim of fraud or exploitation by landlord).

lease attaches to the provision is not controlling. It is a question whether the court concludes the parties in good faith attempted to determine their damages in advance. In this case, the provision states that the landlord would retain the deposit as liquidated damages, but that if the landlord could prove more damages, then the landlord could collect them. Under such circumstances it is obvious that the parties did not intend to liquidate their damages. Thus the provision is in the nature of a penalty. Therefore, since L acted to mitigate damages and the extent of the damages will not be ascertained until the lease is terminated, T is not at this time entitled to recover the deposit. At the end of the lease T will be able to recover the deposit less such damages as proved by L.[68]

PROBLEM 9.27: L leases Blackacre to T for a term of 5 years. At the end of 2 years and when the lease still has 3 years to run, T offers to surrender the premises to L and requests L to accept such surrender of the leasehold. L refuses to accept the surrender. Following this refusal, T tosses the keys to the building to L, and L catches them. L tells T that L will be glad to mitigate T's damages by re-letting Blackacre for T's benefit but that L will not accept a surrender of the possession of Blackacre until the term has expired. T says nothing and leaves. L takes possession of Blackacre for the sole purpose of mitigating T's damages and re-lets the premises to X on the best terms possible for the balance of the three years of the tenancy. While T's lease provided for rent at the rate of $300 per month, X's lease provides for rent at the rate of $250 per month. At the end of X's lease L sues T for the difference between the rent received from X and that which is provided for in T's lease, that is, $50 per month for a three year period or $1,800. May L recover?

Applicable Law: The landlord-tenant relation involves two privities: (a) privity of estate; and (b) privity of contract. There are two types of surrender: (a) surrender by the act of the parties; and (b) surrender by operation of law. There may be a surrender of the leasehold from the tenant to the landlord, thereby terminating the privity of estate without thereby releasing the tenant from the contractual liability to pay the rent provided for in the lease if such is the intention of the lessor and the lessor takes possession of the premises solely for the benefit of the tenant and for the purpose of mitigating damages. The tenant cannot abandon the leasehold estate by unilateral action. The tenant may assign it to a third person or he may surrender it to the landlord provided such assignee or the landlord is willing to accept it.

68. See *Kanter*, supra note 65; cf. Ricker v. Rombough, 120 Cal.App.2d Supp. 912, 261 P.2d 328 (1953); Powell on Real Property, ¶ 231.

Answer and Analysis

Yes. The relation of landlord and tenant involves two privities, (a) privity of estate and (b) privity of contract. When L leased Blackacre to T he carved out of his fee simple estate a five year term and sold it to T for the sum of $18,000 which T agreed to purchase and pay for at the rate of $300 per month for the five year period of 60 months. One thing is certain in such a relationship. The tenant owns a term for years and cannot by unilateral action abandon it. Therefore, even though T intends to abandon the five-year term in Blackacre, such estate still remains with T.

There are two ways by which T can voluntarily dispose of the leasehold: (a) T may assign it to a third person or (b) T may surrender it to the landlord. But these actions presuppose the willingness of an assignee to accept the assignment or the landlord to accept the surrender.

There are two ways to effectuate a surrender: (a) by act of the parties and (b) by operation of law. Here, if L accepted the possession of Blackacre voluntarily from T, there would be a surrender of the balance of the term to L, and T would no longer be liable for rent. Such is a surrender by the act of the parties. Had L made a new and valid lease to T-2 for a longer or shorter term than the balance of the term in the first lease to T and nothing had been said about the former lease, such former lease would have been surrendered by operation of law for the reason that there cannot be two valid leases for the same period of time as to the same premises. But neither of these types of surrender took place since L did not accept the surrender from T.

The law permits L to mitigate T's damages. Some, but not all, jurisdictions require the landlord to do so.[69] If L mitigates T's damages and does so by re-letting the premises, the law will not release T from liability to perform his contractual obligations. In such case the landlord is permitted to take possession of the

69. See Sommer v. Kridel, 74 N.J. 446, 378 A.2d 767 (1977) (if a landlord has multiple vacant apartments in addition to the apartment wrongfully abandoned by the tenant, a landlord's duty to mitigate "consists of making reasonable efforts to re-let the apartment." Landlord must "treat the [abandoned] apartment ... as if it was one of his vacant stock.") See also United States National Bank of Oregon v. Homeland, Inc., 291 Or. 374, 631 P.2d 761 (1981) (since landlord has a duty to mitigate, mere reletting does not release tenant from liability for breach of contract and tenant remains liable for difference between promised rent and fair rental value which is the amount law assumes landlord who takes reasonable steps to relet can receive; furthermore reletting for a longer or shorter term than the remaining terms or for a higher or lower rent is not a sufficient basis to conclude landlord has accepted the surrender and discharged tenant from further liability); MAR-SON, Inc. v. Terwaho Enterprises, Inc., 259 N.W.2d 289 (N.D.1977). But cf. Vasquez v. Carmel Shopping Center Co., 777 S.W.2d 532 (Tex.App.—Corpus Christi) (landlord under no duty to mitigate damages of defaulting tenant, even though landlord had refused to consent to assignment of lease to prospective assignee procured by defaulting tenant).

premises on behalf of the tenant, and to re-let the premises on behalf of the tenant and, of course, must account to the tenant for the rent received from the re-letting.[70]

The re-letting of the premises to a third person by the landlord, an act inconsistent with the continuation of the original lease, would normally constitute a surrender of the premises and termination of the original leasehold, and a termination of the privity of estate created thereby. But it does not necessarily terminate the privity of contract between the landlord and the tenant respecting the latter's liability to pay for the leasehold estate which T purchased from L in the first instance. Thus, L can elect to proceed on a contractual basis, take possession of the balance of the term, sell it on behalf of T, give T credit for the money received on the re-letting, and hold T liable in contract for the difference between the value of the balance of the term and the purchase price agreed to in the lease.

As another rationale accomplishing the same result, suppose with the landlord's consent the tenant assigns the balance of the tenant's term to a third person. This transaction will terminate the privity of estate between L and T but it does not release T from personal liability in contract to pay the agreed rent to L in case the assignee does not pay the rent for T to L. In this situation the leasehold estate is not terminated or surrendered. Nor is it surrendered in the case of a sublease. Thus it seems clear that when L takes possession of the premises, not for L's own benefit but on behalf of T, and re-lets the premises on T's behalf and gives T credit for the rent received, T is not thereby released from the contractual obligation to pay the rent provided for in the lease. The fact that there is a termination of the privity of estate between the landlord and the tenant does not terminate the privity of contract between the two. Thus, L may recover the remaining rent of $1,800 from T.

Of course, there are some potential dangers for L should L elect to relet the premises if L fails to make it clear that L is doing so for T's account. For example, suppose following T's surrender, L leases the premises to T–2 without making it clear L is doing so for T's account. Suppose further that to accommodate T–2's particular needs L either (1) reconfigures the premises leased to T or (2) leases T–2 both T's space as well as the adjoining vacant space knocking down the walls between the two. In either of these cases, a court might conclude that L was acting on L's behalf, not T's behalf. A number of courts have also held that if L relets for a term

70. In the event that L re-rents for a greater sum than the original rent, most jurisdictions would not permit T to recover the excess from L on the basis that T should not be able to benefit from his wrongful misconduct.

longer than the surrendering tenant's term that L has accepted the surrender.

§ 9.10 *Assignment and Sublet*

Introductory Note on Assignment and Sublet

In the absence of a lease provision to the contrary, a tenant may assign or sublet the balance of the term. Thus, if L leases Blackacre to T for five years, T is free to assign or sublet that lease to another at any time prior to the end of the term. On the other hand, most leases contain clauses prohibiting an assignment or sublet without the landlord's consent and such clauses are typically upheld. These restraints on alienation (unlike restraints on transfers of fees) are deemed valid because of the landlord's continuing interest in the property as well as the identity and credit-worthiness of the party in possession. Although the restraints are generally upheld, many leases contain, as a result of negotiations or by law, provisions requiring the landlord not to withhold a consent to an assignment or sublet unreasonably.

Under formalistic common-law rules, a transfer by T to another was viewed as an assignment if the transfer was for the entire remaining balance of the terms; if the transfer was for less than the entire remaining balance of the term such that when the interest of the transferee ended a portion of the term would revert to T, the transfer was characterized as a sublease. Today, the characterization of transfer as either an assignment or sublease depends on the intent of the parties. In addition to scrutinizing the language of the transfer document to ascertain that intent, courts also look to term of the transfer and generally find an intent to assign if the balance of the term is transferred or an intent to sublet if less than the balance of the term is transferred.

As earlier noted, when a landlord and tenant enter into a lease, a relationship arises between them. Viewed from the perspective of the lease, there is privity of contract. Viewed from the perspective of the land, there is privity of estate. In the case of an assignment (but not the traditional common-law sublet) there is a break in the privity of estate but not privity of contract. This has important consequences to the parties. For example, consider the promise on the part of a tenant to pay rent. This obligation arises not only from the terms of the lease-contract but also by operation of law from the fact that tenant is in privity of estate with landlord. Thus, if tenant assigns the lease to A, tenant's obligation to pay rent under the lease continues because tenant and landlord are still in privity of contract and under the contract tenant promised to pay landlord rent. Furthermore, because landlord and A are in privity of estate, A is also obligated to pay rent to landlord.

As between A and tenant, A has the greater obligation to pay rent because A receives the benefit of the land. Thus, if landlord sues tenant to recover unpaid rent, tenant, in turn, could seek reimbursement from A. If A later assigned to A–1, landlord could also seek rent from A–1 for the period of A–1's possession (and tenant because of privity of contract) but not from A for A–1's period of possession because, following the assignment, landlord and A–1 have neither privity of estate nor contract.

If tenant sought to avoid future liability for rent following the assignment, tenant would need to seek a release from landlord from any continuing obligations under the lease. This release is called a "novation."

The rules differ in the case of a sublet because landlord and subtenant are neither in privity of estate nor contract. Thus, tenant continues to be liable to landlord for rent. Of course, if the subtenant fails to pay landlord rent, landlord could evict tenant and subtenant.

Although typically assignees and subtenants do not have any privity of contract with the landlord, such privity can arise if the assignee or subtenant contractually obligates himself to pay rent to the landlord in the course of the negotiations with the tenant. Furthermore, if a lease prohibits an assignment or sublet, which it is free to do, without the landlord's consent, landlord may condition that consent on the assignee or subtenant agreeing to pay rent, thus creating a privity of contract between them.

PROBLEM 9.28: L and T enter into a written lease for a five year term under which T covenants to pay L rent on the first of each month. The lease provides that the term shall end on December 31, 2010. One year later T transfers all of T's rights to A. Subsequently A defaults in the payment of rent. (a) May L recover unpaid rents from T? (b) May L recover unpaid rents from A? (c) If L should recover a judgment against A, and the judgment is not satisfied, may L then recover against T? (d) If A in turn transfers the leasehold to B and B defaults in the payment of rent, may L recover against A or T for rents accruing after the assignment?

Applicable Law: Ordinarily a landlord and tenant are in both privity of contract and privity of estate with each other. The former arises from the terms of the lease; the latter because the tenant takes rightful possession of real property in which the landlord has a reversion. The obligation to pay rent can arise expressly from the terms of the lease and impliedly because of the privity of estate that exists between a landlord and a tenant.

A tenant who transfers an interest in the property makes either an assignment or a sublease. At common law an assignment was characterized by a transfer of the entire balance of

the term; the sublease by a transfer of less than the entire balance of the terms. Today, whether a transfer is an assignment or sublease depends upon the parties' intent.

A tenant who expressly covenants to pay rent remains liable after an assignment, although as between the tenant and assignee, the assignee is primarily liable. A tenant remains liable for rent during the period the assignee has the leasehold estate on the basis of privity of contract; the assignee is liable to the landlord on the basis of their privity of estate. A tenant who has assigned the estate may recover from the assignee sums which the tenant is obligated to pay the landlord. An unsatisfied judgment of the landlord against an assignee does not preclude the landlord from proceeding against the tenant. An assignee terminates privity of estate upon a future assignment; therefore an assignee is not liable for rent accruing after a reassignment unless the assignee was also in privity of contract.

Answers and Analysis

(a) L can recover unpaid rents from T assuming the lease between L and T contained a covenant that T would pay the rent reserved. This covenant is customarily inserted in leases, although the requirement can be satisfied not only by an express promise in exact words to pay the rent, but also by any language necessarily importing an undertaking to that effect. The lease between L and T created a relationship (privity) between them called "privity of contract." Furthermore, since the lease gave T the right to enter into possession of the property, and following the termination of the tenancy the property would revert to L, privity of estate also was created between them. Conceptually this is important because the obligation to pay rent can arise independently from both privity of contract and privity of estate. Therefore, T remains liable for rent so long as either privity exists.

The assignment by T transferred the entire leasehold estate to A. Under the common law, this transfer amounted to an "assignment" of T's interest. An assignment terminates the privity of estate that previously existed between L and T but has no effect upon the privity of contract that existed between L and T. Privity of estate terminates because L no longer has a reversion that follows on the heels of the termination of T's estate. Rather, it follows on the heels of A's estate. L and A are in privity of estate with each other. Since privity of contract continues to exist between L and T, however, L can hold T liable for unpaid rents.[71] T could

71. Samuels v. Ottinger, 169 Cal. 209, 146 P. 638 (1915); Cauble v. Hanson, 249 S.W. 175 (Tex.Com.App.1923).

have avoided liability if L released T from any liability under the contract.[72]

(b) L can recover rents from A because they stand in privity of estate with each other. Upon the termination of A's estate, the property reverts to L. The obligation to pay rent impliedly arises because L and A are in privity of estate with each other. As between T and A, A is primarily liable for unpaid rents for the period of A's actual possession because A rather than T received the economic benefit. Thus, if L were to sue A and collect the rents from A, L could not also recover from T since that would result in L's unjust enrichment.

(c) After an assignment without a novation both the tenant and the assignee are liable to the landlord for rent which thereafter becomes due. The suit by L against A is not an election of remedies and is not inconsistent with L's right to collect from T if in fact L does not collect from A. As between A and T, A has the primary responsibility for payment of rent since A has the use of the premises. The landlord, however, does not have to sue A first before going against T, but, instead, may rely on T's obligations based on privity of contract. Should T have to pay the rent which A should have paid, then T should be subrogated to L's rights against A and would be able to proceed accordingly. In certain instances, other theories of recovery may sustain an action by T against A for sums which T had to pay L on behalf of A.

(d) If A later assigns the balance of the term to another, that assignment terminates the privity of estate between L and A. Therefore, for rents thereafter accruing while A's transferee is in possession, A is not liable. However, T, absent any novation, is liable to L under privity of contract; A's assignee is liable to L under privity of estate. If, however, A had assumed the obligations of the lease at the time of the assignment from T, then A and L are in privity of contract because by expressly assuming the obligations of the lease, L is a third party beneficiary of that promise. A would be liable for any rents that accrued while A was in possession of the property even though such rents were unpaid at the time of A's transfer.[73]

PROBLEM 9.29: L and T enter into a valid ten year lease. Thereafter T subleases to ST, and then ST defaults in the payment of rent. (a) May L recover from ST the past due rent? (b) If the transfer between T and ST is for the entire balance of the term but T reserves a contingent right of re-entry in case of default by ST, is the transfer properly denominated an assignment or sublease?

72. This might arise as a result of a novation.

73. Rents accrue daily.

Applicable Law: In the absence of express contract provisions, the landlord has no action against a subtenant for rent since no privity of contract or estate exists between them. There is a conflict of authority as to whether a transfer of the entire balance of the leasehold estate, but with a reservation of contingent right of re-entry or power of termination by the tenant, constitutes an assignment or sublease.

Answers and Analysis

(a) No. In the case of a sublease, privity of estate and privity of contract exist between the original landlord and tenant. Similarly, privity of estate and privity of contract exist between the tenant and subtenant. However, neither privity of contract nor privity of estate exist between the original landlord and subtenant. Privity of estate does not exist because at the termination of the subtenant's estate, the property reverts to T and not L. Privity of contract does not exist because L and ST did not enter into any contractual arrangements and, unless T and ST otherwise agree, ST made no promises to T of which L is a third party beneficiary. Therefore, the landlord might reserve the right to go against subtenants in case the tenant defaults, and in the sublease, the agreement might provide for direct payments by the subtenant to the landlord. Of course, since L and T are in privity, L can sue and recover unpaid rents from T.

(b) The answer to (b) depends upon the jurisdiction. There is a conflict of authority. At common law an assignment occurs if the tenant transfers the entire estate, or the balance thereof, to a third party. If a lesser estate is conveyed so that the tenant retains an interest in the leasehold, the transfer is denominated a sublease. Historically, a contingent right of re-entry or power of termination was not regarded as an estate. Thus, if the only interest retained by the tenant was a contingent right of re-entry, the transfer was an assignment and not a sublease. There is substantial authority in modern cases, however, that a contingent right of re-entry is a sufficient estate or interest in land to constitute the transfer of a sublease and not an assignment.[74] Under the modern case law, the intent of the parties determines whether the transfer is a sublease or an assignment.[75]

PROBLEM 9.30: L is the fee simple owner of Blackacre, a section of land. By an instrument signed by both L and T, L leases it to T for the ten year period March 1, 1965 to March 1, 1975. The NE1/4 of Blackacre is presently a field of alfalfa. In

74. See Davis v. Vidal, 105 Tex. 444, 151 S.W. 290 (1912); Restatement, Second, Property (Landlord and Tenant) 3C, 15.1, Comment i.

75. Ernst v. Conditt, 54 Tenn.App. 328, 390 S.W.2d 703 (1964); Jaber v. Miller, 219 Ark. 59, 239 S.W.2d 760 (1951).

the lease T covenants to leave this NE1/4 in alfalfa for the years 1965 and 1966; that T will plow this alfalfa field in 1967 and plant corn there; that during the year 1968 T will raise oats on that NE1/4 and in the year 1969 this field will be sowed to wheat. T plows up the alfalfa field in 1966 and assigns the lease to A who in 1967 plants the field to barley. In the autumn of 1967 A assigns the lease to B who in 1968 sows the NE1/4 to flax, and in 1969 sows it to corn. L sues A for damages for breach of the covenant for the years 1966, 1967, 1968 and 1969. May L recover for breach of the covenant?

Applicable Law: For a covenant to run with the land in a landlord-tenant relationship three elements must co-exist: (1) There must be a covenant; (2) There must be an intent for the covenant to run with the land; (3) The covenant must touch and concern the land.[76] Privity of estate always exists between a landlord and a tenant. An assignee of an estate in land with which a covenant runs is liable for the breach of the covenant only while she owns the estate in the land. The assignee is not liable for a breach that occurs before the assignee acquires an interest in the land and the assignee is not liable for a breach of the covenant occurring after she has transferred her interest in the land to another, if liability is merely by reason of the prior assignment.

Answer and Analysis

The answer to this question presupposes that the covenant in the lease runs with the land. A covenant runs with the land in a tenant-landlord relationship if three elements co-exist: (1) There must be a covenant; (2) There must be an intention that the covenant run with the land; (3) The covenant must touch and concern the land.

(1) The covenant. The lease between L and T is in writing and signed by both parties. The promise made by T to L is contained in the lease. For the purpose of running with the land this instrument constitutes a covenant between T and L.

(2) The intention. While the words "assigns" and "successors" are not used in the lease it is nevertheless clear that the purpose of the covenant is to benefit the land itself by rotating the crops on it. This covenant is intended not merely to benefit the landlord personally or as a member of the community but it is intended to benefit the landlord as the owner of the reversion in Blackacre. It is intended to improve the very soil which makes up the subject

76. See § 10.2, which discusses similar requirements with respect to covenants attending the transfer of a fee interest.

matter of the lease. So the parties intended this covenant to run with the land, including both the leasehold and the reversion.

(3) The covenant must touch and concern the land. There is no type of covenant which more plainly touches and concerns the land than the type set forth in these facts. It provides that the very soil on Blackacre is to be plowed or left unplowed. A field is to be sowed to certain crops and not to be sowed to other crops. The covenant provides how Blackacre, the subject matter of the lease, is to be used and how it is not to be used. The legal effect of the covenant is to limit the use of the leasehold estate to the rotation of crops and to make it less valuable to the tenant, T. The burden of the covenant therefore touches and concerns the leasehold estate. On the other hand, the restrictions placed on the use of Blackacre during the leasehold period improve the soil and enhance the value of the reversion. When the possession is returned to L, the land will be in better condition by virtue of the enforcement of the covenant. Therefore the benefit of the covenant touches and concerns the estate in reversion, and

(4) The liability of T. When a person makes a contract she is personally liable on it and cannot assign to another that liability and thereby divest herself of the obligation of performance, unless it is expressly provided for in the contract. The covenants contained in a lease constitute a contract and the covenantor cannot by assigning the leasehold estate rid herself of the duty to perform. Thus, T is personally liable to L for all of the breaches of the covenants T has promised to perform.

(5) The liability of the assignees. The liability of an assignee of a covenant running with land is imposed upon the assignee solely because he becomes the owner of the land. The converse of that proposition is also true. If the assignee is not the owner of the land he is not liable on the covenant which runs with the land. From these two propositions evolve three legal conclusions concerning the liability of assignees of covenants running with land: (a) an assignee of an estate in land is not liable for a breach of a covenant which runs with it if that breach occurred before the assignee became an assignee; (2) an assignee of an estate in land is liable for a breach of a covenant which runs with it if the breach occurs while she is the assignee of the estate; and (3) an assignee of an estate in land is not liable for a breach of a covenant which runs with it if the breach occurs after she ceases to be an assignee.

Application of these principles to the facts. (a) When the covenantor, T, plowed up the alfalfa field in 1966, thereby breaching the covenant in the lease, T alone was liable for such breach. This part of the covenant is a non-continuing provision and can be breached only in 1966 because it applies only to that year. When

such a covenant is breached it is transformed into a cause of action in favor of the covenantee and does not thereafter run with the land. Therefore the liability incurred by T cannot be passed on to his assignee of the land.

(b) When T assigned the leasehold to A in 1966 the burden of performing the covenant passed to A with the acquisition of the estate. When A planted barley instead of corn in the NE1/4 in 1967 there was a breach of the covenant for that year for which A is liable in damages to the covenantee, L. Here again this is a breach of a non-continuous covenant because it can be breached only in 1967. The breach transforms this provision of the covenant into a chose in action in L's favor and it no longer runs with the land. Therefore A cannot pass such incurred liability on to A's assignee by assigning his estate in the land.

(c) When A assigned the leasehold to B in the autumn of 1967 A ceased to be the assignee or the owner of the leasehold and cannot be liable for any breach of the covenant which occurs thereafter because by the assignment both the estate and the covenant running with it pass to B. When B breaches the covenant by sowing flax instead of oats in 1968 and by sowing corn instead of wheat in 1969, B becomes personally liable for such breaches to the covenantee, L. Therefore, L can recover damages from A only for A's breach of the covenant during the year 1967.

Note

The following types of covenants have been held to touch and concern land and therefore run: covenant to pay rent, to insure the buildings on leased premises, to pay taxes on the leased premises, to renew or extend a lease, an option to purchase the leased premises, not to permit a particular person to participate in the management of the business on the leased premises, not to sell intoxicating liquor on the leased premises, to build a structure on the leased premises, not to assign or sublease the leased premises without the lessor's consent,[77] to supply water, light or heat on the leased premises, and not to purchase supplies for resale on the leased premises from one other than the lessor. The following types of covenants have been held collateral and not to touch and concern the land and therefore do not run: covenant to pay taxes on land other than the leased premises, to pay a promissory note of the covenantee, covenant not to compete in business (but see next paragraph), to perform acts on land other than the leased premises, and covenants purely personal.

Modern business leases commonly employ non-competition and exclusive use clauses which frequently extend not only to the leased

77. However, some jurisdictions prohibit lessors from withholding such consent unreasonably. See, e.g., Kendall v. Ernest Pestana, Inc., 40 Cal.3d 488, 220 Cal.Rptr. 818, 709 P.2d 837 (1985).

premises but also to other land within a designated radius from the premises leased or the boundaries of the shopping center within which the premises are located. Although these covenants are strictly construed, if the intent is clear they are generally enforceable.

PROBLEM 9.31: L leases a house to T for a period of 10 years. In the lease L covenants to keep the house in repair during the lease and to maintain the roof so it does not leak. After two years T assigns the remaining eight year period of the leasehold estate to A. L does not keep the roof in proper repair. A sues and recovers damages from L for such breach of the covenant. A assigns the remaining five year period of the leasehold to B. Shortly after B took possession the roof began to leak. B told L to repair the roof. L does nothing and B sues L for damages for breach of the covenant. L's defense is that L has already paid damages to A and that L's responsibility for the repair of the roof is thereby terminated. May B recover?

Applicable Law: In a landlord-tenant relationship, a covenant to repair the property which is the subject matter of the lease runs with the land—the benefit with the land of the covenantee and the burden with the land of the covenantor—whether it be the leasehold or the reversion. In a continuing covenant the covenantor or his assignee is liable for any breach, and the fact that the covenantor has been compelled to pay damages for breach of the covenant at one time is no defense to a later action for a different breach of the same covenant.

Answer and Analysis

Yes. This answer presupposes a determination that the covenant contained in the lease runs with the land and that it is a continuing covenant. The lease from L to T is in writing and signed by both parties. It is thus a covenant. The lease does not in express language say that L will keep the house in repair for T's assignees but it does say that L will keep the house in repair "during the lease." And in the absence of a provision in the lease that the tenant has no right to assign without the consent of the landlord or otherwise, the tenant has a common law right to convey the leasehold estate. So there is an intention that the covenant to repair shall run with the land. In the absence of a statute or an express agreement in the lease, there is no common-law duty on the part of the landlord to keep the leased premises in repair. The fact that in this case the landlord reversioner has covenanted to keep the house in repair makes the leasehold of greater utilitarian value in the hands of the tenant and the reversion is so burdened by it that it is of less value in the hands of the landlord. This effect of the covenant shows that it touches and concerns the land in both its burden and benefit. It is generally agreed that a covenant to

repair the property which is the subject matter of a lease runs both with the leasehold and with the reversion. Whether such a covenant is a continuing or a non-continuing covenant is a question of construction.

In this case it seems clear that keeping the house repaired "during the lease" is an agreement that the house will be kept in repair not only during the occupancy of the original tenant but throughout the period of the tenancy irrespective of who happens at a given time to be the tenant. That being true the original tenant or any assignee of the term has the benefit of the covenant and the right to enforce it against the covenantor landlord. The fact that the assignee compels the landlord to pay damages during the assignee's occupancy of Blackacre does not affect the running of the continuing obligation which L assumed when he executed the lease to T. Thus L may be liable as many times as he breaches the covenant during the period of the lease and is liable to any assignee when the breach occurs during the assignee's occupancy. It is therefore no defense to B's action against L that L has for a previous and different breach of the continuing covenant satisfied a judgment which A procured against him. B may recover for L's breach of the covenant during B's period of occupancy. In this case it will be noticed that it is the original landlord reversioner who is the defendant. Because the burden end of this type of covenant runs with the land the tenant could maintain such action either against L, the original reversioner, or against L's assignee.[78]

§ 9.11 The Holdover Tenant

PROBLEM 9.32: L leases Blackacre to T for a period of 10 years for a term commencing on March 1, 1985 to end on February 28, 2005. T agreed to pay rent of $6,000 annually payable at the rate of $500 per month in advance. Several months prior to the termination of the lease period T notified L that T did not intend to renew the lease and would vacate the premises when the term expired. Complications in T's business, however, prevented T from vacating Blackacre on February 28, 2005, but T succeeded in moving completely from the premises on March 3, 2005. In other words, T had held over the term of the lease three days. T tendered a month's rent of $500 to pay for the three days occupancy. L refused to accept this unless it were to be considered payment of rent for the first month of another entire year. T then refused to make any payment at all. In May 2005, L sues T for $1,000 rent for the months of March and April. Can L recover?

78. See Stoddard v. Emery, 128 Pa. 436, 18 A. 339 (1889).

Applicable Law: When a tenant for years holds over the term and becomes a tenant at sufferance, at common law and unless changed by statute, the landlord has an election either (a) to treat the holdover tenant as a wrongdoer and proceed to eject him and hold the tenant for the fair rental value for tenant's use and occupation of the land, or (b) to treat the holdover tenant as a tenant from year-to-year on the same terms as the prior lease, as far as applicable, in which case the tenant is liable for rent for an entire additional year.

Answer and Analysis

At common law, the answer is yes. In a lease for a term for years no notice to quit is necessary on the part of either the landlord or the tenant since the notice of the date of termination is provided for in the lease. The term naturally comes to an end at the expiration date stated in the lease. Thus, it was immaterial that T notified L of T's intention to vacate Blackacre on February 28, 2005.

The important question is the effect of T's holding over beyond the term and becoming a tenant at sufferance, which means that T is a bare possessor with no right. In this situation a landlord has substantial rights as against the tenant. A landlord may at common law do one of two things: (a) treat the tenant as a wrongdoer and proceed to eject the tenant and hold tenant liable for the fair rental value of the period of wrongful use and occupation, or (b) treat the tenant as a periodic tenant from year-to-year on the same terms as the prior lease for years as far as those terms are applicable. The right to treat the tenant who wrongfully holds over as a periodic tenant is intended to create a substantial deterrence to any wrongful holding over by the tenant.[79] In some cases the assertion that a landlord can treat the holdover tenant as a periodic tenant for year-to-year may be particularly harsh particularly if the tenant was making a good faith effort to vacate or was prevented from vacating by an act of god. In such cases courts have limited the landlord to a claim for actual damages for the period of the actual holding over.

In this case, L exercised the latter election and decided to hold T as a periodic tenant from year-to-year and promptly notified T of that election. The theory upon which T's liability is based depends upon the circumstances. If L merely accepts rent from T and T continues to occupy the premises, then T's liability is based on a contract implied in fact. If, on the other hand, as in this problem, T did not agree to a year-to-year lease, then the obligation is one imposed by law in quasi-contract. In either event, the option is with L to decide whether to treat T as a wrongdoer or a periodic tenant

79. See, Restatement, Property, Second, § 14.4.

from year-to-year. L, having made the election to hold T for another year, T is liable for the rent for the entire year.[80]

The common-law rule is often modified by a statute because it is believed to be unduly harsh. For example, in a number of jurisdictions the right to treat the holdover tenant as a periodic tenant from year-to-year has been modified to have the period of the periodic tenancy run concurrently with the period for which rent is computed.[81] Thus, if rent were payable monthly, the holdover tenant would be a periodic tenant from month-to-month, with, in all event, the year-to-year tenant being the maximum period.

The Uniform Residential Landlord and Tenant Act substantially modifies the common-law rights of the landlord. It provides that if a tenant holds over, the landlord may sue for possession. Furthermore, if the tenant's holding over was willful and not in good faith, the landlord may also recover "an amount not more than [3] month's periodic rent or [threefold] the actual damages" whichever is greater, sustained by the landlord.[82]

PROBLEM 9.33: Ancillary to the sale of land from T to L, the parties entered into a lease in which L leased to T the commercial premises previously occupied by T as owner for a term to end on a specified date two months later. The consideration was one dollar, and it was expressly agreed that T would vacate the premises at or before midnight on the date specified. T failed to vacate, and a few days later L wrote T a letter notifying T to vacate immediately, that any continued occupancy would be at T's risk and L would charge T rent at the rate of $500 per month. A year later, T was still in possession, and L sent T a bill for rent at the rate of $500 per month, and again instructed T to leave or continue to be charged at that rate. T vacated the premises 22 months after the date of the letter specifying the rental increase. Thereupon L sued T for $11,000 representing a claim for 22 months rent at $500 per month. May L recover?

Applicable Law: When a tenant for years holds over after the expiration of the term, the parties can agree to a continuation on different terms than those provided in the original lease. If the landlord notifies the tenant that the rent will be increased

80. See A.H. Fetting Mfg. Jewelry Co. v. Waltz, 160 Md. 50, 152 A. 434, 71 A.L.R. 1443 (1930); Powell, ¶ 254. Cf. Commonwealth Bldg. Corp. v. Hirschfield, 307 Ill.App. 533, 30 N.E.2d 790 (1940), denying the landlord's right to hold the tenant for another year when the tenant's vacation of the premises was not complete until the day after the lease expired; the court concluded that the landlord was entitled only to double rent for the period of actual occupancy in accordance with a provision of the lease.

81. See, e.g., A.H. Fetting Mfg. Jewelry Co. v. Waltz, 160 Md. 50, 152 A. 434 (1930).

82. Unif.Res.Land.Ten.Act § 4.301(c).

if the tenant holds over, and the tenant remains after receiving this notice, then the tenant impliedly agrees to such increased rent. In some jurisdictions the landlord by statute also has the option of demanding double rent from the holdover tenant, and, of course, the option of treating the holdover tenant as a trespasser and recovering for use and occupation.

Answer and Analysis

Yes. When T holds over after the expiration of the term of the lease, L may treat the tenant as a trespasser and claim damages for the deprivation of any reasonable rental value plus any special damages, or waive the wrongful holding over and demand an increased rent if the tenant chooses to remain in possession. Some jurisdictions by statute authorize L to demand double the monthly rent.[83]

T is liable for the increased rent because T remained in possession after receiving the increase notice, thus impliedly agreeing to pay the rent demanded.[84]

83. See West's Fla. Stat. Ann. § 83.06. In Florida the right to recover double rent applies only if a demand for double rent is made. In this problem no such demand was made.

84. See David Properties, Inc. v. Selk, 151 So.2d 334 (Fla. 1st D.C.A. 1963), Powell, ¶ 254, n.31.

PRINCIPLES OF PROPERTY LAW

Sixth Edition

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Chapter 13

COOPERATIVES, CONDOMINIUMS AND HOMEOWNERS ASSOCIATIONS

Table of Sections

SUMMARY

§ 13.1 Cooperatives and Condominiums Generally

1. Housing shortages precipitated by two world wars, large population growth and increased urbanization, rising costs of real estate, inflation generally, and the desire for ownership, perhaps stimulated by income tax advantages, have generated the development of cooperative and condominium living.

2. Both cooperative and condominium concepts can be applied to lateral as well as vertical development, and to commercial as well as residential developments. Even developments with single-family homes or townhouses could theoretically be organized as condominiums.

3. The techniques employed in horizontal subdivisions, such as the covenant running with the land or equitable servitude, the property owners' association, easements and licenses, are employed in the creation of cooperatives and condominiums. Also, of course, the project must conform to applicable zoning regulations.

4. The condominium as a separate form of ownership was virtually unknown in the United States prior to the 1960's, although there were isolated instances of this type of development without the aid of statutory authorization. The National Housing Act of 1961 spurred the development of condominiums by authorizing FHA mortgage insurance on a one family unit in a multi-family structure. Legislation aiding in the development of such structures followed rapidly.

5. The principal advantages of cooperative or condominium ownership include:

a. The acquisition of an ownership interest with the accompanying advantages of security and savings;

b. The sharing of the high cost of the building site and the cost of maintenance among all unit owners;

c. The procurement of income tax deductions for both interest and taxes which are available to individual home owners;

d. Minimization of the risk of personal liability of the various members; and

e. Greater flexibility in choice of site location since the high cost of real estate may prohibit building individual housing on expensive sites which can be feasibly developed only for apartment living.

§ 13.2 Cooperatives

1. Prior to the advent of the condominium, the term "cooperative" was used in a generic sense to mean simply several types of organizations where the occupants of individual units of a multifamily structure sought to acquire the advantages of joint ownership previously delineated. The most common types of cooperatives are the corporate or business trust forms depicted below.

2. A cooperative can be organized in any of the following manners:

a. *Co-ownership in Joint Tenancy.* Title to the premises is vested in all the co-owners as joint tenants with provisions for exclusive occupancy of individual apartments vested in designated co-owners. Because of the characteristic of survivorship and the requirement assessed in some states of the four unities,[1] this form of organization is generally considered impractical.

b. *Co-ownership as Tenants in Common.* Under this plan the occupants collectively own the entire project as tenants in common, and each occupant acquires the right to occupy a designated apartment exclusively. Covenants running with the land or equitable servitudes are employed to enforce each cotenant's financial obligations in the maintenance and operation of the building.

c. *Massachusetts or Business Trust Form of Organization.* Title to the entire premises is vested in the trustees of the Massachusetts trust; certificates of beneficial interest are is-

1. See Ch. 5.

sued to the individual tenants or occupants; and each beneficial owner is also assigned an exclusive right of occupancy in a particular unit under a proprietary lease.

d. *Corporate Form of Organization.* Title to the entire premises is vested in a corporation, and the corporation leases specific apartments to the tenant-stockholders or members of the corporation. The lease is referred to as a proprietary lease. Its unique feature is that the lessee must own a specified number of shares of the lessor corporation, or otherwise qualify as a member if stock is not issued, in order both to acquire the lease and to continue as lessee. Ownership of shares or membership as such in the lessor confers no right of occupancy; such occupancy right is conferred by the lease which is obtainable only by members or owners of shares. This is the most commonly used form of cooperative organization, and is the only one discussed at any length in this chapter.

3. To create a corporate cooperative organization three documents are essential. These are:

a. a corporate charter or certificate of incorporation;

b. a set of by-laws for the corporation; and

c. a proprietary lease or occupancy agreement.

These three documents are read together, and together they constitute the contract between the owners and the corporation.

4. Restriction on either the sale of shares or membership is common, and the shares or interest must always be sold in the original block in order to maintain each owner's relative position as a proportionate owner in the cooperative enterprise.

5. A typical set of by-laws, among other provisions, would include the following:

a. name and location of the corporation;

b. purpose;

c. membership, eligibility, certificates, liens, transfers of membership by death, termination of membership for cause, sales price;

d. meetings of members, voting procedures, proxies;

e. directors, qualification, removal, compensation, meetings;

f. officers, election, removal;

g. amendment; and

h. fiscal management, fiscal year, books and accounts, audits and inspections.

6. The lease gives the shareholder-tenant a right to occupy a particular apartment or unit for a stated term. The rent in a proprietary lease includes the following elements:

a. a fixed annual sum which may be nominal if the building and the apartment are free and clear of mortgages and similar encumbrances.

b. a further amount fixed annually based on the maintenance and operation costs of the building, mortgage payments and tax assessments.

c. an additional sum which may be levied against the individual tenant if that tenant fails to maintain properly the interior of his apartment necessitating the corporation to perform work, and, when applicable, assessment to cover special expenses such as the construction of a new recreational facility.

7. Proprietary leases usually provide for termination on the following grounds:

a. failure to pay assessments;

b. failure to follow house rules; or

c. breach of any covenant required in the by-laws or charter.

8. The relationship of the unit owners to the cooperative corporation is two-fold: they are tenants of the corporation with respect to their individual unit, and they are owner-shareholders of the corporation by virtue of the shares or membership interest they own.

9. Cooperative financing is usually accomplished by a single mortgage executed by the corporation covering the entire project. Separate mortgages on individual units are not common. Thus, each tenant-shareholder is dependent upon the financial ability of fellow cooperators.

10. Each tenant-stockholder is entitled to deduct on her federal income tax her proportionate share of the interest paid by the cooperative corporation upon its blanket mortgage, provided the corporation does not derive more than 20% of its gross income from sources other than its tenant-stockholders.

§ 13.3 Condominiums

1. The term condominium is commonly used in three different ways:

a. to denote the system of ownership;

b. to denote the entire building devoted to that form of ownership; and

c. to denote the individual unit with its accompanying interest in the common elements.

2. As a system, the term condominium means a form of ownership under which individual owners own the separate units of a multi-unit development; in addition, the owners each own an undivided share in certain common elements.

3. As applied to the building, the term condominium simply refers to the entire building which is subject to the condominium form of ownership.

4. As applied to the individual unit, the term condominium simply means a unit or an apartment which is subject to individual ownership in a multi-unit structure, together with an undivided interest in cotenancy in the common elements or those parts of the realty which are used in common and are owned collectively by all the unit owners in the project.

5. Since the common law recognizes fee ownership and lesser property interests in usable airspace, it is feasible to create a condominium form of ownership at common law. Precedent for this form of ownership goes back to at least the Middle Ages, but condominium regimes were seldom created in the United States prior to statutory enactments in the 1960's.

6. All states, Puerto Rico, and the District of Columbia have statutes authorizing the creation of condominium regimes. The provisions of these statutes vary considerably, as do the names of the acts themselves. Such phrases as "Apartment Ownership," "Condominium Ownership," and "Horizontal Property" are the most commonly appearing terms in the titles to the various acts.

7. Unless the statute directly or indirectly provides otherwise, a condominium regime can be constructed on a long term leasehold estate.

8. The creation of a condominium regime requires four basic documents:

a. a declaration of condominium or master deed;

b. articles of incorporation or association organizing the association of owners;

c. a set of by-laws for governing the association of owners and the operation of the building; and

d. a deed for conveying the individual unit.

9. The declaration or master deed is the instrument by which the property is subjected to or brought under condominium use. It commonly contains provisions covering the following as well as other items:

a. a legal description of all the land, a legal description of each unit, and a description of the common elements;

b. restrictions against partition since the continuance of the regime depends upon continued co-ownership of the common elements and individual ownership of the several units;

c. occupancy restrictions and pre-emption rights when a unit owner desires to sell;

d. designation of the shares of each unit or fractional interest in the common elements appurtenant to each unit;

e. provisions for liens on the units to enforce payment of common expenses;

f. casualty loss and rebuilding provisions;

g. easements through the units for pipes, wires, and similar essential services;

h. voting rights of owners; and

i. the method of amending the declaration and by-laws.

10. The deed to an individual unit must conform to local conveyancing statutes and must sufficiently designate the unit conveyed, the easiest method of which is to incorporate by reference the recorded plan or plat incorporated in the declaration of condominium. The deed frequently includes other matters also, such as covenants and use restrictions which are frequently incorporated by reference, the percentage of interest owned in the common elements, transfer restrictions and similar items.

11. The owners of individual units generally have shared access to the common areas, and exclusive access to their individual unit; typically, they may decorate or refurbish their individual unit as they wish, subject to any overriding by-laws of covenants. However, individual unit owners may not exclude others from common areas. For example, if a first floor condominium unit opens onto a lawn, which is a common area, the unit's owner could not build an addition such as a screen porch, thus making a portion of the common area exclusive.[2]

2. See, e.g., Penney v. Association of Apartment Owners of Hale Kaanapali, 70 Haw. 469, 776 P.2d 393 (1989) (to turn a common area into a private area would require unanimous consent of unit owners); accord America Condominium Assn., Inc. v. IDC, Inc., 844 A.2d 117 (R.I. 2004) (amendment creating individual development rights on common areas required unanimous consent); Makeever v. Lyle, 125 Ariz. 384, 609 P.2d 1084 (1980) (unit owner could not add second story because air above unit was common area; made no difference that the space was "unused"). Cf. Jurgensen v. New Phoenix Atlantic Condominium Council of Unit Owners, 380 Md. 106, 843 A.2d 865 (2004) (assigned parking spaces were nevertheless common areas).

12. After construction, financing is accomplished by separate mortgages on each unit and its accompanying co-ownership interest in the common elements. Each unit is also taxed separately.

13. Individual condominium unit owners are entitled to federal income tax deductions for the interest paid on mortgages incumbering their separate units and also for real estate taxes.

PROBLEMS, DISCUSSION AND ANALYSIS

§ 13.1 Cooperatives and Condominiums Generally

PROBLEM 13.1: Megan is the owner of 500 shares of stock in Altos Corporation, a cooperative housing venture. The certificate of incorporation provides that the apartments are to be used for private residential purposes only, and then only by an individual or individuals approved by its board of directors. Megan is also the tenant under a proprietary lease from the Altos Corporation under provisions that make the ownership of 500 shares of stock a condition precedent to the continuance of the lease. Provisions in the lease and corporate by-laws also provide that neither the stock nor lease is to be assigned without the written consent of the board of directors of the Altos Corporation or of two-thirds of its stockholders. Megan, being in arrears in her rental and assessment obligations, offered to sell her stock to the Altos Corporation and the offer was declined. Later she sold her stock and assigned her lease to the Placid Corporation, an entity wholly owned by her husband and which had no other assets. The Board of Altos Corporation refused to consent to the assignment to Placid Corporation. Placid and Megan sued to compel Altos to recognize the assignment as valid and to issue a new stock certificate and new proprietary lease to Placid. Are Placid and Megan entitled to the relief sought?

Applicable Law: Tenant shareholders in a cooperative enterprise are primarily interested in the acquisition of a home, and the success of the entire project, particularly financial but social also, depends upon the exercise of some control in the selection of neighbors. Such control cannot be for the purposes of engaging in unlawful discrimination, but otherwise reasonable restraints on the alienation of stock and proprietary leases are valid.

Answer and Analysis

No. The legal question is the validity of the restraint on alienation. Although the common law has generally prohibited restraints on alienation or construed them narrowly, many kinds of restraints on the sale of condominiums or cooperatives have been

adjudged valid. The validity of a specific restraint should be evaluated by the purposes to be accomplished, the reasonableness of the restraint, and any evils that might result. The tenant stockholders in a cooperative apartment building are principally interested in the purchase of a home. The success of their individual efforts and of the entire project, however, is closely related to the success of the whole. An individual apartment does not stand or fall as a separate unit; rather the success of each individual unit depends upon the success of the entire complex since there is blanket or unitary financing, operation, and taxation of the entire complex.

Thus, the permanency of the individual occupants as tenant owners is an essential element in the general plan, and their financial responsibility an inducement to the corporation in accepting them as stockholders. Under the plan of organization adopted, each stockholder or her representative is entitled to vote upon the choice of neighbors and their individual financial responsibility. This element is important because the failure of any tenant to pay his proportionate share of expenses increases the liability of the other tenant stockholders.

The Altos Corporation is a vehicle for the establishment of a community of homes rather than for the pecuniary profit of its stockholders. The primary interest of the shareholders is in the long term proprietary lease, the alienation of which the corporation has the power to restrain. Thus, decisions relating to restrictions on alienation of stock should not be controlling.

Some decisions have invalidated such restrictions on alienation. Although restraints on the alienation of leasehold estates are generally upheld providing they are not in the form of disabling restraints, restraints on the alienation of fees simple (non-condominiums), have generally been held invalid. The form of the real property ownership in the instant case is that of a leasehold, but it would be inconsistent with the previous discussion to say that the restraint is valid just because the tenant shareholders have only a leasehold interest. In substance they are the owners as well as the tenants; hence the decision should be based on more substantial grounds. As previously indicated, the success of the entire venture depends upon the financial ability of each tenant shareholder, the proximity of living accommodations and the necessity of cooperating in the management of the building.

Further, the social evils frequently asserted as avoidable by invalidating restraints on alienation are not shown to be perpetrated by a cooperative device such as this. The restraints involved will not tend to keep the property in the same family and concentrate wealth; the member is not prevented from liquidating his interest and consuming the property; creditors are usually not prevented

from satisfying their claims; and members are not discouraged from improving their homes. The restrictions on transfer are reasonably necessary to the continued existence of the cooperative association. Of course, cooperative enterprises are just as subject to federal and state antidiscrimination law as any other entity. But there is no evidence of that in this instance. Placid and Megan are not entitled to the relief sought.[3]

§ 13.2 Cooperatives

PROBLEM 13.2: A organizes a cooperative apartment house of 45 units under a statute providing that: "No stockholder at any meeting shall be entitled to more than one vote." A corporate cooperative contracts to purchase the apartments, and 22 of the units are sold to cooperative members. A subscribes to the cooperative and keeps 23 units, residing in one. A is then allowed to sublease his remaining 22 units as ordinary rental apartments to defray the cost burden until they can be sold. A agrees to continue using his best efforts to sell the apartments. He then assigns to 17 transferees all his interest in the stock and a proprietary lease appurtenant to a particular apartment, but retains a promissory note on each and, as a condition of each transfer, retains a proxy to vote the shares as he sees fit. Each of the transferees has no intention of becoming residents of the apartments, but purchased the shares for "investment purposes" only. A now claims that he has the right to 18 votes: 17 by proxy for his "transferees" and one vote of his own. The 17 transferees now file a writ of mandate ordering the coop's trustees to count the "proxy" votes. Should the court grant the writ of mandate?

Applicable Law: A promoter holding units pending sale and authorized to sublease them in the interim is not entitled to exercise proxy votes from transferees of such units when the transferees signed contracts of purchase for investment purposes only with no intention of occupancy. In some states a statute provides that each cooperator is entitled to one vote. A cooperative enterprise envisions individual ownership by the cooperators for the purpose of obtaining homes, and to permit the holder or owner of several units to exercise multiple votes could convert the character of the community from one of individual home owners into that of a commercial enterprise.

Answer and Analysis

No. The promoter (A), in this instance, agreed to use his best efforts to sell all the remaining units to tenant-owners. In this

3. See Franklin v. Spadafora, 388 Mass. 764, 447 N.E.2d 1244 (1983) (upholding condominium by-law limiting to two the number of units that could be held by any person).

context, the promoter should be allowed to subscribe to the remaining units but only so as to defray costs while he is exercising his continuing duty to sell the apartments. The interests of the tenants are not unduly prejudiced since the promoter can never obtain more than the one vote he gets by actually living in an apartment, despite his multiple holdings. Control over both conditions and potential buyers or renters therefore remains in the resident-tenant-owners. The statute provides that no "stockholder" shall be entitled to more than one vote. The term "stockholder" is interpreted in light of its underlying purposes; and the only bona fide stockholder in such an association is a resident. When A, as promoter, subdivided his retained apartments among investors rather than residents, he did not increase the number of bona fide stockholders. The non-resident "transferees" held their shares only through A's right as a promoter, and subject to the duty to attempt to sell to third parties who would become residents. The sum total of this subdivided interest equals one stockholder, and therefore, one vote. To hold otherwise would thwart the purpose of cooperative housing and permit control to be vested in one exercising a commercial renting enterprise rather than in the majority of the owner-cooperators.[4]

PROBLEM 13.3: Plaintiffs, shareholders in a cooperative corporation, and lessees under a proprietary lease, filed suit against the corporation to recover $400 damages, the cost of repairing rotted under flooring beneath the floor in their bedroom. The corporation refused either to make the repairs or to reimburse the plaintiffs on the basis that it was the plaintiffs' obligation to repair the interior of their apartment. The proprietary lease provided: "Lessor shall keep in good repair the foundations, sidewalks, walls, supports, and beams." May plaintiffs recover?

Applicable Law: The relationship between a stock cooperative organization and its shareholder tenants under proprietary leases is in fact that of landlord and tenant in relation to the rights and duties of the parties pertaining to the use and occupancy of the premises. The corporation as a distinct entity owns the building. Its shareholders under individual leases have a right to occupancy solely as a result of the lease. When the terms of such a lease require the landlord corporation to keep certain parts of the building in repair, including "supports" and "beams," the landlord is obligated to keep in repair the subflooring.

4. State ex rel. Leavell v. Nelson, 63 Wash.2d 299, 387 P.2d 82, 99 A.L.R.2d 231 (1963).

Answer and Analysis

Yes. The proper relationship of the parties should be determined. The defendant corporation owns the entire building. Plaintiffs own 200 shares of stock in defendant corporation, the amount of stock owned bearing the same relationship to the total amount of stock outstanding as the value of the apartment occupied by the plaintiffs bears to the total value of the building. Ownership of the stock entitles the plaintiffs or other owners to a proprietary lease which in turn entitles them to occupancy privileges. Stock ownership alone is not sufficient.

The legal significance of the proprietary lease is the crucial issue. Is the relationship between the corporation and the shareholder-tenant different than that of any other landlord-tenant relationship for purposes of determining the rights and obligations under the lease? A corporation is normally a legal entity distinct from its shareholders. In an apartment cooperative the corporation is the sole owner of the land and building. The occupancy rights of the shareholders are derived solely through the terms of the proprietary lease, and under the terms of this instrument the relationship is clearly that of landlord and tenant. The shareholders then are in the same position as any other tenants.

For certain limited purposes some courts have referred to cooperative tenant shareholders as owners. Other cases have regarded such a lessee as a title holder so as to permit him to bring dispossess proceedings to recover possession of the cooperative apartment. As to a third party in possession the stockholder-tenant may be a landlord, but as between the parties the relationship between the corporation and shareholders or members is essentially that of landlord and tenant.

The relationship between the corporation and the apartment dwellers in an organization of this type is entirely different from that existing between the property owners' association and the apartment dwellers in a condominium organization. In a condominium the individual purchasers acquire title to their respective units and to an undivided interest as tenants in common to all of the common areas and the underlying fee. The whole project is owned directly by the individuals—collectively as to the common areas and individually as to the separate apartments. The association as such owns nothing. In a cooperative, the association owns the entire project—the cooperators own shares of stock and lease a particular apartment. Since the parties have chosen the cooperative form of organization, they are bound by its usual incidents. Their rights are determined by a construction of the terms of the proprietary lease construed in reference to the usual incidents of a landlord and tenant relationship.

As previously noted, the lessor had agreed to keep in repair "supports" and "beams." Evidence also was introduced to show that on acquiring their interest, the corporation notified the plaintiffs in writing that "the entire interior of the premises is your responsibility." Generally, covenants by a lessee to keep in repair are construed to exclude structural repairs and extraordinary and unforeseen building alterations. Here, the agreement by the tenants should be construed to mean that they covenanted to repair only the visible parts of the interior of their apartment.

Additionally, there are no qualifications, restrictions or limitations to the words "supports and beams" in the lease under the provision imposing repair obligations on the landlord. The under flooring can certainly qualify as supports and beams in an ordinary sense since it holds up the floor. This construction is consistent with the statutory law in many jurisdictions requiring landlords of multiple family dwellings to keep them in repair. Although failure to make such repairs has resulted in the imposition of tort and not contractual liability on the defaulting landlord, a provision in the lease that repairs required by the lessor shall be made at the lessor's expense may be construed as an implied obligation to reimburse a tenant for any repairs made by the tenant on behalf of the lessor. Accordingly, Plaintiffs may recover.[5]

§ 13.3 Condominiums

PROBLEM 13.4: Jane, owner of Blackacre in fee simple, leased to Carrie for 55 years, the terms of which lease required Carrie to construct an apartment complex within two years. Carrie then recorded the lease and a Declaration of Condominium. Later, Carrie executed 50 contracts of purchase with various individuals for the purchase of individual apartments, and on the basis of such purchase contracts, Carrie borrowed one million dollars for purposes of construction, executing a mortgage to American Bank to secure the loan. Carrie defaulted in her payments to the mortgagee; the purchasers made no payments on their purchase contracts, and innumerable mechanics' liens were filed against the project. American Bank filed an action to foreclose its mortgage and joined all parties. Determine the rights of the parties.

Applicable Law: Individual condominium units are subject to all types of legal actions as if they were completely independent, and a vendee under a contract to purchase such a unit acquires an equitable interest in it even if the building is not yet constructed. A subsequent purchaser or mortgagee who

5. See Susskind v. 1136 Tenants Corp., 43 Misc.2d 588, 251 N.Y.S.2d 321 (City Civ.Ct. 1964).

acquires its interest with notice of outstanding purchase contracts takes subject to the rights of the vendees under such contracts. Mechanics lien claimants may perfect liens against the owners and contract purchasers of individual units.

Answer and Analysis

In order to determine the rights and priorities of the parties, it is necessary to determine the legal effect of each of the transactions. The first problem is to determine whether a condominium regime was established. These regimes are predicated on statutory enabling acts, which establish the obligations and rights of the parties. The acts vary from state to state. In this jurisdiction a condominium regime can be established by recording a master lease or deed and a declaration of submission which is required to contain certain information. The problem states that the lease and declaration were recorded; hence, compliance with the act is established. Once the condominium regime is established, an apartment in the building may be individually conveyed and encumbered, and may be the subject of ownership, possession or sale as if it were solely and entirely independent of the other apartments in the building.

The statute makes the property susceptible to conveyance of individual units. It contemplates the existence of agreements or contracts to convey the developer's interest in individual units within the building. The contracts involved were all issued prior to the construction mortgage executed to American Bank. Although the contracts were not recorded, they were nevertheless known to American Bank since the problem states that the contracts were the inducement for granting the loan and taking the mortgage.

The vendee under a contract of purchase is usually said to acquire an equitable interest in the land, and usually equity will grant specific performance of such a contract. In this case the principal subject of each contract is an apartment in a building not yet constructed. Equity courts generally refrain from issuing decrees they cannot enforce, and equity courts generally will not order acts requiring continuous supervision, such as the construction of a building. Does it follow that these purchasers acquired no interest in the land because of the inability to get specific performance before the building is constructed? No. Recognition of a property interest does not depend upon the availability of any particular remedy to protect that interest.

The public policy behind the condominium statutes, which were enacted to further such developments, suggests that the purchasers' interests under the contracts should be protected to the fullest extent consistent with established law. In the instant case

American Bank had knowledge of the outstanding contracts at the time the mortgage was executed. American Bank could have refused to proceed with the loan unless the contract purchasers subordinated their interests to the lien of the mortgage, but it did not do so. Normally a subsequent purchaser or mortgagee who takes with notice of an outstanding interest takes subject to such interest. The fact that we are dealing with a condominium regime suggests no adequate reason for varying the normal rules of priority when the subsequent purchaser or mortgagee has notice. Thus, American Bank's mortgage will be inferior to the rights of those contract purchasers whose contracts were entered into before the mortgage.[6]

At this point, a brief resume of the rights of the parties is in order. Jane is the owner of the fee; she did not join in the mortgage; therefore, her reversion is not subject to the mortgage, and at the end of the leasehold the land will revert free and clear. Carrie has a 55–year term which is encumbered with a condominium regime and 50 outstanding contracts to purchase individual apartments. American Bank has a mortgage on the leasehold encumbered by the condominium regime and the outstanding contracts. On foreclosure, it will sell the leasehold so encumbered.

The next point is the rights of the mechanics' lien claimants. The rights of such claimants are entirely statutory. The statutes vary considerably among the states on the details of perfecting such liens and their effective dates. We assume that all the statutory requirements were satisfied. Assuming also that the lien statute does not specifically provide that condominium units may be subjected to such liens, the answer nevertheless should be in favor of according liens to those improvers of the realty who would otherwise qualify if the particular land were not subjected to a condominium regime. As previously stated, these individual apartments are treated as separate parcels of real property subject to all types of legal acts. Thus, the lienors acquire a lien superior to the rights of the individual purchasers.

In brief, American Bank (the mortgagee) can foreclose on the leasehold subject to rights of prior vendees of individual units and subject to the condominium regime. The lienors have rights inferior to this mortgage, since the mortgage was perfected first. The lienors, however, have valid liens on the equitable interests of the vendees.[7]

6. For example, a bank holding a prior mortgage on a condominium unit has priority over the condominium management when the latter assert a subsequent lien for unpaid associational fees. Board of Directors v. Wachovia Bank, N.A., 266 Va. 46, 581 S.E.2d 201 (2003).

7. See State Sav. & Loan Ass'n v. Kauaian Dev. Co., 50 Haw. 540, 445 P.2d 109 (1968).

A somewhat different but related problem is the right of a lienholder to go against the entire development, both association and all unit holders, when his claim is against only one or a few unit owners, or perhaps against the association itself.[8]

The issue of tort liability to nonowners is analogous to the issue of contract liability. In Dutcher v. Owens,[9] a tenant renting from a unit owner sued both the unit owner and condominium association for injuries resulting from a fire. The fire, which originated in an electrical box, was found to be the negligence of both the condominium owners' association and the individual unit owner.[10] The court held that individual unit owners in such circumstances could not be "jointly and severally" liable—i.e., individually liable for the entire injury—but that the maximum liability of each must be in proportion to ownership interest. In this case the unit owner-landlord was liable for only 1.572% of the plaintiff's damage award.

PROBLEM 13.5: Clara was a member of a condominium association developed by Byerlee corporation. Byerlee Corporation contracted to sell condominium units in the apartment buildings. Each unit purchaser executed a separate contract with Byerlee Corporation requiring each purchaser to pay the condominium corporation a monthly maintenance charge. At the closing of each of the condominium purchase transactions, the individual unit owners each executed as guarantor and beneficiary a 99–year lease on the communal recreational facilities which were to be used by the unit owners. These leases were between Byerlee Corporation as lessor and the condominium corporation as lessee. The rental under this lease was to be paid by the condominium corporation out of monthly maintenance charges. Clara now brings a class action on behalf of all unit owners for both damages and modification or cancellation of the lease on grounds that the corporation had charged exorbitant rental and made excessive profits.

The pleadings allege several causes of action: (1) breach of fiduciary duties because of the self-dealing lease between the developer and the organization it controls; (2) violation of a

8. See United Masonry, Inc. v. Jefferson Mews, Inc., 218 Va. 360, 237 S.E.2d 171 (1977) (rejecting lienholders' claim that its lien was good against an entire condominium development when work was performed on only some units plus some common area.).

9. 647 S.W.2d 948 (Tex.1983).

10. As a general rule, unit owners are responsible for interior maintenance, while the association provides exterior maintenance, generally paid for by the unit owners' periodic maintenance fees. However, the by-laws may provide for some exceptions to this. E.g., see Casita De Castilian, Inc. v. Kamrath, 129 Ariz. 146, 629 P.2d 562 (1981) (properly passed bylaw could impose on each unit owner the duty to repair his or her roof, even though roofs were common, not individually owned, elements).

statute enacted after the lease was in effect, providing that such leases shall be fair and reasonable; and (3) that the lease is unconscionable. May Clara prevail?

Applicable Law: (a) A recreational lease (or management contract) entered into when the developer controlled both the condominium association and the lessor corporation is not per se invalid because of self-dealing. However, the developer does have some fiduciary obligations to prospective buyers of the condominium units, and if as a result of self-dealing it obtains "inordinate" profits, it may be liable on the basis of unjust enrichment.

(b) Remedial legislation of a substantive nature such as that which would require leases or contracts to be fair and reasonable, or that which would invalidate escalation clauses, are presumptively intended not to be applied retroactively, and if they are intended to be so applied, then they might be unconstitutional.

(c) A recreational lease or contract may be invalidated on the basis of unconscionability even in the absence of a specific statute. To be unconscionable the court must find that there was an absence of meaningful choice on the part of one party, plus contract terms which are unreasonably favorable to the other. These two requirements constitute procedural and substantive unconscionability.

Answers and Analysis

The answers are as follows: allegation (a) states a good cause of action but actual recovery may be quite difficult to obtain; allegation (b) will probably not permit recovery since the statute cannot be applied retroactively; and (c) states a good cause of action but actual recovery will probably be very difficult.

(a) At one time the courts of Florida, where the principal case arose, refused to invalidate the lease or give other relief on the basis of self-dealing. The rationale was that since the officers and directors of the two associations were the same at the time of the lease, and there were no other members, there was no fiduciary duty. Thus no liability was incurred because of the lease. Further, buyers purchased with knowledge of the lease, voluntarily became its guarantors, and hence should abide by it. In the case of each condominium purchase, the documents included the Declaration of Condominium, and the articles and by-laws of the condominium corporation. Each purchaser was on notice of those documents when he or she closed, voluntarily assumed the lease contract, and so could not later complain.

But more recently the Florida Supreme Court concluded that "there is absolutely nothing to recommend a rule of law which encourages persons in positions of trust secretly to betray their trust for inordinate personal gain, at the expense of those to whom they owe a fiduciary duty."[11] The court stated that self-dealing per se was not actionable, indicated that there was some sort of fiduciary duty to those who would become unit owners and members of the association in the future, and that such self-dealing directors and promoters would be liable for excessive profits.

PROBLEM 13.6: Aardvark Corporation, a Condominium Association composed of unit owners, is lessee under a recreation lease with Beverly, the developer and lessor. The lease was assumed by all unit owners as a mandatory condition for purchasing their condominium units. The lease contained an escalation clause calling for periodic adjustments in accordance with the Consumer Price Index. The Declaration of Condominium incorporated all provisions of the Condominiums Act presently existing or as the act may be amended from time to time. Recently, Beverly demanded an increase or escalation of the rental payments as provided for in the lease. Aardvark now seeks to invalidate the escalation clause based on a state statute invalidating certain escalation clauses in condominium leases. The statute was enacted while the lease was in effect. Will Aardvark prevail?

Applicable Law: Although certain types of statutory regulations affecting substantive contractual rights are prospective only in operation, nevertheless, if a declaration of condominium expressly incorporates the condominium act "as it now exists or as it may be amended," then such amendments will be applicable to that condominium regime.

Answer and Analysis

The answer is yes. Such a statute will usually be applied prospectively only and would have no effect on a lease agreement made prior to the statute's enactment. However, the Declaration of Condominium provided for the adoption of all subsequent amendments to the Condominium Act. Therefore, although the statute may have no retroactive effect, Beverly cannot enforce the escalation clause since the statute "as amended from time to time" is adopted into the Declaration of Condominium and becomes binding on all parties. The rent in effect is frozen at the current rate.[12]

11. Avila South Condominium Ass'n, Inc. v. Kappa Corp., 347 So.2d 599, 607 (Fla.1977).

12. Kaufman v. Shere, 347 So.2d 627 (Fla.Dist.Ct.App.1977), cert. denied 355 So.2d 517 (Fla.1978). See West's Fla. Stat.Ann. § 718.401(8)(a), for the stat-

PROBLEM 13.7: Greenhill Condominium Association decides to bring a suit against the Developer, Digger Corp., to test the validity of the recreation lease entered into between the association and Digger when Digger controlled the association. The Association levies an assessment against all the unit owners to finance the law suit. Digger is the owner of one of the condominium units, and files suit against the association to enjoin the association from making it help finance a suit against itself. Will Digger succeed?

Applicable Law: The Condominium Association has control over the common areas and can sue and be sued on behalf of the unit owners. Thus, the association is authorized to levy assessments for appropriate litigation expenses, and if the defendant in the association's law suit is a unit owner, that unit owner is subject to assessment for her share of the litigation expenses.

Answer and Analysis

No. The association generally has control over the common areas, is responsible for their maintenance and upkeep, and generally represents the unit owners in matters of common interest. The funds of the association are obtained by levying assessments against the unit owners. If one of the unit owners is a defendant in a suit by the association, he nevertheless is liable for his share of the expenses in maintaining the suit. Thus, the association may assess him.[13]

PROBLEM 13.8: When the new Board of Trustees or Directors of Green Acres Condominium Association assumed office, the Association was in serious financial difficulties. Huge bills were unpaid; and the condominium buildings were in dire need of repair. Such needs extended to the air conditioning, heating and fire systems. Numerous units suffered water damage from leakage whenever it rained. The by-laws of the Association permitted the Board to vote for and collect, without a vote of the unit owners, a special assessment to meet increased operating or maintenance costs, additional capital expenses, or to meet emergencies. The by-laws also required that a majority of unit owners consent to the expenditure of more than $5,000.00 on any particular item. The Board's assessment amounted to $100,000.00, and was obtained without notice to unit owners and without their vote. Unit owners sought to enjoin the Association from asserting a lien for the assessment. May the unit owners succeed in their action?

ute prohibiting certain escalation clauses.

13. Margate Village Condominium Ass'n, Inc. v. Wilfred, Inc., 350 So.2d 16 (Fla.Dist.Ct.App.1977).

Applicable Law: The association's board of directors or trustees must follow the procedures set forth in the condominium documents and also, of course, adhere to applicable statutes. When the documents require consent of the unit owners for assessments or expenditures in excess of a stated amount, except in the case of an extreme emergency, the board's determination that an emergency exists will not be judicially reviewed in the absence of a showing of the board's lack of good faith, self-dealing, dishonesty or incompetence.

Answer and Analysis

No. The question is whether the Association may validly pass such a large assessment to cover emergency expenses without the vote and approval of the unit owners as required in the by-laws. The test of a board's actions is reasonableness; a court will not second guess the actions of directors or trustees unless it appears that they are the result of fraud, dishonesty or incompetence. The court considered the absence of the unit owners voting for the assessment, and decided that "if an extreme emergency exists, majority approval of the unit owners is not necessary." The court concluded that absent a demonstration of the board's lack of good faith, self-dealing, dishonesty or incompetency, its determination that an emergency existed should not be judicially reviewed. Here, the board's decision was made in good faith.[14]

Note: Community Living

The close proximity, the sharing of common facilities, and the divergent interests of the many neighbors in condominiums can lead to friction and lawsuits. Two commonly litigated areas involve children and pets, but there are many others. In resolving any controversy concerning condominium living one must examine: (1) the applicable statutes; (2) the declaration of condominium or the master deed; (3) the articles of incorporation or association; (4) the by-laws; and (5) the rules promulgated by the Association's Board of Directors. Some changes or restrictions will require an amendment to the declaration or master deed, some can be accomplished by amending the by-laws, and some rules and regulations can be promulgated by the Board of Directors.

Drinking, children and pets. In one case the Board of Directors of a particular association passed a rule prohibiting the use of alcoholic beverages in the clubhouse and adjacent areas. Unit owners approved the rule by a 2:1 majority, but some violently disagreed. The prohibi-

14. Papalexiou v. Tower West Condominium, 167 N.J.Super. 516, 401 A.2d 280 (1979).

tion was upheld since the association has control of the common areas, and the rule was considered reasonable and not arbitrary or capricious.[15] However, several courts have held that such restrictions may not be applied retroactively to those who owned units before the rule took effect.[16]

Restrictions prohibiting occupancy by children under designated ages were traditionally upheld,[17] at least if they are in place from the beginning or applied only prospectively.[18] One state, California, has a civil rights statute that has been interpreted to forbid exclusion of children;[19] however, one California court has permitted such restrictions if applied to housing designed for the elderly. In 1988 the federal Fair Housing Act (FHA) was amended to protect people with dependents from housing discrimination. Except for some narrowly crafted exceptions for housing intended to be occupied by older people, restrictions excluding children are generally unlawful under the FHA.[20]

Problems may arise if new restrictions are attempted to be applied retroactively, if the restriction is not uniformly enforced, or if it is not properly enacted, e. g., by a proper amendment to the declaration or by-laws according to the facts and statutes of the particular case.[21] Pet

15. See Hidden Harbour Estates, Inc. v. Norman, 309 So.2d 180 (Fla.Dist. Ct.App.1975) (upholding prohibition on drinking in clubhouse, a common area); Dulaney Towers Maintenance Corp. v. O'Brey, 46 Md.App. 464, 418 A.2d 1233 (1980) (upholding rule limiting owners to one dog or one cat).

16. See Chateau Village North Condominium Ass'n v. Jordan, 643 P.2d 791 (Colo.App.1982) (pet regulation could not be applied retroactively); Winston Towers 200 Ass'n, Inc. v. Saverio, 360 So.2d 470 (Fla.App.1978) (same).

17. Covered Bridge Condominium Ass'n, Inc. v. Chambliss, 705 S.W.2d 211 (Tex.App. 1985) (upholding rule restricting occupancy to those sixteen years of age or older); Constellation Condominium Ass'n, Inc. v. Harrington, 467 So.2d 378 (Fla. 2d D.C.A. 1985) (upholding restriction excluding children under the age of twelve).

18. See Constellation Condominium Ass'n, Inc. v. Harrington, 467 So.2d 378 (Fla.App.1985) (amended age restriction could not be applied to owners who owned their units before time of amendment).

19. O'Connor v. Village Green Owners Ass'n, 33 Cal.3d 790, 191 Cal.Rptr. 320, 662 P.2d 427 (1983), striking down such a provision under the state's civil rights statute. The California courts seem to be retreating from *O'Connor.* Sunrise Country Club Ass'n, Inc. v. Proud, 190 Cal.App.3d 377, 235 Cal. Rptr. 404 (1987) (sustaining age restrictions where reasonable provision for children was made in other areas). See also Park Redlands Covenant Control Committee v. Simon, 181 Cal.App.3d 87, 226 Cal.Rptr. 199 (1986) (striking down association rule limiting occupancy to three individuals as violation of state constitutional right of privacy).

Cf. Pearlman v. Lake Dora Villas Mgmt., Inc., 479 So.2d 780 (Fla.App. 1985) (condominium declaration excluding children except those of transferees from the institutional first mortgagee created an irrational classification in violation of Equal Protection clause).

20. See 42 U.S.C. § 3607, which creates an exception for housing intended for and occupied solely by persons over 62 years of age; or housing subject to federal regulations and having at least one occupant per unit who is over 55 years of age.

21. See White Egret Condominium, Inc. v. Franklin, 379 So.2d 346 (Fla. 1979), upholding an age restriction but not enforcing it because of unequal administration and estoppel; Riley v. Stoves, 22 Ariz.App. 223, 526 P.2d 747 (1974), not involving a condominium but upholding an age restriction in a recorded declaration of restrictions. See also

limitations have provoked a great deal of litigation.[22]

Architectural and developmental control. Declarations of restrictions regulating the size, style and architectural design of homes in subdivision developments are rather common and are generally enforced if reasonable and uniformly administered.[23]

The association may not pass by-laws or make developmental decisions that deprive other condominium owners of their legal interest in their individual units or in the common areas. For example, in Makeever v. Lyle,[24] a majority of owners gave Lyle permission to enlarge his condominium by extending it into the common area. The minority then sued and successfully obtained an injunction. The association had no power effectively to transfer part of the common area to one member, at least not without compensating individual unit owners.[25]

Ritchey v. Villa Nueva Condominium Ass'n, 81 Cal.App.3d 688, 146 Cal.Rptr. 695 (1978), upholding age restriction even though claimant had purchased unit prior to its passage.

22. E.g., *Dulaney Towers*, supra; Nahrstedt v. Lakeside Village Condominium Assn., 8 Cal.4th 361, 33 Cal. Rptr.2d 63, 878 P.2d 1275 (In Bank, 1994) (upholding pet restriction); Chateau Village North Condominium Ass'n v. Jordan, 643 P.2d 791 (Colo.App.1982) (upholding regulation forbidding new pets, although pets already present at time rule was passed were permitted to stay).

23. E. g., Gaskin v. Harris, 82 N.M. 336, 481 P.2d 698 (1971) (upholding architectural restriction in subdivision).

24. 125 Ariz. 384, 609 P.2d 1084 (1980).

25. Compare Jarvis v. Stage Neck Owners Association, 464 A.2d 952 (Me. 1983) (associations management agreement giving resort hotel some access to common areas was permissible, for it did not deprive any individual unit owner of access to lawful entitlement in common area); Thanasoulis v. Winston Towers 200 Ass'n, Inc., 110 N.J., 650, 542 A.2d 900 (1988) (neither condominium act nor by-laws permitted association to charge nonresidents higher parking rates than residents).