

Law School Survival Guide

PROPERTY

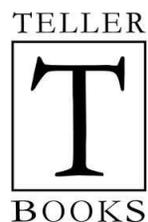
Outlines and Case Summaries

2010
Edition

Law School Survival Guide

Property

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Some judicial decisions discussed in this book, due to their ambiguity, are subject to different interpretations. Other authors may come to conclusions different from those presented herein. No representation is therefore made that these materials reflect a definitive statement of the state of the law or of the views that will be applied by any court in any particular case or jurisdiction.

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ABBREVIATIONS

A	Grantee (for present estate/ future interest hypotheticals)	JT	Joint tenant/tenancy
AGI	Adjusted gross income	K	Knowledge (criminal law) or Contract (all other law)
AP	Adverse possession	K.B.	King's Bench (UK)
A/R	Assumption of the risk	KSC	Knowledge to a substantial certainty
B	Buyer	L	Loss in value
BFP	Bona fide purchaser or bona fide purchase	L1	First landlord
C	Constitution	Lat.	Latin
CIF	Cause-in-fact	LE	Life estate
Cl.	Clause	LED	Life estate determinable
CLEO	State Chief Law Enforcement Officer	LLC	Limited liability company
Court (cap.)	United States Supreme Court	LLP	Limited liability partnership
CP	Court of Pleas (UK)	LRM	Least restrictive means
CR	Contingent remainder	MPC	Model Penal Code
CSD	Common Scheme of Development	MSAJ	Motion to set aside the judgment
CSI	Compelling state interest	N	Negligence
Ct.	Court	N.B.	Nota bene
Ct. App.	Court of Appeals	NIED	Negligent infliction of emotional distress
Ct. Chan.	Court of Chancery (England)	O	Original owner, or grantor (in present estates and future interests)
ED	Emotional distress	OLQ	Owner of the <i>locus in quo</i>
EI	Executory interest	OO	Original owner
Eng.	England	P	Purpose or purchaser
ES	Equitable Servitude	PE	Privity of Estate
FI	false imprisonment	PJ	Personal jurisdiction
FLSA	Fair Labor Standards Act	PJI	Pattern Criminal Jury Instruction
FMLA	Family and Medical Leave Act	PK	Privity of Contract
FQJ	Federal question jurisdiction	Q.B.	Queen's Bench (UK)
FRAP	Federal Rules of Appellate Procedure	R	Recklessness
FRCP	Federal Rules of Civil Procedure	RAP	Rule against perpetuities
FRCrP	Federal Rules of Criminal Procedure	RC	Real Covenant
FRE	Federal Rules of Evidence	Restatement	Restatement (of Contracts, Torts, Judgments, etc.)
FS	Fee simple absolute (fee simple)	RFRA	Religious Freedom Restoration Act of 1993
FSCS	Fee simple on condition subsequent	RIL	Res ipsa loquitur
FSD	Fee simple determinable	RPP	Reasonable prudent person
FS EL	Fee simple on executory limitation	Rule	Federal Rule of Evidence or Federal Rule of Civil Procedure
FT	Fee tail	§	Section
H.L.	House of Lords (England)	S	Sublessee or seller
IIED	Intentional infliction of emotional distress	S.Ct.	Supreme Court or US Supreme Court Reporter
IT	Intentional tort	SF	Statute of Frauds
JMOL	Judgment as a matter of law	SJ	Summary judgment
JNOV	Judgment non obstante veredicto	SL	Strict liability, or statute of limitations
J/SL	Joint and several liability, or jointly and severally liable		

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SMJ	Subject matter jurisdiction		(compilation of US Supreme Court opinions)
SP	Specific performance		
T1	First tenant	USC	United States Code
TE	Tenant/tenancy by the entireties	VR	Vested remainder
TO	True owner	VR SD	Vested remainder subject to divestment
UCC	Uniform Commercial Code		
US	United States of America or United States Reports		

I. THE ACQUISITION OF UNOWNED PROPERTY

A. THE ACQUISITION OF WILD ANIMALS AND UNOWNED PROPERTY

1. The Acquisition of Unowned Personal Property

a. *Ad Coelum* Doctrine

- i. Under the *ad coelum* doctrine, for the purpose of immovable minerals, “to whomever the soil belongs, he also owns to the sky and to the depths.”
- ii. *See Edwards v. Sims* (Ky. 1929)), where the plaintiff Edwards owned and excavated a cave that Lee claimed ran under his property. The plaintiff asserted that he should be the owner because it was the result of his hard labor, he owned the entrance, he paid for it to be explored (*first occupant theory*). However, the court, applying the *ad coelum* doctrine, ordered an excavation of the plaintiff’s cave to determine whether it did in fact run under Lee’s property. The plaintiff sued to stop the defendant judge Sims from enforcing the order. Judgment for the defendant: the court order is to be enforced in order to determine whether the plaintiff trespassed on Lee’s property.
 - 1) Dissent (minority view): the *ad coelum* doctrine is an outdated theory that should not be applied; the ownership by *first occupant theory* would make more sense. The plaintiff excavated the cave through his own funds and labor; he alone is able to use and exploit it; he owns the entrance. Preventing his enjoyment of it hurts the plaintiff and does not help Lee, who cannot take dominion.

b. *Ratione Soli* Doctrine

- i. Under the *ratione soli* doctrine, also known as “*ad coelum minor*,” the owner of the soil is the *first occupant* and owner of whatever is found on the soil, including minerals and *ferae naturae*, regardless of who the finder is.
 - 1) *See Goddard v. Winchell* (Iowa 1892), where Winchell found a meteor on Goddard’s property. Because the court applies the *ratione soli* doctrine, Goddard is able to replevin it.
- ii. This doctrine is not recognized by all states and even in those states that do recognize it, it is not always applied.
- iii. As we will explore later on, the more general rule allows finders to keep what they have found; the law grants finders better title than all the world except for the true owner, with some exceptions.

2. First Occupancy Theory

- a. Under the first occupancy theory, the first occupant becomes the owner. The doctrine applies to the acquisition of *ferae naturae* (wild animals).

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- b. However, the *ratione soli* doctrine continues to apply when an animal is captured and killed on someone's property.
- c. When not captured and killed on another's property, *ferae naturae* belongs to the first occupant, regardless of whether the animal was originally on another's property.
- d. The first occupant is the one who:
 - i. Intends to possess and control an animal; and
 - ii. Injures or traps it in a way that makes its escape either impossible or improbable, depending on the state's approach.
 - 1) Impossible (Strict Occupancy approach under *Pierson*)
 - a) The animal's escape must be *impossible*.
 - b) *Mere pursuit* of an animal does not constitute ownership.
 - c) Rather, one of the following must occur:
 - i) The animal must be trapped *and* escape must be impossible; or
 - ii) The animal must be mortally wounded *and* there is continued pursuit.
 - d) *See Pierson v. Post* (N.Y. 1805)(N.Y. 1805), where the defendant was charged with unlawfully killing and capturing a fox that was under pursuit by the plaintiff. Held: mere pursuit of an animal does not constitute ownership. The animal would have had to be put into a situation where escape was impossible.
 - 2) Improbable (Law of the Chase approach under *Liesner*).
 - a) The animal's escape must be *improbable*.
 - b) If an animal is so badly wounded that escape will be made improbable, then the animal belongs to the party that wounded it.
 - c) *See Liesner v. Wainie* (Wis. 1914)), where Liesner mortally wounded a fox, then Wainie delivered shot that killed it and took it away. The court ruled that Liesner was the first occupant and that the fox belonged to him.

B. ACQUISITION OF VOLATILE MINERALS (OIL AND GAS)

- 1. The general rule regarding minerals can be summarized by the *ad coelum* doctrine: the owner of a parcel of property has a right to the property as it extends "to the sky" and "to the depths." He becomes owner of all minerals beneath his land.
 - a. *See Hammonds v. Central Kentucky Natural Gas Co.* (Ky.1934)), where the court held that the defendant was not liable for using a reservoir under the plaintiff's land to store gas. Once the minerals,

through their natural volatile tendencies, migrate under the plaintiff's land, the defendant cannot be liable because he no longer controls and possesses them.

2. However, once volatile minerals are captured and stored, title to them is not lost, even if they migrate underneath another's land. The landowner may not exploit the stored mineral. *Lone Star Gas Co. v. Murchison* (Tex. Civ. App. 1962)(Tex. Civ. App. 1962).
3. In summary, with respect to acquiring unowned property, courts apply:
 - a. The *ad coelum* doctrine to the acquisition of fixed minerals and imbedded objects; and
 - b. The *first occupant theory* to the acquisition of volatile minerals and *ferae naturae* (unless the *ferae naturae* is caught while on another's land).

C. ACQUISITION BY CONQUEST

1. General rule: when Europeans came to the Native Americans' land, the applicable rule was that the discoverer's government gained title to the land by conquest, despite the Native Americans' occupancy.
2. Thus, courts held that one who was granted land by a Native American does not have good title, since the Native Americans did not have good title to give.
 - a. *See Johnson v. McIntosh* (U.S. 1823), where the Court held that the plaintiff, who claimed land through deeds granted to him by the Native Americans, did not in fact have title because full title was never passed on. Because the land was conquered by the early settlers, the Indians have a right to occupancy, but they do not have transferable title. Rather, transferable title belongs to the U.S. government, to which England gave title after it relinquished title after the Revolution. Because of the savage habits of the Native Americans, they have no claim to their land's title.

II. PERSONAL PROPERTY

A. BAILMENT

1. Bailment can be defined as a legally recognized property relationship between a bailor, who gives personalty to another to be held for a particular purpose, and a bailee, the party that receives the property. Bailment and bailment.
2. The agreement between the bailor and the bailee can be written or oral, gratuitous or for consideration.
3. For there to be a bailment relationship, the following five elements must be met:
 - a. The object of the bailment must be *personal property*;

- b. There must be actual or constructive *delivery*¹;
 - c. The bailee must expressly or impliedly *consent* to accepting the personal property;
 - d. The bailee must have the *right of possession and actual possession*; and
 - e. The bailee must agree to *return* the personal property back to the bailor, who keeps title.
4. Conditions under which the bailee becomes liable to the bailor:
- a. If he fails to return the item, he becomes strictly liable.
 - b. If he fails to exercise requisite care as bailee, the following standards of care apply:
 - i. The Modern Law Approach
 - 1) An ordinary standard of care under the circumstances is *always required*.
 - 2) The bailee is thus liable for ordinary negligence.
 - ii. The Three Approaches of the Common Law
 - 1) Gratuitous Bailment
 - a) Gratuitous bailment is solely beneficial to the bailor.
 - b) The bailee has a minimum standard of care; he is only liable for gross negligence;
 - 2) Mutually Beneficial Bailment
 - a) When the bailment is mutually beneficial to the bailor and bailee, an ordinary standard of care is required.
 - b) The bailee is liable for ordinary negligence;
 - c) *See Hanes v. Shapiro and Smith* (N.C. 1915), where Shapiro is held to the ordinary standard of care for bailment of a sideboard destroyed in a fire, since both parties had a stake in the bailment.
 - 3) Bailment Solely Beneficial to the Bailee
 - a) When the bailment only benefits the bailee, a high standard of care is required.
 - b) The bailee is liable for even slight negligence.
 - c. Example: a store clerk finds in his store a mislaid wallet, which he intends to return to its rightful owner. If he loses the wallet, his standard of care will be:
 - i. Under the common law approach, he is subject to a slight duty of care (he is liable only for gross negligence).

¹ An example of constructive delivery would be giving to another the keys to a car.

- ii. Under the modern law approach, he has an ordinary standard of care under the circumstances; he is liable for ordinary negligence.
- 5. In trial, the burden of proving negligence in bailment cases falls on the plaintiff bailor.
 - a. The plaintiff's *prima facie* case consists in proving: (i) he gave the personalty to the defendant in good condition; and (ii) the bailee did not return the personalty or return it back in a damaged condition.
 - b. When the problem was caused by abnormal causes, the burden is on the defendant to show that he was not at fault.
 - c. If he is able to show he was not at fault, the burden shifts back to the plaintiff to show that the defendant was negligent in exposing the personalty to the risk of harm.

B. FINDINGS

- 1. Introduction to the Findings Law
 - a. The overarching goal of findings law is to get the item back to the original owner (OO) or to preserve the rights of the OO.
 - b. At the same time, in order to promote honesty, finders are generally permitted to keep their findings. with the exceptions of the following circumstances, in which constructive possession is applied:
 - i. Mislaid, imbedded property;
 - ii. Trespass;
 - iii. In other cases where the courts reserve the right to apply constructive possession.
- 2. Lost Items
 - a. The general rule of findings is that the finder obtains the right to possession against all of the world but the true owner.
 - b. *See Bridges v. Hawkesworth* (Q.B. 1851), where a man found a box of bank notes on the floor of a public section of a store and told the owner to hold it for the rightful owner. When the rightful owner never showed up, the finder asked for them back. The court held that the finder had the rightful title for the bank notes, since they were found in a public part of the store.
- 3. Mislaid Items
 - a. An item is mislaid when its owner intentionally places it in some place and then forgets about it.
 - b. An object will usually be considered to be mislaid when it is located on a table or a counter; it will be considered lost when found on the ground or some other area where it is unlikely to have been intentionally placed.

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insignificant space in the apartments was occupied. The taking was imputed to the government, since a local law required certain property owners to permit the installations.

- ii. Regulations Denying All Economically Beneficial Use of the Land
 - 1) *See Lucas v. South Carolina Coastal Council* (U.S. 1992), where the Beachfront Management Act barred the plaintiff from any economically profitable use of land that he purchased for \$975,000. Held (Scalia, J.): the act's effect on the plaintiff's ability to economically benefit from his land was a key factor for determining whether just compensation was required.
 - 2) *N.B.*: a distinction is to be made between: (i) regulatory takings, where the land is so burdened by regulations that it is deprived of all economic use, and where just compensation is required; and (ii) regulations preventing nuisances, where compensation is not required, since the government's rights are based on the common law.

V. LANDLORD / TENANT LAW

A. INTRODUCTION TO NON-FREEHOLD ESTATES

- 1. The Two Kinds of Estates
 - a. Freehold Estates
 - i. In a freehold estates, the possessor is the owner of the property (at least for a temporary period of time).
 - b. Leasehold Estates
 - i. A leasehold estate is one where the possessor (tenant) has only possession, and full title will spring back to the owner (landlord).
 - ii. Historical origins
 - 1) In feudal times, the king owned all of the land. Nobles that were loyal to him were able to use parts of the land. They then were able to parcel land out to serfs and peasants.
 - a) Today, this many-layered system of tenancy continues to exist. For example, in commercial shopping centers, sections of a store may be parceled out to merchants many times over.
 - 2) Later, leaseholds were established as collateral for loans. The tenant would "lend" the landlord the money in exchange for the use of the land. Rather than pay the loan back with interest, the landlord would simply grant the tenant use of the land.
 - 3) Eventually, the law began to recognize leaseholds as interests in land in and of themselves.

2. Three Kinds of Leaseholds

a. Tenancy for Years

i. Characteristics

- 1) A tenancy for years is a discreet lease with a determined beginning and end date.
- 2) If there is a provision clause in the lease, then a second, separate one-time renewal lease may be established.
- 3) When there is a renewal clause in the lease, it is evidence of a tenancy for years, since periodic tenancies and at-will tenancies require no renewal to continue.

ii. How It Is Created

- 1) A tenancy for years is created formally.
- 2) It requires a clear end date.
 - a) The end date need not be explicitly expressed, if the expiration of the lease could be determined.
 - b) The following clause, for example, would be sufficient: “the lease will begin on Jan 1, 2000 and will expire three years later.”
- 3) According to some authorities, there must also be a set start date.
 - a) Under the majority view, however, it does not need to be fixed.
 - b) The clause “the lease begins when the construction has ended” would be sufficient.
- 4) Statute of Frauds: under the modern law, any lease for more than one year must be in writing to be enforced.

iii. How It Is Terminated

- 1) A tenancy for years ends automatically at the end of the term.
- 2) The lease may provide the possibility of renewal.
- 3) In such a case, a court would allow the new lease.
- 4) Except for when a provision of the original contract (lease) is illegal, unclear or for some other reason against public policy, the original contract controls all matters in the new lease.

b. Periodic Tenancy

i. Characteristics

- 1) A periodic tenancy is an indefinite lease.
- 2) There is no need for renewal.

ii. How It Is Created

- 1) A periodic tenancy may be created by the parties in an express agreement (*e.g.*, “This lease is from month-to-month.”).
- 2) In addition, it may be created by law.
 - a) If the parties attempt to create a tenancy for years, but a period is mentioned (*e.g.*, “rent will be paid each month”) and no end date is determined, then a periodic tenancy is presumed.

iii. How It Is Terminated

- 1) Either party may end a periodic tenancy with *proper notice* (unlike tenancies at will, which do not require proper notice).
 - a) For periods of one or more years, six months of notice is usually required.
 - b) For periods of less than one year, notice equal to one full period (generally measured by payment periods) is required.
- 2) Generally, notice of termination must be in writing and delivered.
- 3) Example: the tenant rents from a landlord in a monthly periodic tenancy. The tenant gives notice to the landlord on July 15 that he wishes to leave. Until when must the tenant pay rent?
 - a) Since the tenant must have one full month of rent paid before vacating, all of August must be paid before leaving. Thus, the tenant is responsible for rent up until August 31.

c. Tenancy at Will

i. Characteristics

- 1) A tenancy at will may be terminated at any time.

ii. How It Is Created

- 1) It is usually created by operation of law; if a tenancy for years is attempted, but there is no clear end date and no basis for ascertaining a period, then a tenancy at will is presumed.
- 2) Examples of tenancies where there is no basis for ascertaining a period:
 - a) The landlord agrees to allow his tenant to live on the property on the condition that the tenant keeps up the property and pays the taxes and insurance.
 - b) The tenant is an employee-at-will of a landlord who furnishes a home as part of the compensation.

3) *See Womack v. Hyche* (Ala. 1987), where the parties disputed a tenancy “for \$300 per year with the option to renew so long as the camp is run as a business.” The landlord argued that there was no fixed end date and that the lease was therefore a tenancy at will that would allow him to evict the defendant. The defendant argued that the end date was the end of the year. Held: a tenancy at will is created, since the end date is not clear. Remanded to determine a reasonable time required to vacate.

a) N.B.: a court could have interpreted this to be a periodic tenancy based on the one year payment period.

iii. How It Is Terminated

1) Under the common law, a tenancy at will could be ended at any time.

2) Today, many state statutes protect tenants, by requiring, for example, at least ten days of notice prior to the landlord’s termination of the tenancy.

B. DISCRIMINATORY PREFERENCES AND RELIGIOUS LIBERTY ISSUES

1. The Evolution of Regulations on Landlords

a. Under the common law, a landlord could select whichever tenants or purchasers he wanted for his housing or land.

b. Later, statutes prohibited landlords or sellers from discriminating on the basis of race, color, religion, sex, familial status, age, handicap or national origin.

c. One example of such a statute is the federal Fair Housing Act.

i. The Fair Housing Act prohibits:

1) Discrimination on the basis of race, color, religion, sex, familial status, age, handicap or national origin for the basis of choosing a tenant or buyer; and

2) The publication or indication of a preference as to any of the above categories in choosing a buyer or tenant.

ii. The subjective intent of the owner or landlord is irrelevant; what matters is whether a reasonable person from one of the protected groups would interpret an indication as expressing preference.

1) *See Jancik v. Department of Housing and Urban Development* (7th Cir. 1995), where the Seventh Circuit held that the landlord violated the Fair Housing Act by indicating his preference for a “mature person,” which a reasonable person would take to mean a middle-aged tenant without small children, thus violating the statute on familial status. He also violated the statute by saying that he did not want any teenagers and by inquiring as to race

with a discriminatory purpose. Damages and injunction affirmed.

- a) *N.B.*: a landlord could refuse to rent on an individualized basis to persons with children who were disruptive or would damage property, but a class-based exclusion is invalid.
- b) *N.B.*: this court did not deal with the issue of whether inquiries as to race on their own are enough to violate the Fair Housing Act. The Second Circuit, however, in dicta stated that they were sufficient.

- d. Many states have adopted stricter versions of this federal act. Massachusetts, for example, has adopted statutes that also prohibit discrimination on the basis of sexual orientation.
- e. Regulations are usually more lax for the rental of rooms attached to the owner's abode (*e.g.*, he may chose a tenant based on gender).

2. Modern Statutes and Religious Liberty

- a. Many state and federal statutes prohibit familial status discrimination.
- b. Such statutes do not necessarily prohibit landlords from discriminating against unmarried cohabitants.
 - i. *See State v. French* (Minn. 1990), where the defendant French, a religious landlord, discriminated against unmarried cohabitant tenants. The Minnesota Human Rights Acts forbade the discrimination of tenants based on age, race, religion, and marital status. Because the Minnesota Constitution did not define "marital status," the court looked to the legislative history and found that the legislature excluded the language, "and other like categories" that would have protected unmarried cohabitants. Additionally, the Minnesota Constitution protects freedom of religion, with the exception of that which poses a threat to the safety of the state. Since the defendant landlord's discrimination did not threaten public safety, his right to follow his conscience outweighed the plaintiffs' right to live in his apartment.
- c. Since there is no federal law protecting against marital status discrimination, claims for marital status discrimination fall to the states, whose regulations vary widely.
 - i. Most states either have: (i) not passed statutes prohibiting discrimination based on marital status; or (ii) passed legislation prohibiting discrimination based on marital status, but explicitly exclude unmarried couples from protection.
 - ii. Other states have passed legislation protecting against marital status discrimination, but not specifically protecting unmarried cohabitants.

C. TENANT’S RIGHTS AND REMEDIES

1. Introduction

- a. A tenant has four basic rights:
 - i. Legal possession;
 - ii. Actual possession;
 - iii. The covenant of quiet enjoyment / constructive eviction; and
 - iv. The implied warranty of habitability.
- b. Furthermore, he has certain remedies if the lease violates housing regulations.

2. Legal Possession

- a. All states recognize tenants’ right to legal possession.
- b. The landlord must have title in order to enter into a lease.

3. Actual Possession

- a. The landlord has a duty to deliver the actual possession of the premises to the tenant.
- b. This duty prevents *third parties*, such as holdover tenants, from preventing new tenants from taking actual possession of the rented property.
- c. **English (majority) rule:** the landlord has the duty of delivering the actual possession of the property and of preventing third parties from interfering with it.
 - i. Some states that have adopted the English rule apply it only to *residential*, not *commercial*, leases).
 - ii. In states that have adopted the English rule, the tenant’s remedy for the landlord’s failure to deliver actual possession is *expectation damages*.

1) See *Adrian v. Rabinowitz* (N.J. 1936), where the plaintiff successfully sued the defendant landlord Rabinowitz for failing to vacate a building to be used in a commercial lease for a shoe store on the beginning day of the lease. Although NJ recognized the *universal rule* that *tenants are entitled to legal possession*, and though this lease imposed the *covenant of quiet enjoyment* (which otherwise would not have been recognized in NJ), the issue was whether the landlord had a *duty of delivering actual possession* to the tenant against holdover tenants. Held: NJ applies the English rule, which imposes the duty on landlords. The plaintiff is therefore awarded *expectation damages* equal to lost profits.

- d. ***American (minority) rule:*** the *new tenant is responsible for obtaining possession* of the property and for evicting holdover tenants; the landlord is merely a title holder.
 - i. In states that have adopted the American rule, the tenant has no remedy for the landlord's failure to deliver actual possession.
4. The Covenant of Quiet Enjoyment and Constructive Eviction
- a. The covenant of quiet enjoyment and constructive eviction deals with the tenant's *actual and constructive continued possession* of the property after delivery.
 - b. It is implied in all states except NJ.
 - c. There are two kinds of violations:
 - i. Actual (Full or Partial) Eviction
 - 1) There are two kinds of actual eviction:
 - a) *Eviction for lack of title:* a third party with superior title evicts the tenant from the property.
 - b) *Wrongful eviction:* the landlord evicts the tenant without cause.
 - 2) The promises in a landlord-tenant relationship are independent from one another.
 - a) Thus, even if a lease is violated by a landlord, the tenant is generally not relieved of the duty to pay rent.
 - b) However, a violation of the covenant of quiet enjoyment is the exception.
 - c) Thus, if a tenant is evicted from the property, he is excused of the duty to pay rent.
 - 3) Full and Partial eviction
 - a) Full eviction applies when a tenant is evicted from *all* of the property.
 - b) An eviction is partial when the tenant is evicted from only *part* of the property.
 - c) In either case, the covenant of quiet enjoyment protects the tenant.
 - d) Since the lease is seen at common law as a transfer of *all* the property, *exclusion from any of the property* is seen to be an eviction.
 - e) Thus, the *remedy for partial eviction is similar to that for full eviction:* the obligation to pay rent is entirely excused until the tenant's full possession is restored.
 - i) *See Smith v. McEnany* (Mass. 1897), where the court held that a lessor's putting up of a

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GLOSSARY

Ad coelum doctrine Under this doctrine, for the purpose of immovable minerals, “to whomever the soil belongs, he also owns to the sky and to the depths.” It refers to the right of the owner of property to the space that extends vertically upward and downward from his property.

Arson The malicious, willful, and unlawful burning of a structure which, at common law, had to be the dwelling place of another.

Assignment A transfer of property that grants the possession of land for the *entire period of a lease*. By default, an assignment grants *all of the property* for the lease period. A *partial assignment* may however, be granted for only *part of the property* during the lease period. Compare SUBLEASE.

Bailment A legally recognized property relationship between a bailor, who gives personalty to another to be held for a particular purpose, and a bailee, party that receives the property.

Bill of attainder An unconstitutional legislative action that singles out an individual or group for punishment without the benefit of a trial.

Burglary At common law, the specific intent crime that consisted of the breaking and entering of the dwelling of another at night with the intent to commit a felony therein.

Causation in fact Actual causation that links an act with a result through implementing the “but-for” test (*i.e.*, “but for A, B would not have occurred”). Compare PROXIMATE CAUSE.

Circumstantial evidence Secondary facts and other evidence that lead to primary fact inferences.

Chattel An item of personal, as opposed to real property; any moveable object.

Claim preclusion See *RES JUDICATA*.

Closing (real property) The final meeting between the seller and the purchaser in a land sale contract, whereby the executory period is concluded and the payment and property are exchanged.

Closing of escrow See CLOSING.

Collateral estoppel Under the doctrine of collateral estoppel, a factual issue *may not be litigated* in any lawsuit if it was litigated and decided in a previous proceeding. Also referred to as ISSUE PRECLUSION.

Constructive notice Legal notice derived from the circumstances.

Construction The act of interpreting the sense or intention of a constitution, statute, contract, or some other text; the process of construing the meaning of a writing.

Constructive possession doctrine Doctrine by which control or dominion of property is granted to the owner of the *locus in quo*, in situations in which it would otherwise go to the finder (*e.g.*, in cases of treasure trove and findings generally). The doctrine is applied, for example, when an object is found in a private place of a store. The owner of the *locus in quo*, rather than the finder, obtains possession.

Conversion A tortious act of willful interference with the property of another without lawful justification, in a way that *deprives the owner of the use of his property*. Examples of conversion include illegal takings, the assumption of ownership, and the destruction of the property of another.

Counterclaim An independent cause of action made by the defendant against the plaintiff in order to defeat the plaintiff’s claim.

Criminal negligence Extremely negligent conduct that creates a risk of death or serious bodily injury beyond that of mere civil negligence.

Cross-claim A claim under FRCP 13(g) by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action.

Dead Man's Act A statute that disqualifies a party from testifying *against the estate* of the deceased because of the party's incentive to lie based on: (i) his interest in the case; and (ii) the unavailability of the deceased to contradict him.

Detinue An action at common law to recover PERSONALTY or its value when it is unlawfully held by another.

Devise To make a gift of real property by will. Property that can be given in such a gift is referred to as "devisable."

Duress A defense that applies when the defendant acts illegally and against his own will as a result of another's *unlawful threat* of bodily harm. Duress excuses an actor from the legal effects of his actions (*e.g.*, a defendant is not guilty for a theft committed under duress).

Easement The right to use part of land owned by another for a special purpose. *See* EASEMENT APPURTENANT and EASEMENT IN GROSS.

Easement appurtenant An easement that benefits the grantee's (dominant tenant) land. When there is an easement appurtenant, there are *both dominant* and *servient tenements*. Compare EASEMENT IN GROSS.

Easement in gross An easement that does not benefit the grantee's land. Although there is a servient estate, but there is no *dominant estate*. Compare EASEMENT APPURTENANT.

Equitable servitude Covenants restricting the use of land that run with the land at equity and thus offer remedies at equity (*e.g.*, injunctions). Compare REAL COVENANTS.

Executory period In a land sale contract, the period between the formation of the sale contract and the closing.

Ex post facto law (Lat., a law "after the fact"). A law that does any of the following retroactively: (i) makes conduct criminal; (ii) establishes a stricter punishment for a crime; or (iii) alters the procedural or evidentiary rules in favor of the prosecution.

False pretenses A specific intent crime consisting of the acquiring of title to the property of another through making false statements or misrepresentations with the intent of defrauding the owner.

First degree murder Under the modern statutory approach to murder, first degree murder is generally defined as all forms of murder having malice aforethought *and* premeditation and deliberation. Compare SECOND DEGREE MURDER.

Freehold estate An estate where the possessor is the owner of the property (at least for a temporary period of time).

Grand theft The commission of LARCENY when the value of the property unlawfully taken exceeds some predetermined amount.

Habeas corpus Legal proceeding where a writ is brought to determine whether a person is being lawfully detained.

Holdover tenant A tenant who keeps possession of the property beyond the expiration of the lease.

Implied easement by prior use An easement that comes into being when an owner of two parcels of land uses one of them, the servient estate, to benefit the other in such a way that when he sells one of them, the purchaser can *reasonably expect* that the servient estate will continue to be used in a way that is consistent with its prior use.

In-court identification Modality of identification where an attorney asks a witness

if she recognizes the perpetrator of a crime in court.

Indictment Since a defendant may not cross-examine witnesses presented against him in a grand jury indictment, the Confrontation Clause does not apply. Compare PRELIMINARY HEARING.

Infant A person who has not yet reached the legal age of majority (generally, eighteen years of age); a minor.

Intent (torts) The *mens rea* element for intentional torts, which is formed when the defendant possesses either: (i) purpose (a wanting or desiring) that a certain result come about; or (ii) knowledge to a substantial certainty that a result is substantially certain to come about as a result of his act (based on belief or knowledge).

Intervening cause An act that intervenes in the series of events after an act, such that it alters the resulting consequence. When intervening causes are strong enough to relieve wrongdoer of liability, they become SUPERSEDING CAUSES.

Involuntary manslaughter An *unintentional* killing lacking malice aforethought committed either with criminal negligence or during the commission of an unlawful act.

Issue preclusion See COLLATERAL ESTOPPEL.

Joinder The uniting of distinct claims or parties in an action.

Knowledge to a substantial certainty (torts) Knowledge of an extremely high risk that a particular consequence will materialize as a result of one's act. It may be based on knowledge or belief and, like purpose, satisfies the *mens rea* required in intentional torts.

Larceny A specific intent crime consisting of the unlawful taking and carrying away of the property of another with the intent to permanently deprive him thereof.

Leasehold estate An estate where the possessor is not the owner of the property (*e.g.*, in the case of a rental property). Possession will spring back to the owner after the current possessor's lease or rental comes to a close.

License (property law) A right to use another's property that is terminable at the will of the possessor of the land.

Malum in se (Lat., "a wrong in itself"). An inherently evil or immoral act, regardless of whether it is prohibited.

Malum prohibitum (Lat., "a prohibited wrong"). An act or offense which is prohibited but is not inherently wrong (*e.g.*, failing to stop at a stop sign).

Merchantable title Title not subject to such reasonable doubt that it would create a just apprehension of its validity in the mind of a reasonable prudent person. Merchantable title is not necessarily good title; it may have *slight defects*.

Mortgage Security for a debt given by a mortgagor (a debtor) to a mortgagee (a creditor) to secure a loan given to the mortgagor, usually for the purpose of purchasing land or some other real estate.

Mortgagee In a mortgage, the creditor, loan company, or bank that lends to the debtor, or mortgagor.

Mortgagor In a mortgage, the party that borrows from a creditor, loan company, or bank; a debtor.

Negligence per se Negligence established as a matter of law such that the plaintiff need not establish duty and breach. The violation of civil and criminal statutes gives rise to negligence *per se* in most states, such that the jury is instructed that the violation of a statute constitutes the breach of duty for the purposes of negligence.

Nonjusticiable political question A question that involves the exercise of *discretionary*

power by either the Legislative or the Executive Branch; it does not involve a *judicial* question to be decided by the judiciary.

Nuisance A condition or activity on another's land that unreasonably affects the other's right to enjoy and use his land. The standard is one of a person of *ordinary sensibility*.

Parol evidence Oral or written evidence of a bargain that occurred before the final terms of the contract were laid down and that was not made part of the final contract.

Parol evidence rule Rule of substantive law that states that supplementary oral or written evidence of any agreement prior to or contemporaneous with the laying down of the final terms of the contract cannot be used to contradict or vary the final agreement.

Pendent parties jurisdiction The jurisdiction to adjudicate a claim against a party who is not otherwise within court's jurisdiction, because the claim by or against that party arises from the same core facts of another claim that is properly before the court.

Personalty Personal property, which is moveable, as contrasted with REALTY (real property).

Photographic lineup Modality of identification where a witness identifies one suspect among others in a spread of photographs.

Pleading Documents filed by a litigant that set forth the material facts and legal arguments of his claims or defenses.

Police lineup Modality of identification in which suspects are lined up at a police station and a witness is asked if he recognizes the perpetrator among them.

Preliminary hearing Permits a defendant to cross-examine witnesses presented against him. Compare INDICTMENT.

Prima facie case A case in which the plaintiff presents sufficient evidence "on its first

appearance" (Lat.) supporting the cause of action. If no contrary or rebutting evidence is presented, the plaintiff is entitled to a decision in his favor.

Profit à prendre An easement that grants the right to enter and remove timber, minerals, oil, gas, game, and other substances from another's land.

Proximate cause is legal causation that serves as a limitation on actual cause. The law limits those acts that are said to be "causes" of some consequence, requiring the acts to be related to the consequence through some foreseeable sequence of events. If an act is foreseeably related, it is said to be the proximate. Compare CAUSATION IN FACT.

Quantum meruit A Latin expression meaning "as much as he deserves." This is a doctrine at equity that allows a party to recover for the value of the labor or materials delivered to another, even if there was no actual contract or if there was a contract and the party breached it, in order to prevent the other party will not be unjustly enriched.

Rape Under the common law, rape was defined as "the carnal knowledge of a woman forcibly and against her will." The modern law has departed from this view by defining rape in gender-neutral terms.

Ratione soli doctrine Under this doctrine, also known as the "*ad coelum* minor doctrine," the owner of the soil is *the first occupant* and owner of whatever is found on the soil, including minerals and *ferae naturae*, regardless of who the finder is.

Real covenant A promise relating to land use that runs with the land at law and is enforceable at law (offering monetary damages as remedies) between the original covenanting parties as a contract. Compare EQUITABLE SERVITUDE.

Realty Real property, which is immovable and fixed to the ground (*e.g.*, buildings, land), as contrasted with PERSONALTY.

Recklessness (torts) The purposeful disregard of a high probability of a resulting consequence (*e.g.*, of resulting emotional distress, in the case of the intentional infliction of emotional distress).

Replevin An action at common law to recover *the possession* of personalty wrongfully taken from the plaintiff. Compare TROVER.

Replevy To exercise the common law action of REPLEVIN.

Res ipsa loquitur A negligence circumstantial evidence doctrine that is invoked when the facts create such a strong presumption of negligence that “the thing speaks for itself” (*Lat.*). The plaintiff is not required to introduce direct evidence.

Res judicata Under the doctrine of *res judicata* (*Lat.*, the “the thing already adjudicated”), a party *may not litigate claims* that he raised or could have raised in a previous suit that reached a final judgment. Also referred to as CLAIM PRECLUSION.

Respondeat superior (*Lat.*, “let the superior answer”) The doctrine that a master or principal is *vicariously liable* for the negligence of his servants or agents, even when he was not himself negligent. This doctrine usually refers to the liability of employers for their employees.

Robbery The specific intent crime that consists of the unlawful taking of property from another person or in the person’s presence by the use of force or by threatening the imminent use of force.

Second degree murder Under the modern statutory approach to murder, second degree murder is generally defined as all forms of murder having malice aforethought, but, unlike FIRST DEGREE MURDER, lacks premeditation and deliberation (*e.g.*, depraved heart murder, felony murder committed in tandem with a non-inherently dangerous felony, etc.).

Shelter principle Under this principle, if a possessor of some chattel or other property became the legitimate owner of the property under some theory of ownership (*e.g.*, adverse possession, accession, etc.), then all subsequent possessors may claim that good title was also passed to them if they legitimately acquired the good.

Showup Modality of identification in which police seize a suspect, bring him to the victim of a crime, and ask the witness if the suspect is the perpetrator. A showup usually occurs before an indictment, when time is of the essence.

Solicitation The act of entreating, imploring, inducing, or encouraging another person to engage in some unlawful behavior.

Sua sponte By order of the court, “of its own will” (*Lat.*), without motions by either party.

Sublease A transfer of property that grants possession of the land to a new tenant for *part of the duration of a lease period*, even if it is as little as one minute. Compare ASSIGNMENT.

Suicide pact An agreement whereby two or more people agree to kill one another.

Superseding cause An INTERVENING CAUSE that is strong enough to relieve a wrongdoer of liability.

Supplemental jurisdiction The jurisdiction that a court has over a claim that is *part of the same case or controversy* as another claim over which the court has *original jurisdiction*.

Tort A civil wrong, other than a breach of contract, for which the law provides a remedy.

Tortfeasor A person who has committed a tort.

Trover A remedy that allows the rightful owner of property to recover possession or to recover damages for the wrongful taking of his property. Compare REPLEVIN.

Voidable title Title that is fraudulently transferred or transferred through the owner's negligence. Although it is imperfect, it has the potential of becoming full title (if transferred to a *bona fide* purchaser, for example). Compare VOID TITLE.

Void Title Fatally flawed title that no action can cure or transform into full title. Compare VOIDABLE TITLE.

Voir Dire Judicial procedure in which attorneys examine prospective jurors to determine competency and potential bias. The

process leads to the selection or rejection of those who will ultimately serve on the jury in a particular case.

Voluntary manslaughter An intentional killing mitigated by provocation in the heat of passion or other circumstances that negate malice aforethought.

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