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Property I, Volume 3 | Torts, Volume 2

Maynard Jackson

PROPERTY – VOL. III

TORTS – VOL. II

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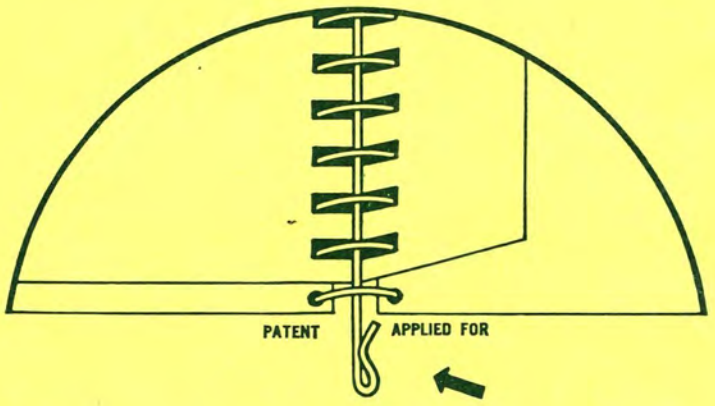

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CLASS SCHEDULE

TIME	9:00		10:00		11:00		12:00		1:00
MON.	CONTRACTS		BUSINESS ORGANIZATION		PROPERTY	STUDY →			
TUE.	TORTS		PROCEDURE		CONTRACTS				SEMINAR
WED.	PROPERTY		TORTS		B. O.	STUDY →			
THU.	PROCEDURE		TORTS		PROPERTY	STUDY →			
FRI.	CONTRACTS		B. O.		PROCEDURE	STUDY →			
SAT.	← STUDY →								

FINAL EXAMINATIONS

DAY	DATE	TIME	PLACE	COURSE
MONDAY	MAY 13	9:30 A.M.		PROPERTY
THURSDAY	MAY 16	9:30 A.M.		PROCEDURE
SATURDAY	MAY 18	9:30 A.M.		BUSINESS ORGANIZATION
TUESDAY	MAY 21	9:30 A.M.		CONTRACTS
FRIDAY	MAY 24	9:30 A.M.		TORTS

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NATIONAL

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Vested v. Contingent Remainders (cont'd.)

Hypo #1:
A → "To B for life and then to C and his heirs"
B = present possessory life estate.
C = a vested rm. in FSA. It is a rm. because it was created simultaneously w/ B's life estate, and it will not cut short B's estate. It is vested because regardless how + when B's estate terminates, C is ready to take over. It is indefeasably vested, i.e. not subject to divestment. A has no reversion because he gave away all.

Hypo #2:
A → "To B for life and then to C + his heirs, but if C leaves no children surviving him, then to D + his heirs."
A = nothing
B = present poss. life estate.
C = vested rm. in FSA subject to divestment in favor of a shifting executory interest in FSA in D. It is a vested rm. because it is ready to take over however and whenever the life estate of B terminates, but if C dies w/o any children surviving him, the FSA rm. may be divested.
The word "children" means only the immediate offspring of C. When used, the word "issue" includes all lineal descendants.

Hypo #3:
A → "To B for life, and if C attains the age of 25, to C and his heirs." Assume C is 15 years old.
B = present possessory life estate
C = a contingent rm. in FSA. Due to the form of expression, the attainment of 25 is a condition precedent.
A = vested reversion in FSA subject to divestment. A created only one vested estate: B's life estate. ∴, since A created vested estates totaling less duration that what he (A) orig. had, he gets a rever.

However, if C attains 25, A's reversion will be divested of him (A).

Hypo #4:

A → "To B for life, and then to C and his heirs, but if C fails to attain the age of 25, then to D + his heirs.

B = present poss. life estate.

C = due to the form of the wording here, the rm. of C is vested subject to divestment upon the failure of C to attain the age of 25.

D = shifting executory interest in FSA.

Because the phrase "... but if C fails, etc." is worded like a cond. subsequent, the rm. of C is vested. However, due to the form of wording in hypo #3, that was a cond. precedent.

Hypo #3 v. Hypo #4

The results in hypos #2 + #4 are identical.

Hypo #5:

A → "To B for life rm. to the children of C."

Children of C = contingent rm. in FSA. The children are, as yet, unborn.

B = present poss. life estate.

A = reversion in FSA subject to defeasance by the birth of a child.

A born child will have a vested rm. in FSA subject to partial defeasance by the birth of other children of C. e.g., C^1 is born, and, therefore, has a vested rm. to 100% of the property. But, if C^2 and C^3 are later born during C's life, the 100% of C^1 will be partially defeased due to the necessity of sharing w/ C^2 and C^3.

The unborn children have a shifting executory interest in FSA.

Under *Purefoy v. Rogers, a shifting executory interest will not be construed if it is possible for a rm. to take effect.

Rule of Construction

Hypo #6:

A → "To B for life rm. To the heirs of C."

B = present poss. life estate.

C = a rm. Whether C is still alive determines whether the rm. will be vested or contingent. A living man cannot have heirs. Therefore, *if C is alive, the heirs of C have a contingent rm.

and A has a reversion subject to divestment. But, if C is dead, the heirs of C have a vested rem. in FSA and A has no reversion. Thus, whether C is alive or dead will determine whether the heirs of C are ascertained or unascertained.

Hypo #7:
A → "To B for life, and if C attains the age of 25, then to C and his heirs; but if C fails to attain the age of 25, then to D and his heirs."
B = present poss. life estate.
C = cont. rem. in FSA.
D = alternative contingent rem. If C fails to attain 25, D will be "substituted" for C. Either C or D will take alternatively. D, therefore, gets an alternative cont. rem. in FSA, NOT an executory interest because that would cut short C's estate, and D will not.
A = reversion because only B's present poss. life estate is vested.

If B diss before C reaches 25, it will revert to A. D won't take in this case because the cond. of C not reaching 25 is the only cond. under wh D will take, and it is still possible that C will attain 25.

New Rule of Construction

However, the more recent rule re this problem is: on y is a cond. precedent and a cond. subsequent (as here), the cond. precedent will be ignored, and only the cond. subsequent will be considered. Edwards v. Hammons. Therefore, under the new rule, the result here would be the same as in hypo #4.

Hypo:
A → "To B and the heirs of his body and then to C and his heirs."
B = present poss. fee tail estate

C = a vested rm. in FSA subject to divestment by B's disentailing (if B so chooses). A FSA cannot follow a FSA.

Problem on page 356:

(1.) B = life estate (present possessory)
B's widow = contingent rm. for life. It is not certain who will be B's widow nor is it certain that W will be B's ". Her widow is unascertained during B's life. A widow becomes ascertained only at death.
C and his heirs = vested rm. in FSA. They are ready to take whenever and however the prior estates terminate.
A = nothing.

(2.) Can a rm. be devised, descend or be alienated inter vivos? =

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(2.) (cont'd.) A vested rm., being a vested interest, has the same legal characteristics as a rever. i.e.; It is descendable, devisable and alienable inter vivos. Creditors and the trustee in bankruptcy can reach it.

Legal Characteristics of a Contingent Remainder:

(1.) Since y is no guarantee that the cont. rm. will vest, it is not alienable inter vivos at C.L. Exceptions:

(a.) Hypo: A owns B/A + via a warr. deed → "To B for life, and if C attains the age of 25, to C and his heirs." Before C reaches 25, C conveys his rm. via warranty deed to D. C then attains 25 before B dies. Who is entitled to the rm.? C or D? Since C made warranties & representations on wh D relied, D should get it. This is the doctrine of Estoppel by Deed: if, at the

Doctrine of Estoppel by Deed

time of the conveyance, the conveyor actually has no title to pass but before the conveyee goes into poss. or at the time of trial the title vests in the conveyor so that if he had the title it would be good, it will be construed to inure to the benefit of the conveyee, and the conveyor will be estopped to deny the legality of title transferred.

(b.) Breach of Contract

On valuable consid. is paid to bind the agreement so that, upon failure of the conveyor of the cont. rm. to perform, the conveyee could sue in breach of Contract.

(c.) Release by a Co-tenant

Or y is a co-tenancy, a release of the cont. rm. in favor of the co-tenant is valid.

Modern View

Today, the wt. of author. holds that a cont. rm. is alienable inter vivos.

(2) Hypo: A → "To B for life then, ~~to C and his~~ if X marries Y, to C and his heirs." If C dies and X & Y are not yet married, and under C's will T is to take. X and Y marry and then B dies. X v. T = J/T. A cont. rm. is devisable and descendable.

If the cont. rm. ~~[illegible]~~ perishes before the death of the cont. remainderman, y is nothing to devise or descend.

(3.) Creditors can reach an interest if the interest is alienable. So, if

would depend on the jurisdiction. Therefore, at C.L., creditors could not reach it. Today, in the majority of jurisdictions, creditors can reach the interest.

Under sec. 70 of the Bankruptcy Act (since all Bankcy. cases are brought in Dist. Cts.), the trustee in bankruptcy will get title to the interest if in the state in wh the Dist. Ct. sits, a cont. rm. is alienable inter vivos. i.e., the prop. law of the forum state will defer. But, the Bank. Act goes further and says that if the prop. Rater becomes alienable d/in 6 months after the bankruptcy proceeding, it is subject to the Bank. Act and the Trustee in Bankruptcy could reach it.

Bankruptcy Act

* Poss. of Reverter *

Definition: The interest left in the grantor or testator when a FS Determ. is transferred. This automatically reverts.

Hypo: A → "To B and his heirs so long as the prop. is used for school purposes."

If the prop. is ceased to be used for school purposes, the entire estate will automatically revert to the grantor.

* Characteristics:

1) It is alienable, devisable + descendable. Mass. in accord: Brown v. Independent Baptist Church, 325 Mass. 645.

326/645

There are some juris. wh hold that a poss. of reverter is inalien-

376 Ill. 486 – minority view still holds to the three exceptions, even still however, any attempt to alienate will not destroy it even though not one of the exceptions.

able inter vivos (e.g., Ill.). But, an attempt to alienate will not destroy it. Further, the three exceptions apply here. Hus is the minority view (Ill.)

(2.) Can creditors reach the interest? = Depends on whether it is alienable inter vivos in the particular juris.

Local law of creditor's rights will decide. Sec. 70 of the Bankr. Act applies.

(3.) Can trustees in bankruptcy reach a poss. of reverter? = Depends on the same as above.

* Right of Entry *

A → "To B and his heirs ~~so long as~~ provided liquor is not sold on the premises, but if liquor is sold on the premises A and his heirs may re-enter and retake."

TYPICAL CONVEYANCE

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A = a right of entry is retained by A and his heirs. It will NOT automatically revert. At C.L. A would have had to enter upon the land and take over poss. Today, you may bring an action of Ejectment, and if successful, get the land back.

Characteristics:

(1.) W.T. of author. holds it to be inalienable inter vivos. The reasoning is that the right of entry is akin to a C/a, and

C.L. did not favor the stirring up of litigation (Champerty, Barratry, Maintenance)

1 All. 141 — Attempt to alienate — C.L. result

Rice v. Worcester Ry., 12 Allen 141 held that even an attempt to alienate a right of entry will result in its destruction. This was the C.L. result.

Rest., Prop. — Today, per the Rest. of Prop. the Rice Case is no longer the rule of authority. The 1948 Rest. says this.

Mass. — But, Mass. has not changed. Therefore, the C.L. rule still holds sway.

(2.) Will not automatically take effect. You must actually re-enter or bring ejectment.

Schwartz says it is no reason why it should not be alienable.

(3.) Whether creditors can reach it depends on whether, under the local property law, it is alienable.

(4.) Whether trustees in bankruptcy can reach it depends on the same as above.

Post v. Weil 115 N.Y. 361 — Exception to Rule of no alienation

However, on the right of entry is coupled w/ a reversion, it is freely alienable inter vivos per the rule of authority

Hypo: A → "To B for life ~~so long as~~ provided that it is used for school purposes, but if not used for school purposes A and his heirs may re-enter and retake." Here, the right of entry will be freely alien-

able.

Cts. will not require the forfeiture of an estate merely for the breach of a covenant. But, the breaching party may be liable in b/k for damages.

* Post v. Weil, 115 N.Y. 361 — "provided it is not used as a tavern."
The ct. here said it was neither a poss. of reverter nor a right of entry, but in case it is used as a tavern, the ct. will merely say that it is a covenant and that it has been breached thereby requiring the pymt of damages.

whether a poss. of reverter is created by a given conveyance or whether a right of entry is created depends on the wording: "so long as" = possibility of Reverter; "provided that" = rt. of entry.

Problem on page 352
Ask X to release his right of entry for a nominal apt. because w/ a right of entry he might want to enjoy the proceeds; but, w/ a bad financial situation, it would be no enjoyment. Further, the club could merely sell the liquor off the premises and could bring it on the premises. Or, they could give it away and the members could give donations. W/ these arguments, X will probably release the right of entry.

Query: Can ∃ be future interests in personal property? = Generally, yes. See Dukes v. Potter, p. 138.

However, ∃ are two ex-

ceptions:

(1.) There can be no fee tail in the transfer of personal property because the Statute De Donis, wh created the Fee Tail, is said to apply only to real property.

Hypo: A → "all of my silverware to B and the heirs of his body. Then to C and his heirs."

So, here B = a FS subject to a shifting exec. interest in C & his heirs. = No problem of seisin since we are dealing w/ personalty. And seisin only applies to realty. Therefore, even before the Statute of Uses, the shifting executory interest in C and his heirs would have been valid.

The shifting exec. int. will take effect when B's line runs out.

But, at C.L., C's int. would not be good because it would be against the Rule Against Perpetuities. So, B would get a FSA at C.L.

(2.) There are no future interests in consumable goods. e.g., foods.

Hypo: A → "my banana to B for life, rem. to C and his heirs." Because of the very nature of the subject matter, i.e., perishable and consumable, the conveyance would be interpreted as being a FSA in B, and nothing in C and his heirs.

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Invalid Future Estates

There are certain future estates in realty wh are invalid at C.L.

(1.) A freehold cannot be created to commence in futuro. It must be a present livery of seisin.

Rule of law

freehold (a.) ~~Y~~ cannot be a springing out of an estate from the grantor's estate at some future date. Thus is invalid at C.L.

Hypo: A → "To B for life + one year after B's death, to C + his heirs." — Upon the death of B, the seisin must go back to A. So, a year after A retakes, the estate of C would have to spring out of the grantor's reversion. So, at C.L. and before the Stat. of Uses, C's estate would be invalid.

Rule of law [(b.) ~~Y~~ cannot be a conting in a freehold rem. following a term of years.

Hypo: A → "To B for 10 years + if C attains the age of 25 to C + his heirs."
Since the seisin would remain in A, that means that if C attains 25, C would take by a springing exec. interest, and this was invalid before the Statute of Uses.

So, ~~Y~~ cannot be a cont. rem. in freehold following a term of years or some other non-seisable estate.

~~Y~~ can be a vested rem. following a term of years, and it is interpreted as being a vested, present estate subject to a term of years in the termor. It is said that the seisin ~~follows~~ flows presently from the termor to the remainderman.

Problem #1, page 358

B has a term of years a non-freehold estate. Before any of B's children can take, they must survive him. Therefore, ~~the~~ B must first die. Therefore, the children have a cont. rm. So since y is a cont. rm in a freehold following a term of years, the rm. of the children is invalid. ∴, B = a determinable term of years and A = a reversion FSA

Problem #2

B = a deter. term of years. Children of B who survive B = a cont. rm. in a non-freehold estate, i.e., the remainder of the 999 years after the death of B. We don't have to worry about seisin here because all of the estates involved here are non-freehold.

If you're in a juris. which interprets a term for more than 100 years as a freehold estate, you've got problems.

So, y can be a springing non-freehold estate to commence in futuro.

Problem #3

B = term of years, i.e. non-freehold. Eldest son living at end of B's term = a cont. rm. in a non-freehold. ∴ no problem of seisin. C & his heirs = vested rm. in FSA (C has the seisin here. It flows from B to C.)

(2.) You cannot reserve a cond. in favor of a stranger other than

Rules of Law | the grantor. * It cannot be an abrupt shifting of the seisin. Before the Stat. of Uses, this would make the conveyance invalid. After the Stat. of Uses, if the conveyance is properly worded, a Shifting Exec. Int. would be created.

(B.) Doctrine of the Destructibility of Cont. Rmds. — DOES NOT APPLY TO EQUITABLE ESTATES.

Rule of Law | The C.L. does not permit a springing of the seisin. So, the Cont. rmn. does not vest upon the termination of the prior estate, the cont. rmn. is destroyed.

Rule of Construction (Purefoy v. Rogers) | Further, on it is possible for a rmn. to take effect a shifting interest will not be allowed.

No effect by S/U | This Doctrine was still in force after the Stat. of Uses due to the above Rule of Purefoy v. Rogers.

* Methods of Destruction:

(1.) When the prior estate terminates naturally.

(2.) Forfeiture, e.g. on the reshainderman's predecessor tries to convey more than he had, i.e., Tortious Feoffment. Termination here is premature.

(3.) * Doctrine of Merger — (("The 'Jonah' Doctrine")) — On a smaller estate is swallowed up by a larger estate.

Hypo: A → "To B for life [but if C attains 25, then] to C & his heirs!"

A rever. in FSA is larger than a life estate.

Assume A conveys his reversion in FSA to B. So, here

B would have two estates & these would create in B an estate larger than C's sm. exp. since when A conveyed his rever. to B, C's sm. had not vested.

Exceptions:

(1.) A fee tail can swallow up smaller estates, but a fee tail cannot be swallowed up. (can be disinherited.)

(2.) If a man gets two estates at the same time, merger will not take effect immediately.

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Hypo: A → "To B for life & if C attains 25, to C & his heirs."
Assume C is 15 at the time the conveyance (will) take into effect. Assume B is also A's heir under A's will and is entitled to A's rever. in FSA. So, when A dies, B gets the life estate & rever. in FSA. But, here the cont. rem. of C would not be destroyed because both estates of B vested at the same time; and therefore merger would not occur.

But, B could cause Merger to occur by conveying both the rever. & life estate to X. Therefore, since the cont. rem. is not ready to vest at the time of termination

of the preceding life estate, the cont. rem. is destroyed. Upon the conveyance to X, the life estate of B is destroyed, & only the reversion remains. X could then convey a rever. interest to B in FSA.

Problems on Page 361

(1.) A would take in FSA since the heirs of C had a cont. rem because during C's life we don't know who the heirs are, i.e., when the life estate terminates, the heirs of C are not ready to take, i.e., Their cont. rem. is destroyed & A would take in FSA.

(2.) B = present poss. life estate.
C = vested rem. for life (freehold)
C's first son = cont. rem. in FSA.
A = reversion
Thus, that was before C dies.
However, after C died:
B = present poss. life estate
C's son = cont. rem. in FSA. It will not be destroyed because the freehold of B still exists and (supports) the cont. rem.
If C detaches it before B dies,
C = FSA.

(3.) B = legal FS as trustee + seisin
C = eq. estate for life
C' = eq. cont. rem.
The Doctrine of Destructability of Cont. Rems. has no application here. We are dealing w/ equitable estates.
A = Equitable rever. in FSA.
When C dies, the enjoyment of

the ~~land~~ proceeds from the land will go to A until C[1] reaches 21 & then C[1] will take. This will not spring out of A since the seisin remains in B. So, this is the trust to preserve cont. remainders.

(4.) The term of years (999) is non-freehold.
C = a life estate in a non-freehold
C[1] = a cont. rem. in a non-freehold.
B's heirs = reversion in a non-freehold estate.
If C dies and leaves a son 19, in the interim it will go to B or his heirs, and when C[1] reaches 21, C[1] will take the rest of the term. No problem of seisin because we are dealing w/ non-freehold.

(5.) B = a present poss. life estate
B[1] = cont. rem. in fee tail.
A = rever. in FSA.
Before son is born, A dies & it turns out that B is A's heir. Thus B[2] will take a LE + a rever. Merger applies here because the two estates - LE + rever. - weren't created simultaneously. ∴, B = FSA.

(6.) B = fee tail
A = rever. in FS.
After A dies, B = fee tail + rever. But, merger does not occur because although the fee tail is smaller, a fee tail does not merge.

(7.) B = present poss. life estate
B[1] = cont. rem. in fee tail
C = vested rem. in FSA
A dies intestate, but the

death of A will have no effect on the state of title because A had retained nothing.

Quaere: What have the Cts. and Statutes done to the Doctrine of Destructability today? = * EXCEPTIONS *

(1) Reeve v. Long - a child in gestation is considered in life in being. (see p. 359.)

Hypo: A → "To B for life & to the first son of B who reaches 21." Here, the cont. rm. would be destroyed because of the additional cond. of Reaching 21.

But, above on A → "To B for life rm. to the first son of B" the cont. rm. would not be destroyed if the son is born w/in 9 months due to the rule of Reeve v. Long.

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So, the child is considered ascertained if born w/in the period of gestation, for the purposes of the Doctrine of Dest. of Cont. Rms.

(2) The Doctrine is inapplicable to executory interests per v. Pell.

Hypo: A → "To B for life & then one year after B's death, to C if C attains 21." Here, we have a springing exec. int. There is no possibility that C could take via a rm. So, the Doctrine does not apply here. The C.L. said that since the Doctrine is in -

applicable to effec. interests, ymust be some way to take care of this situation. This, the Rule Against Perpetuities.

So, that is the second exception to the Doctrine.

(3) A third possible exception: Bower v Martin, 294 Ill. 488 - Since A conveyed via a warr. deed, it is a rep to C that his cont. rem. will not be affected, and that A would be estopped to convey his rem. to B to cut off the cont. rem. of C. - This is a singular decision and is truly an "Ill." decision.

The vast majority holds that the fact that a warr. deed was the mode of conveyance makes no difference, but that it only warrants that C gets a cont. rem. = So this applies only in Ill., that is, this exception.

Haywood v. Spaulding 75 N.H. 92 ch 184, sec. 3

(4) Fourthly, in N.H. there has been an outright abolition of the Doctrine as being antiquated Haywood v. Spaulding, 75 N.H. 92.

Mass. abolished the Doctrine in M.G.L., ch. 184, sec. 10 and sec. 3. Fortious fee simple abolished by M.G.L. ch 184 sec. 9. R.I., Me. & D.C. have also passed stats. which eliminate the doctrine, but the stats. are poor because they ignore certain other considerations which can still activate the Doctrine. So,

Pott v. Bond 158 Fla. 185 (56)

here the stats apply only to [illegible] jeopardy + merger. Thus, if the estate terminates naturally, these three stats. do not apply.

There are still jurisdictions wh apply the Doctrine today. Pott v. Bond, 158 Fla. 185 (1956).

* Rule in SHELLEY'S Case *

Statement of the Rule (a rule of construction)

This rule can be stated thusly: If an instrument creates a freehold in A + purports to create a rem. in A's heirs or the heirs of A's body, + these two estates are of the same quality (both legal or eq.) under this rule the rem. becomes a FS in A if the words "the heirs of A" are used, and a FT if the words "the heirs of A's body" are used.

Hyp: "To A for life rem. to the heirs of the body of A." — Both of these are of the same quality — legal.

* Key elements of the Rule:

(1.) Must be freehold estate in the ancestor, i.e., a FT or a LE. No FS because it would be no rem.

(2.) The heirs must take via a rem. + not by way of an exec. interest.

(3.) Does not apply to personalty, no seisin ∴ no freehold.

(4.) Rem. must be "to the heirs of A" or "to the heirs of the body of A" and in no other words. Those words must be used.

(5.) The estate in A or in the heirs or the heirs of the body of A can be separated by another estate.

Hypo: "To A for life & then to B for life, rm. to the heirs of A." The rule would still apply here despite B's estate!

Thus: = { A = life estate
B = vested rm. for life
heirs = cont. rm. in FS.

(6.) The estates must be of the same quality. The two estates must be either both legal or equitable.

(7.) Rule operates only on the Remainder. However, sometimes the Doctrine of Des helps sometimes.

Hypo: O → "To A for life, rm. to the heirs of A."

Hypo: O → "To A for life, rm. to the heirs of the body of A."
A = present life estate & a vested rm. in fee tail. So here merger would occur & A could disentail.

There are situations in which R/SC will apply but merger won't:

(1.) O → "To A for life & then to B for life if & marries Y, w/ a rm. to the heirs of A."
R/SC applies:
A = life est
B = cont rm. for life in B
A = vested rmb. in fee SA under R/SC.
But, here merger will not

apply because merger does not occur immediately. But, A could make merger occur by conveying both of his estates to a third party and thereby terminate the life estate and thus cut off the cont. rem. in the heirs by destruction.

As a general rule, therefore, if y is an intermediate estate, merger will not occur immediately, but it could occur by a conveyance out.

(2) O → "To A for life, & if A marries B, to the heirs of A."

A = present life estate & rem. in F.S. But, this rem. is contingent upon the marriage of A & B.

Quaere: Can a cont. rem. in FS swallow up a smaller vested estate? = No because y is no guarantee that A & B will marry.

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PROBLEMS on Page 365

HYPO: (#2) Via will "To B for life - rem. to B's heirs."

B = a present LE + a vested rem. in FS. Since y is no intermediate estate, merger would occur, & B would take a present FSA and the heirs nothing, if we apply the R/S/C. However, since the testatee (B) predeceased the testator, the will had LAPSED. The will is an ambulatory document and can be changed as often as the testator so desires.

However, the Ill. case to the contrary notwithstanding, R/SC should not apply here because we should look at the problem from the date of execution. The ~~his~~ son of B should get a FSA. The date of execution is the date the will takes effect, i.e., at T's death.

(3.) The R/SC does not apply because y is no vested rm. in the heirs of the grantee.
If C is living, the "heirs of C" get a cont. rm. If C is dead they get a vested rm.

(4.) R/SC not applicable
B = present LE
heirs of B = cont. rm. in FS. However not every heir will necessarily get an equal share if the power of appointment is exercised.

Meaning of "heirs" w/in the Rule in Shelley's Case

The R/SC does not apply here because the definition of the word "heirs" w/in the meaning of the rule means ad infinitum, ad nauseum line of heirs. So, since it was said that B "their father" will appointment, that is taken to mean that only the children of B are included in the words "heirs" as used in the conveyance.

(5.) The Rest. Prop. & the Ill. case held that R/SC applies, merger occurs

and the grantee, B, gets a F.S.
But per the English C.L. view, R/SC not applicable because the word "heirs" in the conveyance is not used in the sense in wh "heirs" is used in R/SC. In the R/SC "heirs" means an indefinite line of heirs of the granted and not the descendents of a certain class or group.

"Heirs" w/in R/SC:

The Rest. of Prop. view is not good because it perpetuates the R/SC & the R/SC is antiquated.

Quaere: (6.) Is the R/SC a rule of law wh operates regardless of the testator's intent or is it a rule of construction wh will bend to the contrary manifestation of the testator's intent. ?= In *Perrin v. Blake, L. Mansfield, C. said it was a rule of construction. But, upon appeal, reversal: R/SC is not a rule const. but is a Rule/Law. So, even tho' the testator expresses a contrary intent, R/SC will govern. Thus, B = LE + y is a rem. in the heirs. Merger will occur & B = FS.

(7.) B = legal life estate pur auter vie for the life of C.
C = eq. LE
"Rem. to the heirs of C." - But R/SC will not apply because both estates are not of the same quality. So, while C is alive, the heirs of C = legal cont. rem. in FS, & A = rever.

(8.) The R/SC could conceivably be prevented from being applied by the Theory of

Equitable conversion. Even though they may not have sold it yet, they could be compelled to sell it by going into Equity and compelling the sale. Therefore it is treated as personal property, and is, ∴, no seisin problem either.

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(9.)

(a.) Due to the cond. imposed, C has a cont. rm. in FS, w/ an alternative cont. rm. in the heirs of B if C does not survive B.

B = present poss. LE
C = cont. rem. in FS
heirs of B = alter. cont. rem. in FS.
A = rever. in FS.

(b.) All people who have an int. in the prop. must join in the deed. At C.L., however, A + B need only join in the deed. A will convey his rever + B his LE. The LE will be swallowed up by the rever., merger will occur & the grantee of the deed will get a FSA. However, if the statutes of today have abolished the Doctrine of Cont. Rm. Destruction, all of the parties to the orig. conveyance will have to join.

(10.) (a.) Is the R/SC applicable on one of the co-tenants heirs has a cont. rm.? Each one of the co-tenants is seised of the entire estate. Yes, the R/SC per Bails v. Davis is applicable. Joseph + Mora = concurrent estate in LE

Joseph = vested rem. in FS. Thus,

merger could occur. — This is the Eng. Rule.

* However, there is authority to the effect that Joseph would own only the ½ of the estate [redacted] since he would only get ½ of the premises if there were partition. Thus under this ~~rule~~ view, Joseph has a LE in ½ + could get a vested rem. in only ½. Thus, the R/SC would apply to only the ½. Thus, the heirs of Joseph have a cont. rem. in ½ of the premises. A = Revers.

(b.) Under the Eng view, only Joseph + Mora would have to join in the conveyance. Under the second view, all would have to join.

* DOCTRINE OF WORTHIER TITLE *

4 are 2 parts: (1) Doctrine of Testamentary W.T.
(2) Inter Vivos W.T.

[I.] Testamentary Worthier Title

Rule 6a: If a will devises to a person a freehold estate of the same quality and quantity wh he would have taken by descent if the testator had died intestate, then such estate passes by descent and not by devise.

At C.L., it was worthier that a man derive his title by way of descent or intestacy than by way of a will. This was important at feudal times because of the incidents of feudalism.

* Ellis v. Page, 7 Cush. 161 (Mass. 1851) - What is the importance of the rule today? If

the creditors tried to reach prop., they would be able to reach intestate property first. In any case, the man will get his due property, but it still makes a difference whether he takes it by will or by intestate succession or descent.

Under this rule, we are worried about the heirs of the conveyor or grantor, not the heirs of the grantee.

[II.] Inter Vivos Worthier Title

Rule 5 b: (note. the effect of this is to convert a rem. of the grantor's heirs into a revsd. in favor of the grantor.)

Requirements:

1. ~~A~~ limitation to the heirs of the grantor,
2. Not only if the person designated to take turns out to be the heirs of the grantor. The D/WT would be inapplicable here. The word "heirs" must be used. D/WT will not apply if the grantee is incidentally the grantor's heir.
3. It does not matter what kind of estate the heirs ~~of #~~ will take.
4. The preceding estate to the grantor's heirs does not have to be an estate of freehold.
5. D/WT only a rule of construction. It will bend to a manifestation of contrary intent.
6. D/WT is today applicable to personal property as well as realty.

So, the effect is that the limitation in favor of the heirs of the grantor is void & the grantor will have a reversion. So, the effect is to convert the int. of the heirs into a rever for the grantor.

#1 Hypo: O → "To A for life rem. to the heirs of O."
Can the creditors of the heirs of O reach anything? No, the heirs of O have nothing that can be reached.

#2 Hypo: Defer - If a trust is sought
O → "To a trustee to pay the income to B for life rem. of the proceeds to the heirs of O."
Here, trustee will get a legal FS + ~~the~~ B would get an eq. LE + the heirs of O nothing. O would get the eq. rever. in F.S.
If the D/WT were not applicable here, the heirs of O would have an eq. cont. rem. ~~& O would still have~~

#3 Hypo: D/WT makes a difference estate tax-wise. If the D/WT is applicable O will not avoid the estate taxes. When O dies, he owns a rever. in FSA + will be includable in his ~~est~~ gross estate for the purpose of the estate tax under Sec. 2033 of the Int. Rev. Code.

Estate Tax could be defeated by a contrary expression of intent so that it is clear that the rever. should not occur + that the sym. be valid + not destroyed.

Note: All of the above Three are inter vivos. They are examples of the effectiveness of D/WT even in the modern law of today.

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#1 Hypo: (cont'd.) whether creditors can reach the prop. depends on whether the conveyance is inter vivos.

The estates need not be of the same quality.

#3 Hypo (cont'd.) Estate Taxes - the rever. passes from the

heirs back to O and is included in O's gross estate for estate tax purposes under sec. 2033 of the I.R.C.

In most states, D/WT is still applicable, but it has been softened somewhat in that it is a rule of construction. Both D/WT - testa. & inter vivos - are rules of construction.

PROBLEM ON PAGE 368:

TRUSTEES = legal title under the trust
S & T = joint life estates
survivor = vested rem. for life in survivor, in some cts. contend it would be cont.
children = cont. rem. in FS.

If Y are no kids, the rever. will go to Sarah's heirs. So, advise S to convey here rever. to T now. No is no necessity to bring a bill in Equity to reform the instrument.

* EQUITABLE FUTURE INTERESTS OR USES AND STATUTE OF USES *

Hypo: At C.L., via a C.L. feoffment (livery of seisin) A → "B & his heirs to the use of C & his heirs." B has seisin. C does NOT have a legal estate. The language would tend to indicate that C will have the bene. enjoyment & could enforce his rights in a ct. of Eq. Thus, C = eq. fee simple, eq. title & eq. use of the prop. Since C could go to Equity & compel B to use the land in a more desirable way. So, B is akin to the modern TRUSTEE.

* Reasons for this type of conveyance:

(1.) (May be incapable of handling the prop.

(2.) Before 1540, at C.L. land could not be devised via will. This could be avoided by A setting up a legal estate in another to his own (A) use, & then A would have the power to decide who would get the eq. use & bene. of the estate after A's death, & this could be done by way of will.

(3.) Could avoid feudal incidents since they applied only to legal estates.

(4.) Could avoid the rules that the estate could not be made in a stranger & could not vest in future. This would be The Springing Use.

(5.) Could avoid these rules by creating a shifting exec. interest. Shifting Executory Int.

Hypo: A → "B & his heirs to the use of C & his heirs, but if X marries Y, to the use of D & his heirs."

B = legal F.S. w/ seisin.

C = C ∃ eq. F.S.

D = shifting exec. int. in F.S. A. to take effect upon X & Y marrying.

METHODS OF CREATION:

(1.) "To B & his heirs to the use of C & his heirs" Thus, B would be enfeoffed to the use of C. C.L. Feoffment.

(2.) Bargain & ~~Sale~~ - K to sell land supported by pecuniary consideration. Thus, before the conveyance of the land, A still has the legal title & B has the eq. F.S. estate, the use. The Bar. & Ex. at early C.L.

could have been either oral or written.

Quaere: Will a mere recital of consideration suffice? = Yes + the use would be created in B.

(3.) Covenant to Stand Seised - a written instrument under seal in wh the owner of prop expresses an intention to convey the land to a relative, and the relative can be of close blood or a distant relative.

(4.) (This arose inadvertently)
Suppose A grat. (w/o consid.) use to B + his actual livery of seisin. But, the C.L. presumed that A intended to retain a use in his own behalf + to give legal title to B only for + to the use of A. RESULTING USE.
Could that presumption be rebutted? = Yes.
(A) A enfeoffs B + his heirs to B's own use. This would negate the Resulting Use.
(B.) Mere recital of consideration.

RESULTING USE

* STATUTE OF USES (1536) *

(This stat. is reprinted on p. 371)

The effect is that the man who previously had only the use would also have seisin. It is treated as being a legal estate. B drops out of the picture.

STATUTE OF USES (1536)

If any person be seised of any lands to the use of any other person ~~[illegible]~~ such person that have such use shall henceforth be deemed in lawful seisin and poss. of the same lands in such like estate as he had in use

The Statute of Uses (1535) (1935)

"If any person be seised of any lands to the use of any other person, such person that have such use shall henceforth be deemed in lawful seisin and possession of the same lands in such like estate as he had in use."

(1)

creditors by entering into a secret Bar. + Sale w/ B. Also, the Crown would be defeated re taxes on conveyances. Thus,

Statute of Enrollments

the Statute of Enrollments was passed, a tax stat. or revenue measure. It said that all Bars. + Sales of freeholds must be recorded to be valid. This filled the gap left by secret Bars. + Sales. However, men got around the statute by Bar. + Sale (secret) for a term of five years. This would not have to be recorded because it is only a lease of years & not a freehold. Since A has retained a rever., this being a future interest and capable of alienation by a grant (instrument under seal), A could grant his rever. to B by a grant, + B would have a term of years + a rever. in F.S.A., i.e., B would have a F.S.A. This whole process is called Lease and Release.

LEASE AND RELEASE

If we are in U.S. at Co. + A does not want to lose seisin

could have been either oral or written.

Quaere: Will a mere recital of consideration suffice? = Yes + the use would be created in B.

(3.) Covenant to Stand Seised - a written instrument under seal in wh the owner of prop expresses an intention to convey the land to a relative, and the relative can be close blood or a distant relative.

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Ordinarily, conveyances at C.L. were done for the public eye, not at midnight in the dark in a deserted place.

(1) In the Bargain & Sale, feoffment or Covenant to Stand Seised, the S/U did away w/ the necessity of livery of seisin. So, A could defeat his creditors by entering into a secret Bar. & Sale w/ B. Also, the Crown would be defeated re taxes on conveyances. Thus, the Statute of Enrollments was passed as a tax stat. or revenue measure. It said that all Bars. & Sales of freeholds must be recorded to be valid. This filled the gap left by secret Bars. & Sales. However, men got around the statute by Bar. & Sale (secret) for a term of five years. This would not have to be recorded because it is only a term of years & not a freehold. Since A has retained a rever., this being a future interest and capable of alienation by a grant (instrument under seal), A could grant his rever. to B by a grant, & B would have a term of years & a rever. in F.S.A., i.e., B would have a F.S.A. This whole process is called Lease and Release.

Statute of Enrollments

LEASE AND RELEASE

If we are in U.S. at C.L. & A does not want to lose seisin

but does want to convey to B at FSA, A can Bar. & Sell to B so long as there is no Stat. of Enrollments, & that stat., being an Eng. revenue stat., is not part of the C.L. but was peculiar to England. Statutes like De Donis, etc.,) are part of the C.L. due to their nature.

(2) A Second effect of the stat. Uses makes possible Newly Estates, i.e., Freeholds to commence in futuro.

Hypo: A Bar. & Sells "to B & his heirs 5 years from now." — First ask ourselves what would happen before the S/U. A use would be raised in B.
A = seisin & eq. use for five years.
B = springing eq. int. to take effect five years from now.

* After the S/U, A = legal FSA subject to a legal springing executory interest in B and FSA. A still has the seisin but in five years, it will spring out of A & vest in B. Thus, it can now take effect in futuro due to the S/U.

Problem 2 on page 376:
The question here is re an estate in futuro. So, to avoid that, one can estab. a use estate & here a use estate can be created by a Covenant to Stand Seised: (1) Sealed instrument in wh the grantor mani-

Covenant to Stand Seised

feels an intent to create an estate in a relative, blood or by marriage. Here, G was a grant but is under seal, + 4 are relatives involved.

So, Chris = non-freehold for 1 yr.
after death, Chris = springing eq. use in FT.
Thomas = legal FS + title for life.
John Williamson = eq. rem. in FSA.

Now after the S/U:
Thomas legal title subject to Chris legal springing ex int in F that takes effect upon Thomas' death.
John = legal rem in FSA.

Hypo: A Bar. + Sold "To B for life + 1 yr after B's death to C and his heirs."

*Before S/U:
A = legal title + seisin then out.
B = eq. life estate.
C = springing eq. use in FSA to spring one year after B's death.
A = eq. rever for one year. This would be in addition to A's legal title.

*After S/U:
B = legal life estate
A = legal rever. for one year subj. to a legal springing exec. int in FSA in C.

56 sections

Hypo: A Bar. + Sells "To B & his heirs but if C marries D, to C and his heirs."
B = eq. FSA subject to a shifting eq. use estate in C. *This is before S/U.
*After S/U: B = legal FS subject to a legal shifting exec. int, in FS in C.

Problem on page 378:

C had shifting legal int. + this would not be allowed before S/U. Further, after S/U y would still be nothing in C since y was no use wh could be executed by S/U.

Even tho' the S/U may have been passed, meanwhile, in order to create a shifting or springing int, y must first be a use estate wh can be executed by the S/U. This is so as far as the inter vivos transfers are concerned. Under the Statute of Wills (1540) wills can be used to create the spec. estates w/o first have a use raised.

Statute of Wills (1540)

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Rule of Law: In order to have a springing or shifting exec int., y must first have been a use raised.

C.L. Rule of Law: At C.L., y could be no cont. rm. after a non-freehold, i.e. y term of years.

Hypo: A bar. + sells "To B for 10 yrs. + thereafter to C + his heirs if C attains 25."

Before S/U:
B = an eq. term of 10 yrs.
C = an eq. use cont. upon attaining 25.
A = seisin, legal title + eq. rever. in FS.

After S/U: all uses are executed.
B = legal term of 10 years
A = legal rever. in FS subject to legal springing int in C
C = a legal springing exec. int. in FS.

C could not get a legal cont. rm. because a term of years precedes it. So C = legal springing exec. int. in F S. It is springing since it would go to A during the interim if any until C attains 25 if after the term of years. It would then spring out of A.

Problems on page 379:

(3.) *Before s/u:

B = deter. term of years

B's heirs = can't take after B dies because since heirs are not ascertained until B dies y is a cont. rm. Since it follows a term of years, it cannot be.

A = rever. in F S.

(1.) *Before s/u:

B = eq. deter. term of years.

B's heirs = use estate, an eq. cont rm. in F S A.

A = legal title & seisin eq. rever in FS

*After s/u: deter.

B = legal term of years

A = legal rever. in FS subject to heirs' estate.

B's heirs = legal springing exec. int in FSA. Will take effect upon B's death.

We are also avoiding the Rule in Shelley's Case.

Hypo: A bar + sells "TO B for life rm. to B's heirs."

B = eq. use for life. A = legal title & seisin.

B's heirs = eq. cont. rm.

*After s/u:,

B = legal est. for life

B's heirs = legal rm.

So here, RSC would apply. But, it would be avoided by giving B a

non-freehold. The chances of B living more than 100 years is slight anyway.

(2.) The RSC can also be avoided here.

Before S/U:
A = legal title + seisin.
B = eq. LE
A = eq. rever. in FS for one day.
B's heirs = springing use in FS
A's estate by rever. would be subject to heirs' estate.

After S/U:
B = legal LE
A = legal rever. for one day subj. to heirs' est.
heirs = legal springing exec. int in FS A.

RSC did not apply here since the ancestors heirs took via an exec. interest. RSC only applies to remainders.

So, 2 are two methods here to avoid the RSC under the S/U:
(1.) Term of years in B
(2.) Exec. interest in the heirs + not a rem.

Caveat: S/U does not guarantee that RSC is out of the window. You must still contend w/ the RSC.

Effect of S/U on Doctrine of Destructability:

Rule: If you don't raise a use, you cannot benefit from the S/U.

Hypo: A has + sells "to B for life + if C attains 21, to B + his heirs.

Before S/U:
B = eq. LE
C = eq. cont. rem. in FS
A = eq. rever in FS.

After S/U:
B = legal LE
C = legal cont. rm in FSA. Prior estate is freehold.
If B dies & C is under 21 years of age, we can say that after the S/U under the Rule of Pibsfon v. Rogers it possible that the est. could take effect as a rm., then it cannot take effect of anything else), this colluteral ance would NOT benefit from S/U. So, however, on a cont. rm. use is raised after a term of years, after S/U it would be springing legal exec. int in FS (since a legal cont. rm. cannot follow a non-freehold). So here, it is the possibility that the cont. rm. can take effect since C may not be 21 when B dies. So, C would have to take a cont. rm. and could not take as an exec. estate.

Problems on page 380:
(1.) Before S/U:
B = eq. detr term/ 4 years
1st son to reach 21 = eq. cont. rm.
A = eq. rever. in FS + legal title + seisin.
After S/U:
B = legal detr. term of years.
A = legal rever in FS subj. to 1st son's est.
1st son to reach 21 - since it is impossible for a cont. rm. to follow a non-freehold, he would get a springing exec. int. in FS.
Eq. interests are not subject to Doc. of Destruc.

(2.) *Before S/U:*
B = eq. LE
A = Eq. rever. for one day subj. to legal est. in son.
Son = springing exec. int. in FS to take effect one day after B's death or when he reaches 21, whichever happens last.
(Cond. subsequent will be construed effective.)
No problem of destructibility has no application here due to the rule that it has no application to exec. interests.

So, Doc. Destruc. not effected by S/U.

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PROBLEMS on PAGE 382

(2.) We are here dealing w/ a will & after (1540) (Stat. of Wills) you can take full advantage of S/U w/o even having to raise a use.

What is the effect of this will or devise? The testator has actually given the son of A two gifts. One of them will go into effect if son reaches 21 before A dies. Add this would be a cont rm. The second would be if he attains 21 even after A's death. Son could not take by rm. because there will be a time lapse between A's death & son reaching 21. So, it would take effect by a springing exec. interest. So, here the S/U is fully employed w/o having to employ the machinery of S/U.

The first gift was destroyed because son was not ready to take when A died. So, the rm is destroyed.

If y is a tortious feoffment before son reaches 21, the second gift via springing exec. interest. This would be so because the devise ~~[illegible]~~ required that the son reach 21 in order to take. Since the estate was no longer in A after the tortious feoffment (this occurring before son reaches 21), son would have nothing. The second gift is ltd. to the first son who reaches 21 AFTER A's death. A would not have died yet under the tortious feoffment.

would be destroyed ←

*However, if tortious feoffment occurred when son was 18 and then A died when son was 20, son would still take by springing exec. int. since son would reach 21 after A's death.

Notice y were two gifts created.

(3.) Here, we can say this is like #2 in that two gifts are created in the son: a rem. and a springing exec. interest.

(1.) Despite the three ways to avoid Doc. Destruc., a man can still bungle. (One of the methods is a Trust to Preserve Cont. Rms.)

The purpose of this trust is to preserve cont. rem. A cond. of survival is imposed upon the estate of the kids.

The problem here is what would happen if John predeceases Sarah. During his life John had seisin. When he dies it will not go to Sarah and can't go to the children since they are unascertained. So, the seisin would revert to the grantor & the cont. rem. of the children would be destroyed.

This could have been avoided by putting it in trust in the trustees for the life of John AND SARAH.

The fact that John's LE preceded the sm. makes immaterial the rule that a cont. rm. cannot follow a non-free-hold estate.

Since S/U executes the uses, how can trusts be created today? Here are three situations in wh uses are not executed:

I. A. Use on a Use -

Hypo: A bar. and sells land "to B + his heirs to the use of C + his heirs."

The bar. and sale raised a use in B and his heirs:

A = legal title & seisin

B = eq. use in FSA

C = eq. use in FSA

After S/U

B = legal FSA for the use of C & his heirs.

C = eq. use in FSA. Can enforce in Ct. of Equity.

A = nothing

B's use would not be executed, thus B + his heirs become trustees for C + his heirs.

B. A use on a use is different from a use AFTER a use:

Hypo: A via C.L. feoffment (livery of seisin) "To B + his heirs to the use of C for life and then to the use of D + his heirs."

B = legal title + seisin.

C = eq LE

D + his heirs = vested eq. rm. in FSA.

C & D will take their uses in succession order. So, after S/U:

B = nothing

C = Legal LE

D = vested legal rm. in FSA.

The difference is that here the uses are not to be ripe simultaneously, but successively. In the use after the use, the S/U executes the uses.

(II.) 2. On the trustee has an active duty (an active trust), the S/U will not operate. If the trust is passive, the S/U will execute the uses.

(III.) 3. On the grantee (B) does not have a seisinable estate:
a. Personal property - S/U has no applicability here.
b. B only has a legal term of years - would be different on A → "To B and his heirs to the use of C for five years."
Before S/U:
B = legal FS
C = ~~eq~~ eq. use for 5 years
After S/U:
C = legal term of 5 years
B = legal FS A subject to C's term of years.

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II. ACTIVE TRUST -
Where the trustee has active duties (collection of rent, etc.) the S/U will not execute the trust. The trustee will have legal title & seisin & the cestui que use (beneficiary) has an eq. FSA.

III. On one is not seised to the use of another.
A. On personalty is involved. So B would have a legal FSA & C would have an eq. FSA.
B. A → "To B for five years to the use of C." B is not holding a seisable estate to the use of C & therefore S/U would not operate. So, B = legal estate for 5 years.

C = eq. estate for 5 years.

Hypo: A → B & his heirs to the use of C for 5 yrs."

Before S/U:
B = legal F-S
C = eq. ~~estate~~ use in a term of years for 5 yrs.

After S/U:
B = legal F-S subject to term of years in C
C = legal estate for 5 years
or one could say that B has a legal term of years for 5 years. w/ a rm. in B in F-SA.

Problems on page 386:

(1) Before S/U:
B = eq. term of 99 years
A = legal title + seisin throughout
C = use estate for 99 years.

After S/U:
B = legal term of years for 99 yrs.
C = eq. term of 99 years. Since B had the seisin + also since C has a use on a use, the S/U will not execute C's use.
A = reversion (legal) + has seisin throughout.

(2.) Before S/U:
B = eq. F-SA
C = eq. use est. for 20 years. It is a use on a use.
D & his heirs = eq. vested rm. in F-SA
As compared to C's estate D's rm. is a use after a use. Comparing D's est. to B's estate, it (D's estate) is a use on a use. B's estate is of potentially indef. duration. For 20 years, C has a use on a

use since it occurs simultaneously w/ B's ~~estate~~. For a period after the end of the years, D's estate will occur simultaneously w/ B's estate.

After S/A.

B = legal FSA
C = eq. use est. for 20 years.
D = ~~vested~~ eq. rem. in FSA.

The S/A does not execute a use on a use.

(3.) ~~If~~ this were a devise:

B = Legal FS
C = eq. use for life
C's heirs = eq. cont. rem.

The devise will not create a use on a use.

Caveat { ✱ Before you try to apply the rule in Shelley's Case, you should apply the S/A.

B = legal LE pur autre vie for C's life
C = eq. LE for his own life
C's heirs = since they are ascertained, the heirs would have a legal cont. rem. in FSA.

✱ RSC would not apply since the heirs would have a legal est. + C had an eq. use.

(4)(a.) A direction ~~to~~ convey here in B. If we assume that this is an active duty in B, then B will be a trustee w/ an active ~~trust~~, therefore making ~~[redacted]~~ none of the uses executory. Since B has a duty to turn over the proceeds to C's heirs during C's lifetime. Therefore, B is the trustee for C and for the heirs & has active duties to both, interpreting the direction to create active duties in the trustee to both C and his heirs. Therefore,

Before S/U
B = legal FSA
C = eq. use ed. for Life
C's heirs = eq. cont. rem.
Therefore, RSC will apply to C's est + to the heirs' estate since they are of the same quality + the heirs' have a cont. rem. So, C would take a present possession eq. FSA Trustee would have legal title. Merger occurred.
After S/U:
B = legal FS
C = present poss. eq. FS

(6) If we don't interpret the directions to make the trust active, the result would be the same as in #3 + merger would not occur.

DEEDS * Thus far, therefore, we have seen there are two ways to create estates:

(1) C.L. devpment - actual livery of seisin.
(2) Creation of uses

Now, by a single deed ~~of~~, you can / convey out. No livery of seisin. This is in all 50 states.
To create a use, most states say that you can do so w/o declaring a use. So, today you can create estates like you could have by will at C.L.

18, 14
M.S.A. ch. 183, sec. 14 =
"If no use is declared in a conveyance or devise, the same shall take effect as if it were expressed to the use of the conveyance or devisee."
The effect of this, by a single deed out, a use can be created w/o using Bargain + Sale or a

Covenant to Stand Seised. This MAP does not mean that all of the other rules (RSC, Purefoy v. Rogers) are not still in effect.

Types of deeds:

(1) General Warranty Deed
(2.) Special Warranty deed - Mass. calls it a quit claim deed, altho' it is here a misnomer.
(3.) Quit Claim deed - called

* Warr. Deed -
  contains covenants of warranty.
* Quit Claim (Q.C.) -
  merely says "I'm giving you what I have, + I'm not promising anything."
* Sample Deed on p. 690:
  First part called premises. Address does not have to be. Parties must be identified.
  Does not have to have a recital of consid (50 states in accord) But it is safe in case A.B. has creditors and you don't want it to seem you were trying to defraud the creditors.
  Mass. requires deeds to be sealed. If it is not sealed, the grantee would only have an equitable right, but could bring a Bill in Equity to compel the grantor to give him a sealed instrument. If, before the Bill, grantor sold to B-F-P, B-F-P would cut off grantees equity.
  In Mass., a deed requires a seal but not witnesses. A will requires witnesses but not a seal.
  19 states require seal + witnesses.

Acknowledgement is not required for validity of the deed, but must be in order to record the deed.

Special Warranty Deed
Same as general except for special warranties.
Called "quit claim" in Mass. the warranties are expressed simply by saying "w/ all quit claim warranties."

Present Covenants:
(1.) Covenant for Seisin - covenants that he ~~has~~ has ownership. Does not say that it is no mortgage, but this may breach the second type:
(2.) Covenant against Incumbrances - no mortgages, liens, etc.
(3.) Covenant of the Right to Convey - guarantees he has the right to convey the prop. A man may have the right to convey w/o having seisin. However, for all practical purposes, 1 & 3 are alike.
These covenants if breached, **are** breached at the time of conveyance. Present covenants do not run w/ the land at C.L. Thus a subsequent purchaser (C) who takes from the first purchaser (B) cannot take advantage of any br/present covenants. However, modern ~~law~~ via statutes "in many states" (Mass. too) say these covenants run w/ the land.

Future Covenants:
(1.) Covenant of Quiet Enjoyment - A covenants that the quiet enjoyment of the premises will not be disturbed by the grantor in

the future, nor by anyone claiming under paramount title in the future. — A mere disturbance will not suffice. There must first be an ouster of the grantee, either by actual or constructive eviction.

(2.) Covenant for further Assurances— grantor covenants that the grantor will do such further acts as are w/in his power to make the purchaser's title good. e.g., if B (grantee) later wants to convey to C and C will only take by having A (grantor) sign a statement.

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The use of the words "w/ warr. covenants" will mean that, in a general warr. deed, all of the covenants in the statute are impliedly or by reference, incorporated into the deed.

Parts of Deed:

(1.) Must be a grantor + grantee. If the name of the grantee is left out, the grantee can fill his own name in when we can say

that the grantee is acting as an agent of the grantor. However, a deed is a sealed document, and at C.L. + in Mass, author. for an agent to executed a sealed instrument must also be under seal. So, where a deed has left the name out of the grantee, at C.L. + in Mass. (a few cases on contraire), the deed is void.

The granting portion of the premises of the Deed, and the Habendum clause sometimes conflict. eg., In granting potion "to A + his heirs." In habendum clause it says "to have and to hold to A + the heirs of his body." — At C.L. + y were many rules devised to cover this, but nowadays these cases seldom arise. So, today, read all of the parts of the deed together. Thus the words "A + his heirs" could be construed as the heirs of his body not the lineal and collateral heirs of A.

{ At Citty it was said that a habendum clause cannot cut down an estate expressly created by the granting clause.

Hypo: Granting clause = "A & his heirs."
Habendum = "A for life."
Here, the granting clause cannot be cut down by the habendum clause, but the habendum can enlarge the granting clause. (e.g.) if the keys were reversed.).

Ordinarily the definitive clause is the Habendum, as we presume. However, the above rules serve to qualify this.

Deed does not even have to recite consid. But, the land must be described, and there are three methods:

(1) By use of landmarks (called monuments) and in total reference thereto.
(2) By use of courses & distances.
(3) By use of area description.

Hypo: Deed says "down 50 feet to the old Oak Tree." Actually, the old oak tree is only 40 feet down.

Since people sell the monuments and buy on that basis, thus the conflict between the courses and distances, and the landmarks (i.e. monuments) is resolved in favor of the monuments. The ~~order~~ line-up of importance is: (1) Monuments (2) Courses & distances (3) Area description.

If you have a monument of a street, it is presumed (absent contrary intent expressed) that half of the street, if owned by grantor, is

conveyed, too. Same for land of a river wh is a monument. If it is a navigable river or stream the state owns it. In Mass. all ponds or rivers ~~or~~ lakes w/ any kind of tide are owned by the Com., and the owner of the bordering land owns to the low water mark.

Mass. { In Mass., must be a seal on the deed. Otherwise, it will be invalid and grantee will only have an equity.

.55¢ per $500.00 of land transferred ~~is~~ the ~~[illegible]~~ tax required. * Failure to pay the tax will not void the deed.

Delivery { All deeds, to be valid, must be delivered. What const. delivery? Any act by wh the grantor manifests his intent ~~that~~ the deed is to become operative at once as a conveyance will const. a valid delivery. There does not have to be a transfer of poss. of the deed. However, it is a rebuttable presumption ~~that~~ on the grantor held onto poss., no delivery.

If the deed changes hands, the rebuttable presumption is that it was a valid delivery. Proof of want of immediately effective intent to transfer can be shown and will negate the delivery. (or fraud, etc.)

Hypo: Grantor makes out a deed wh apparently is an ~~[illegible]~~ absolute

or complete present transfer. P contends that the grantor kept the deed because the grantor said he did not want the deed to take effect until 5 years hence. — The writing will prevail over the oral cond. allegedly imposed.

However, we could say that an oral cond. of taking effect 5 years hence of will be valid on an independent agent. The agent must be escrow independent of the grantor.

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So, what const. "delivery" of a Deed is not the same as what const. delivery of a gift.

Recording the deed raises the presumption (conclusive) that a delivery was made. Ch. 103, sec. 5 (M.G.L.). This is true as to subsequent BFPs from the grantee are concerned. If it is merely grantor v. grantee, even if deed is recorded, the grantor could prove there was no delivery. But, as regards a BFP from the grantee, however, the recording raises conclusive / presumption of delivery.

HYPO:

Assume that it is a valid delivery. On its face, it are no conditions. Orally, grantor says collaterally that the deed won't become operative until B hits a monkey in the ear lobe. — The oral condition is void because on its face the deed is valid w/o

conditions.

If you don't want the deed to become effective until something happens, you can do the following:

(1) Express cond. in deed, or

(2) Escrow - the use of an escrowee (indep. 3rd party). Here, the imposition of a coll. cond. will be valid on an escrowee is used.

Date of Delivery

The date of delivery relates back to the date the grantor delivered the deed to the escrowee except on a BFP becomes involved in the interim, and to relate the grantee's title back to that earlier date would defeat the BFP's title.

Acceptance of something beneficial is presumed.

Thus, even before recording, as between grantor & grantee, title has passed and it is a valid transfer.

RECORDING ACTS

Hypo:

Gor → Gee #1 (not recorded) 6-1-58

Gor → BFP 6-5-58

Here, the BFP would prevail since Gee did not record.

TYPES:

(1) NOTICE - in force in Mass. and most applicable to most states, esp. New England.

Hyp: Under Notice type:
$G_{P1} \rightarrow G_{P1}$ #1 - not rec.
$G_{P2} \rightarrow G_{P2}$ #2 = not rec.
Even though G_{P2} #2 does not record, if G_{P2} #2 is a BFP (no prior notice of a prior conveyance to G_{P1} #1) he will prevail over G_{P1} #1.
But if G_{P1} #1 records it & G_{P2} sells to G_{P2} #2 afterwards, G_{P1} #1 will prevail. G_{P2} #2 is not a BFP there because he is deemed to have CONSTRUCTIVE OR RECORD NOTICE, 4 are two types of notice:
(1) Actual notice
(2) Record or constructive notice - once the deed is properly recorded the whole world will have been deemed to have notice. G_{P1} #1 should not turn over his money to G_{P2} ~~upon should~~ before he records this new deed. If G_{P2} refuses to give deed before he gets the money use escrow, and upon the happening of the cond., the G_{P2} & G_{P1} will have a simultaneous conveyance of deed & money via the escrow.

Power in G_{P2} { to have the power to create title in another by virtue of the requirements of the recording act.

A slight variation on this type is the Period of Grace type of statute.

(2) Race Statute - who records first? Even though G_{P1} #1 is the first to get a deed, if G_{P2} #2 beats him to recording, G_{P2} #2 will prevail.

(3) Race-Notice - So here 1 & 2 are combined, and G_{P2} #2 will prevail only

where:
(1.) He is a BFP, and ~~where~~
(2.) where he beats #1 to recording.

Race Type { In Race type - no necessity for Grantee #2 to be a BFP, so long as he beats Grantee #1 to recording.

It is not ever important that Grantee #1 not have notice of Grantee #2. Even if Grantee #1 knows of Grantee #2 before #1 records, #1 will still prevail.

In Mass. & all of New England all of the statutes are Notice & this is the predominant type. So, we will deal only w/ the Notice type of statute.

To aid in checking the registry, they are Indexed. Types of Indexes:
(1.) Tract Index - All land is indexed and any transactions re that land are indexed under that land.

(2.) Grantor Index Books - All of the conveyances are indexed under names of all grantors alphabetically; name of grantee; name & No. of deed book in deed is found.

(3.) Grantee Index Books - same as above except grantee is the departure point.

Problem #2 p. 778
A → B (not rec.)
A → C (rec. but has actual notice of B)
Here, B would prevail because C was not a BFP.

assume now C [not a BFP] → D, a BFP.
B v. D = J/P. D is a BFP. C had the power to pass on title to a BFP.
So, B v. C = J/B
B v. D = J/D
Now, if D → C, C would not prevail over B since C was not a BFP. So, the Doctrine of Shelter would not benefit C. It was true to C could simply convey out always to D + get D to reconvey to C.

Problem #2:
A → B (not rec)
A → C (not rec., BFP)
B records
B → D, a BFP
Before B records, C would prevail over B since C is a BFP + B had not recorded.
After B records, C then assumes position of a "grantee" from A and would be a BFP grantee w/o notice of C, therefore D v. C = J/D. By checking the Index, D would only find one conveyance out of A, that to B, D's grantor.

PROBLEM #3:
① A → B - not rec
② A → C = not a BFP, has actual notice of prior unrecorded deed.
③ C records
④ C → D, a BFP
⑤ B records
⑥ D records
B v. C = J/B because C is not a BFP + does not get any benefit from B's failure to record.
B v. D = J/D in a notice statute state. D only sees a conveyance out of A ~~from~~ to C, D's grantor. Since B had

not recorded, C still had the power to convey to a BFP, D.

Problem #4 $5,000 ea

(1) 4/1/45 - A → B (mort. deed) not recorded.
(2) A → C ($7,000 mort. deed) C knew of B's prior mort. ∈
(3) C immediately recorded.
(4) A → D ($3,000 mort. deed) - a BFP as to B's mort. Not a BFP as to C's mort. deed as it is recorded.
(5) Land sold at an execution sale for $10,000.00 Mort. outstanding = $15,000. Called the Casualty of Lien.

So B v. C = I/B. C was not a BFP.
C v. D = I/C. D had "knowledge" since C had recorded.
D v. B = I/D. D had no knowledge of B's deed.

Approaches to this problem:

(1) Mechanical - prior in time, prior in right. Pecun. rule. So, since B was first to get deed,
B = $5,000.00
C = $5,000.00
D = nothing

(2) Virginia Rule - by notice. Since C recorded first, C = $7,000.00,
D " next, D = $3,000.00

(3) N.Y. or N.J. Rule - a purchaser of property should be able to rely on the integrity of the recording act. He should be able to get his expectations. C's real expectation is the selling price minus $5,000 of B of which C had actual notice. D's real expectation = everything in excess of $7,000 of C since D has notice of C's deed.

However, we will penalize

one owner failure to record ~~caused~~ some-
one else's loss.
Therefore,
D = $3,000
C = $5,000
B = $2,000 - B is being penalized.

(4) C should be penalized for not putting into C's deed to D ~~on~~ on C's rec. deed the fact that B had added C knew of B but did not tell D.

D = $3,000
C = $2,000
B = $5,000

Approach #3 (N.Y. v N.J.) is the best of all and better than #4 because #4 makes you your brothers keeper. If B blindly did not rec., why should C be penalized?

Hypo: Assume same as above except that all parts. are $5,000.00 and land is sold for $5,000.00. Assume #3 approach: (per rea. expectations)

B = $5,000.00
C = 0 (nothing)
D = 0 (")

Here, B is not penalized because he has not led anyone to expect anything in excess of B's $5,000.00

Problem #5:

C gets a D.V. because by accepting the deed, B was no longer in adverse poss. & the prop against the owner. The giving of the deed interrupts the 20 S/L.

B's deed was not recorded & C was a BFP. Therefore, R.V. B = T/C.

Hypo: A → B who runs down to Registry and did something which not properly rec.

A → C - if B had properly rec, C would be deemed to have constr. notice. Thus, what are the requirements for recording?

(1) Assume the deed was not acknowledged but recorded. Under ~~Mass.~~ ch. 183, sec. 29, failure to acknowledge a deed will not affect it between A & B, but as between B & C it is invalid and it is not deemed recorded.

(2) Who bears the loss if there is a mishap at the Registry of Deeds? Per the maj. authority (Mass. in accord), so long as it is presented for filing it is deemed filed & const. record of constr. notice. See 118 Mass. 517.

118 Mass. 517

Minority holds that indexing is a requirement and failure will mean no recording. If the clerk puts it under the wrong name, the subsequent purchaser may have a c/a against the clerk or the mere putting of the deed on the window of the Registry is suffic.

Problem on page 795:

If you are in a juris. wh requires only that the deed be given to the clerk, B would prevail because B had rec. ~~and~~ by giving his deed to the Registry. Else's names would not matter.

However, if we are in an index requirement juris, C would prevail and B would bear the loss of the deed not being under both Smith & Taylor. If B fails to make sure it is properly indexed, B will bear the loss.

Even if C knew that Elsa had been previously married, he would not have had to be suspicious, since the Rec. Stat. ~~says~~ says "actual notice."
If this is under a tract index, C would see that Elsa, under both names, had conveyed out. Thus, C would have notice.

Hypo: O → A (not record)
A → B - rec.
O → C - a BFP, no actual notice of the prior deeds.

Bd. of Ed. v. Hughes p. 795
Even tho' deed is properly indexed & rec, it does not const record or constr. notice unless it is in the chain of title.
If we assume that C has no actual notice of B, C will trace the land from the chain from O in the grantor - grantee index. Then, he would check the grantor index under O, and would not find anything under A. By when A failed to record, it broke ch/title between O & B, So, B's recording would not be notice.

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Gee #2 (a BFP) will prevail over a Gee #1 who has not recorded, but if Gee #2 does not rec., Gee #1 will have the power to convey out.

W+/author. says indexing not necessary.

To const. record or constr. notice, the recorded deed must be in the chain of title. So, altho a prior Gee may have recorded, if he is not in

the chain of title, and if the subsequent Gee is a BFP, the latter will prevail. See Bd. of Ed. v. Hughes p. 715

Gee #2 will only get full, indefeasible legal title when he records. Otherwise, a third Gee who is a BFP will prevail over Gee #2.

Hypo:

A → B (A doesn't own land yet) T.O. of land = O.

B rec.

O → A rec.

If A conveyed to B by means of a warr. deed, he is making reps + guaranties + warranties; and if A later acquired title, A will be estopped to defy the warranties. So, the title of A inures for the benefit of B via doctrine of Estoppel by Deed.

Where one w/o title has conveyed w/ covenants of warr., and has afterwards acquired title, he is estopped from asserting his want of title at the time of making such first conveyance.

Hypo:

Same as above, but now A → C, a BFP. Now B v. C = T/C. If C were to check the Grantee Index, he would see that O → A, and all of the chain before O. Now, if O → A in 1950, it would not be reas. to require the title searcher, C, to look at the records before 1950, & thus C would be a BFP and would prevail. The majority view holds this and does not require C to go back past A where O has already been checked out. The minority view (Mass. in accord) holds that you search at your peril and that you should have to check back prior to the time he (C) acquired title. Thus, under the min. view T/B. Min. view: Ayer v. Philadelphia Brick Co.

The average title search does not

exceed 60 years, since failure to assert rights for 60 years would toll the S/L.

Hypo: See Morse v Curtis, p. 807

O → A not rec.

O → B - rec. - not BFP

A rec.

B → D - BFP

In Mass., D will prevail because as soon as you find one conveyance out, you can stop looking under O's name. So, D would see O → B recorded and would not have to check O any further.

A tax lien can be levied on land for unpaid taxes. 3 years, in Mass. are allowed for foreclosure for unpaid tax~~es~~ liens. Thus, when you check title, you should still check the title three years after the conveyance from O → B. This way, you won't take subject to the lien of the city. The tax lien is filed w/ the deed. So, if during the 3 year check, D sees a conveyance to B, D will be charged w/ actual notice.

So, Mass. policies in Ayer + in Morse are inconsistent.

PROBLEM on Page 814:

#1 In Mass, you would not have to check any further forward than 1931. In the other juris., you'd have to check down to the present date.

#2 B would prevail over C since C was not a BFP! But, C would have the power to convey out, so what should B do in a state like Mass.?

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#3 p. 815:

A → B not rec.

A → C (BFP) - C prevails here

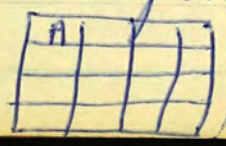
B rec.

C rec. (still a BFP since he was past time he bought B/A.)

C still prevails at this point.

B → D (BFP)

So, D would prevail over C because in Mass., D should only have to search under A's name in the Gr. book only to see that A → B, the conveyance out from

Hypo: O builds housing development + divides land tract into lots.  O sells to A

that actual, real knowledge must be had before you would be a BFP. It is a subjective standard, & merely because an OKPM would have inquired is immaterial.

However, there are Inquiry Notice States who only require that if there are suspicious or curious circumstances, the "BFP" would have the duty to inquire, and failure to do so on an OKPM would, will mean you are not a BFP.

In all states, if the deed or lease is rec., all the world has record or constructive notice.

A break in the chain of title in an Inquiry Notice State will be a suspicious circumstance.

Hypo: A → B not rec.
A → C via a quit claim deed.
In Mass., T/C since A had the power to pass on title to C & B would be cut off due to failure to

record. However, a minority of juris. say that an acceptance of a quit-claim deed const. a suspicious circumstance & court will be put on inquiry notice, becoming not a BFP if he fails to conduct a reas. investigation. Reasoning: a quit claim deed should make the receiver of same wonder why the ~~seller~~ grantor did not warrant.

See Meeks v. Bickford, p. 839

The writ/author & the better ~~rule~~ rule says that the quit claim deed will not const. inquiry notice.

184, 15 A Ch. doctrine held that on litigation is pending (lis pendens) w/ respect to the land, subsequent purchasers are deemed to have notice of the respective rights of the litigants as revealed by this pleadings.

However, most states have statutes which abrogate the doctrine of lis Pendens. Mass. G.L. ch. 184, sec. 15 says: subsequent purchasers will be put on notice of pending litigation only if the litigation is [illegible]

a lot + covenants that he will sell the other lots to only residential buyers if A will build a residence on lot A. Other lots are sold to B, C, D, E, F, and then to G. G has no restrictive covenants in his deed and has no notice of the restrictive covenants in A's deed, even though the deed w/ its covenants is recorded.

— The better view is the Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc., p. 815; it would be an intolerable burden on G to have to check all of the deeds to see whether they are restrictive covenants in all of the deeds out of O. So, G would not be deemed to have notice of the covenants and would not take subject to the covenants of A. So, if G wants to build a store on his lot, he may = G only has to check the Grantor Index and not the actual deed.

What const. actual notice?

Toupin v. Peabody p. 553

All leases in excess of 7 years must be recorded. P had a five yr. lease w/ option to renew for 5 years. Case here held that on a BFP purchases from O after O leased to P, if the option to renew is exercised by P, the lease must be recorded; and, if P fails to rec., the BFP would cut it off if he, BFP, does not have actual notice. A BFP prevails only on a prior unrec. deed ~~or~~ or lease which must be recorded.

In the facts here, P exer. his option to renew for five years and, therefore, the lease must be recorded unless the BFP had actual notice. Did the BFP have actual notice?

Even though BFP went on premises, saw and found out that P was a tenant, he was found to be a BFP by Mass. Ct. since he did not inquire as to whether P had a lease, and did not, therefore, have ACTUAL notice in Mass. So, Mass. requires

evidenced by the Rec. of Deeds

Wilson v. Nixon is a Purchaser

Strong v. Wolybark p. 872

Holds that $5.00 of love & affection is adequate for sale of $10,000.00, and the Ct. will not look behind the recital of consid.

The better view, is that on the consid. is grossly inadequate, the Ct. will look behind the consid and the "purchaser" will not be a "purchaser" if the consid. is inadequate.

Is a creditor a BFP w/in the meaning of the Rec. Stat.? Depends on local juris. 50/50.

One way: if he ~~[illegible]~~ is antecedent debt & he attaches, the " " safe as consid. (Mass. in accord).

The other way: NO.

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Title Registration

This differs from Title Recording. Reg. does not displace rec. in the state we have both (Mass.). But, if you employ Reg., you will insure #10 00 that you will have full title.

5 steps:

1. Petition to Land Ct.
   a. Includes professional engineering survey. Very expensive.

It is a proceeding in rem, an adjudication of the land. It will be under the supervision of a professional examiner of title and then —

2. A certificate of title is granted by the Ct.
3. Duplicate of cert. of title registered in Registry of Title.
4. Then, a duplicate of the certificate must be surrendered to the Ct. when the land is purchased.

The only type of defect we might

occur is that the ~~certificate~~ certificate may be obtained fraudulently. An assurance fund is used by the ct. to reimburse those fraudulently done out of their title certificates

Gifts
Accession
Finder
BFP
LLRT
Bmts

EXAMINATION

I. Two parts, part 1 + part 2.

A. First part primarily concerned w/ real property.

(1.) 55 % of grade

(2.) 110 T or F. May be best to first work out state of title.

B. Two essay questions.

1. There will be specific questions asked, 8 in the first, + 4 in the second.
2. Primarily personal prop + First semester.
3. 45 % of
4. Some of them may be acceptable or adeq. ans., but "by & large" they aren't.
5. If you feel that you must assume certain facts that are not there, state your

assumption explicitly. All assumptions should be pertinent.

6. Write legibly
7. Follow page limitations.

O —C.L. Feff.→ to A for ~~life~~ 50 years or until B dies (whichever happens first) for use of B, then to C for life for the use of D, then to the heirs of the body of B.

Note: unless stated otherwise, assume all C.L. rules in force.

Before 5/11:

A = legal deter. term of ~~years~~

B = eq. ~~use estate~~ deter. term of years

C = vested rem. (legal) ~~fee~~, i.e., a legal vested rem. for L per autre vie (for the life of D).

D = eq. vested rem. for life (his own.)

heirs of body of B = (Shelly's Rule not applicable since B's estate is not a freehold) a legal cont. rem. in FT.

O = legal rever. in FSA.

After 5/11:

B = (5/11 wont operate since A is

not seised of a freehold to the use of B) ~~[illegible]~~ same as he had before S/U.

D = legal vested rem. for life
C = nothing
heirs = ~~[illegible]~~ same
O = same

1. A has a legal deter. term of years - trad. — I.
2. B = eq. LE — F.
3. C = legal LE pur autre vie — F.
4. heirs = legal cont. rem. in FS = F
5. O = legal rever. — I.

Nothing on WILD ANIMALS.
Will be:
1. Accession
2. Lien
3. Finders - know rights of finder + occupant of premises
4. B^nts — if B^ee recovers, what can B^rs do. (see p 76 problem). Is it a B^nt or otherwise

Answer all questions. No deductions

J.E.W.

TORTS - VOL. II

Prof. Curran

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Opinion (cont'd)

(1) Statement of Law - can be an opinion when it is not a matter of fact and the speaker is not intending to give that impression. However, under Derry v. Peek, (p. 938), we should ask ourselves "whether a reas. man situated as the Ds were, w/ their knowledge + means of knowledge, might well believe what they state they did believe, and consider that the representations made were substantially true." The distinction must be made between a representation as to the law and an opinion of law. If the latter, it is not actionable (i.e., a jury could so find it to be NOT actionable).

Professional Opinions Paid for:

Or, however, one purchases the services of an expert to get his opinion and such opinion is incorrect re a present fact, that misrep. may well be actionable, esp. for br/K or for malpractice. e.g., to a lawyer, assayer.

Generally, opinion is not actionable w/ the primary exception of one who purchased the professional opinion of one who, in his opinion, misrepresents a present fact.

(p. 944) Quaere: Sovereign Pocohontas Co. v. Bond. Is neg. misrep. actionable? = It is generally held that on the neg. misrep. results in physical harm, the misrep. is actionable.

Negligent Misrepresentation

147/403 FRD 147/403

Generally, however, neg. misrep. is not actionable. However, the type of stmt. has great bearing on the decision.

Here, the "of one's own knowledge" rule was applied on a party representing a material fact to be true of his own

The "of One's own Knowledge" Rule (strict liability)

personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, even if he believes ~~it~~ to be true, and if the statement is thus made w/ the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud.)

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A mere pecuniary loss as a result of mere negl. misrep., is not actionable.

*Ultramares Corp. v. Touche

(strict liability)

If you make a stmt. of your own knowledge wh you don't know to be true or false, and wh is false, if y is reliance on the stmt. both reliance either was or should have been anticipated, the person making the false stmt. may be held accountable for the proximate results.

Professional Representations

A Professional ~~opinion~~ representation is held to an even higher degree of scrutiny.

!! EXAM !!

When answering an exam question re misrepresentation, first look to see if there was a false stmt. and what it was. Always first deter. whether y is a false stmt. as to an existing fact.

In the "of one's own knowledge" situations, the way

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you prove whether the party actually knew or not is simply to find out whether the statement is true or not. If it is not true the speaker is held liable — strictly liable. This is the application of the doctrine of Strict Liability to the area of misrepresentation.

Hypo: "I have examined the facts and F.X (the false stmt. in question) is true." — This is the clearest example of "of one's own knowledge." If that stmt. is not true, even if said in honest belief as to its truth, D will be liable for the proximate results.

It seems that liability in these cases is not really for the stmt. itself but for falsely stating D had been at examination or D had not been, or on the examination was not up to par. This is Curran's view not that of the courts necessarily.

General Rules of Law

No Duty to Investigate

The current view is that it is enough if the reliance is justified and D is no duty to investigate unless the thing is right up in front of you.

1076, 1083, 1088, +notes, 1095, 1097, 1099, 1104, 1112, 1115
notes 1144 - 1146 + 1150 - 1151, 1140; notes 1152 - 1154, 1154, 1160, 1167, 1176.
notes 1216 - 1217, 1217 + notes, 1231, 1246

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The first element of any of these cases is the F x, the false stmt. Next, we must consider the basis or bases of liability:

1. Intent
2. Negl. - in some states
3. Strict Liability

Next, we must consider the reliance and the reasonableness of the reliance.

Standards to wh an orator is held

If the orator knows of a lower intelligence level in the listener and takes advantage of it, the orator will be held liable, and will be held to the standard that he did know of the lower intelligence. Otherwise, the OR Pn test is applied.

The man who can reas. rely on the stmt. has no duty to investigate beyond the bounds of his immediate sight. Broadly speaking, the maxim "caveat emptor" has gone its way. Today, if reas. reliance is shown, half the battle is won.

* DAMAGES *

There is no action for misrep w/o proof of a pecuniary, actual loss. There are, ∴, no nominal damage recoveries in Misrep. Sometimes, only is a showing of malice, intent or actual deceit, ∃ will be punitive damages recoveries.

About 1/3 of the States use an "out of the pocket" tort-type recovery.
* The majority of the states

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allow K-type recovery or "benefit of the bargain" rule. Mass. follows this but requires that P was actually a K involved in the transaction from wh arose the misrepresentation. A few states have also adopted the "benefit of the bargain" rule. However, even these states use Tort-type recovery when the K-type would be unrealistic. eg. on Plas bsen "sold" the Billijn. Bridge, the ct will not allow recovery to the extent of the worth of the Bridge.

* DEFAMATION *

Locke v. Gibbons

P sent information to D wh D was to broadcast, D interpolated the news script P had written and exaggerated so that P claimed his reputation as an accurate news reporter was damaged and that he lost valuable employment as a writer for radio broadcasts.

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There is a difference between Misrepresentation and Defamation in that the latter is much more serious. There is a difference between what is Defamation in America, Britain and on the Continent. On the Continent, and to some extent in Britain, the social demand is to meet the defamation and disprove it. It is a

greater affront ∴ than here. More things are defamatory there than here. It is akin to the the defense of one's name and pride and character and honor.

No Prior Restraint

(1.) It is very doubtful that ∴ can be an enjoining of an anticipated defamation. There is seldom if ever prior restraint. This is peculiarly American.

PRIVILEGE

(2.) There is a very large area of privilege:

ABSOLUTE PRIVILEGE

(a) Absolute - under circums. on the privilege is available, the orator is immune from a defamation action, even if the stmt. was made maliciously and w/ the intent to defame.

QUALIFIED PRIVILEGE

(b) Qualified - under circums. on the privilege is available, the orator is immune from liability only if he believes the stmt. to be true. ∴ can be no malice nor intent to defame. The good faith requirement is tested primarily subjectively, but sometimes objectively. Usually, the question is asked, "Did you make the stmt. in good faith?"

Quaere: Who decides whether the stmt. is defamatory, the court or the jury? = The judge has the responsibility of deciding whether reas. men would interpret the stmt. as defamatory, and if he so decides, he

can send it to the Jury to decide if it was taken as defamatory, i.e. whether these 12 men did think it was defamatory.

The Judge has the duty to determ. whether, in law, the stmt. could reasonably be interpreted as defamatory. If he so decides, it lays to the jury.

Defamation by Publication of OPINION

The statement of one's opinion can be defamatory. e.g., "In my opinion he is a thief." This could be defamatory.

Quaere: What about a stmt. which can be taken two ways, one defamatory, the other not? = It can be read, taken as defamatory and sets it to the Judge. Then, it will be up to the Jury to decide if it was defamatory to the character of the P.

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SLANDER PER SE

There are four categories wh const. slander per se:

(1.) Imputation of want of chastity to an unmarried woman.
(2.) Imputation of a loathsome disease.
(3.) Imputation of a serious crime.
(4.) Statements wh hurt a man's business or profession.

Proof of actual, pecuniary loss is a sine qua non of an action of defamation.

To say that a person is a Communist may be slander per se de-

Keefe v. O'Brien
116 N.Y. Supp 2d 286
1952

pending on the circumstances. It may be slander per se to say that a politician is a communist, or someone in a govt. civil service position, whether sensitive or not.

Communism

Under the Smith Act it is a crime to be one who advocates the violent overthrow of the U.S. Govt. The cts. in at least three cases have found that active membership in that party creates a presumption that the accused knows of and sactions the violent overthrow of the govt. and, therefore, the member will be deemed to have committed a serious crime.

Keefe v. O'Brien 116 N.Y. Supp. 2d 286 (1952) - held that an accusation in a labor union meeting that P was a Communist was not slander per se because to say that it was would be to aid the desire of that party to use the courts to further their advocacy of Communism.

!! Quaere !! Is y any distinction between slander and libel re the matters wh are slander per se? =

(1) Libel per se - no need to show any special damages because the words are deemed actionable in themselves w/ no added factors having to be shown to show a special meaning to the listener!

(2) Libel per quod - need to show that the listener understood the stmts to be defamatory. e.g. a stmt. may be interpreted by the majority of the hearers as perfectly good & non-

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{Boston Herald
April 12, 1955

libelous; but, due to special knowledge of some of the hearers, those "sp. knowledge" hearers may interpret the stunt as libelous. As to those hearers, the libeled party has been libeled. It must be shown the special knowledge.

* PUBLICATION *

Ostrowe v. Lee (p. 1065)

Here D dictated a letter to his secretary wh P alleges defamed:

Every new publication is a new tort. Every republication is as actionable as the orig. defamatory stunt. The damages may differ, however.

Rule of Law

Dictation to a stenographer is publication, but that is to say is privileged to publish the matter to the addressee of the letter, he is privileged to dictate it. On be dictation is reduced to writing, it is generally held that the dictation is the publication of a libel, rather than slander.

The Ct. held here that this was libel and slander.

Here are three kinds of stunts.:

(1.) Orig. defamatory stunt.

(2.) Republication of the stunt. Even to "say" "It is alleged that" will const. a new publication. Each newspaper wh publishes an AP report is liable for libel if the report is libelous. This is in the same class the orig. defamatory publisher.

(3.) Secondary Publisher - not a republisher. Not liable. e.g., newsstands, libraries.

Secondary Publications

Radio and T.V. - good faith doctrine

Generally the new American rule is that a T.V. or Radio company or station is not liable if they publish it in good faith.

Re politicians: two rules:

(1.) Radio and T.V. must allow equal time to candidates. This does not means y must be 15 mins. for 15 mins, but equality must be equal opportunity given. This is the old rule.

(2.) Radio + T.V. allow time to rebut accusations.

A RETORT can only fairly meet the orig. accusation, but cannot itself take the offensive. It is like the law of self-defense.

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Hedgpeth v. Coleman (p. 1068)

Rule of Law: If the P himself causes the publication or the exposure of a libelous writing, y will be no recovery. This is due primarily to public policy considerations that a party will not be allowed to complain for something he has caused to hurt or injure him. The typical example is on one receives a handwritten letter (or one not dictated to a stenographer) and takes it to a lawyer to see if y will be a chance for recovery, and then claims that y was publication when the atty. read it. Under this case, y would be no publication.

However, we can imply from Ostrowe v. Lee that Cardozo, C.J. would have allowed recovery in the lawyer situation above on the ground that even though y was a confidential situation (e.g., doctor-pt. lawyer-client), y was a publication. Cardozo, C.J. said

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that the D and his secy. had a confidential relationship.

In the 17th Cent. P had to plead + prove:
(1.) intent to defame
(2.) That D was inspired by malice in the sense of an improper motive.

This is true of all defamation to get a basis of liability.

Basically, Libel is a strict liability tort. Thus, y can be liability for a slip of the tongue. However, the hearer must not take it to be said in jest, but must understand the orator to mean what he says.

These states also require proof of special damages only y is an immediate retraction. No other dams. are allowed to be shown. Usually, y must be a retraction w/in a certain time after a request for retraction has been made.

A published retraction in many states will limit damages. Some of the retractions are allowed to lessen the damages + elim. the punitive damages (1) only on the D honestly believed what he published, or (2) had negligently published it.

The real importance of the above two factors is to show the presence or absence of malice and punitive damages are allowed only upon the showing of malice.

These two factors (honest belief and negl.) also affect the questions of privilege? These three: (1) privilege, (2) damages, and (3) retraction, are found primarily among the newspaper cases.

Whenever dealing w/ belief, the majority of courts require that it must be either reas. or bona fide.

Whenever dealing w/ any problem in defamation, look for two things:
1. Was y a defamatory statement.
2. Was it published.

PUNITIVE DAMAGES

This is the source of the majority of recovery in any given case. More likely

123 F. Supp. 36 (MD Pa)

than not, an insurance policy (liab.) does not cover punitive damages. 123 F. Supp. 36 (1954) Reynolds v. Pegler - the jury allowed $178,000.00 to be recovered, only $1.00 of wh was actual damages. The other $177,000 were punitive.

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Hypo; Suppose A publishes to B, and B publishes to C. How many c/a does P have, one or two? = Two, for each republication is a new c/a accruing to P. So, P v. A and P v. B. The Rest., Torts in accord. A new S/L begins on the accrual of each new c/a, and each new publication results in a new tort. The same would be true if A told five other people separately. There would be 5 c/a against A. But, if A told all 5 of the people together as a group, y would be only one c/a.

The Cts. are now beginning to apply a new rule. The above is the C/L rule re application of the S/L to libel & slander. The new rule is the "Single Publication" Rule wh applies mainly to mass media cases, e.g., books, radio & T.V. broadcasts. The rule is a minority now, but mainly the industrial and leading juris. are adopting it. It holds that on such a thing as a magazine or a book is published, y is but one c/a accruing upon the publication to the public, and the S/L begins when the publication of the libel occurs.

However, on the publication arises

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a state line, the prevailing view appears to be that the entry into a new state creates at least one new & distinct C/a. Thus, this is an exception to the "single publication" rule.

Often, under the "single pub." rule, one action is brought w/ anywhere from 10 to 100 or more counts. Further, many suits are brought via one in each state resulting from only one pub.

A principal is exonerated from liab. for the acts of the agent where:

(1.) The agent has been specifically instructed not to do that thing which results in the action by P.

(2.) The agent commits an intentional tort.

Thus, in a radio station, the announcer is usually specifically instructed as to what he cannot say, and libel and slander are intentional torts. A number of states have statutes making the radio sta. a distributor, not a publisher. — On an announcer says something slanderous, if the station knew beforehand, or even if they did not know beforehand, y would be liability on the station. The station would be liable on an agency theory.

On a sponsor who undertakes to edit the script for the purpose of deleting defamatory matter and who inadvertently fails to delete defam. matter which the announcer speaks over the air, the sponsor will be liable. If the sponsor does not so undertake

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Absolute Privilege

[I.] Judicial Proceedings -

(A.) Counsel - in this country, A communication made by a counsel (atty.) in a judicial proceeding is absolutely privileged if it is pertinent and relevant to the issues, although it may be false and malicious. If the communications be irrelevant, they do not necessarily become actionable, They must be malicious, as well as irrelevant. The complainant must prove actual malice.

(B.) Judge - absolutely privileged.

(C.) Witness - absolutely privileged esp. in the courtroom during proceedings. Depositions of witnesses are absolutely privileged.

(D.) Pleadings - Ab. Priv.

(E.) Statements to atty. by witness to allow him to frame the pleadings - more than likely, Ab. Priv.

(F.) Parties - Ab. Priv.

(G.) T.V. Cameras in courtroom - Ab. Priv. if y w/ permission of Ct.

(H.) Reports -

(1.) Official - Ab. Priv.

(2.) Unofficial - probably Ab. Priv., but there are hints that it would be qual.

[II.] Legislative Proceedings - extends to comm. meetings + hearings. But if made in office of the mbr, some doubt.

(A.) Legislators

(B.) Committees

(C.) Witnesses

(D.) Vice Pres. on the floor.

In all of these, relevancy is the test and statements made even on the floor which are malicious and irrelevant are not covered by this privilege.

(E.) Congressional Record - deemed Ab. Priv. esp.

Contracts

WHEN DISTRIBUTED UNCHANGED. IF THE LEGISLATOR DELETES SOMETHING, THEN IF THE STMT. AFTER DELETION IS NOT DEFAMATORY ANYWAY, THE PRIV. IS PRESERVED. IF THE LEGISLATOR ADDS SOMETHING, THE PRIV. MAY BE DESTROYED IF THE RESULT IS DEFAMATORY.

(F.) PRIOR PRESS RELEASES —
IF THE ACTUAL SPEECH DOES NOT DEVIATE FROM THE RELEASE, Y IS AT LEAST a QUAL. PRIV. IF THE SPEECH VARIES FROM THE RELEASE, THE RELEASE IS NOT PRIVILEGED.

[III.] MEDICAL STMT. BY DOCTOR COMMITTING A PERSON TO A MENTAL INSTITUTION.

[IV.] GOVT. OFFICIALS
(A.) High OFFICERS — PRES., V.P., MEMBERS OF CABINET ARE ABSOLUTELY PRIV. MEMBERS OF THE FED. REGULATORY AGENCIES (S.E.C., F.E.P.C., I.C.C. etc.) ARE PROBABLY AB. PRIV., BUT ANYONE BELOW Y IS DOUBTFUL.

HYPO: If Chris HERTER MADE A SPEECH AT THE Harvard Law School Forum, HE WOULD PROBABLY BE COVERED, ESP. IF THE SPEECH IS POLICY-

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The question of Qualified Priv. is basically for the Judge. In some few cases the jury may have to decide some facts & ascertain their existence. But, almost always the facts are clear enough to either allow or not allow the qual. privilege.

The privileges overcome the presumption of malice, thereby putting the risk of non-persuasion on P. P will have to

show that D did not believe what he said.

Defense of Truth

In at least 48 states, truth is an ABSOLUTE DEFENSE to an action for defamation, even on it is shown incontrovertibly that it was said w/ malice. In Mass. & N.H. y is possibly an obligation to present a reas. justification or reason for saying the defamatory statement.

Defenses of persons:

(1) Self-Defense - right of retort, protection of prop.
(2) Defense of Others - primarily in families. eg., on father says something about boy courting his daughter to protect his daughter.
(3) Group defense - e.g., on a labor union head speaks for the labor union.

Rule of Law

There must be a belief in the truth of the stmt.

In the group defense, y are often credit warrant involved.

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* Fair Comment *

(1) Activity of a Critic in making comment on public activities. It is a qualified priv. See Chem Co.
(2) Articles by newsmen.

Hyp: Newspaper says that it does not think the candidate is fit. Is this fair comment? - This is a stmt. of opinion, and standing alone, may not be privileged. So, the paper would more than likely have to support their stmt. of opinion w/ facts.

Must be made in good faith. It must be relevant to the area of discussion. So on it is in good faith & relevant, y will more than likely seldom be liability.

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The group most normally granted this qual. priv. is the mass media.

On the stmt. is true, however, y may be liab. for an invasion of privacy.

Lawyer's Check list:

(1) what was stmt.?
(2) was it true?
(3) Was it libel or slander?
(4) Was it per se or not?
(5) Can it be proved to be false if not true? Difficulty in proof often.
(6.) Were y damages?
(7.) If written, did client request retraction?
(8.) why did he come to lawyer?
  (a.) Money?
  (b.) Retraction?
  (c.) Rebuttal? (Must fairly meet the accusations.)
  (d.) Revenge?
  (e.) Vindication? If client wants this primarily and so much interested in money, advise him that (if he has been recently defamed - may be stat. time for retractions) he should request a retraction (directly to the D-to-be if he (D-to-be) has no lawyer).
(9.) Lawyer should advise client that action will mean greater publication of the defamation.
  (a.) If motivation is vindication, then you want to get publication in newspapers. There are two ways to get in the papers:
    (1.) Well known personages
    (2.) Amt. of ad damnum - should be at least 6 figures usually.
(10.) lawyer should look to see if it is per se. If it isn't, y is then a priv. in D, and seldom are defam. cases won on D has any privilege. If you lose, the newspaper

reader will assume that the statement was true.

(11.) In the U.S., not only is truth a complete def., but 50% of the courts and states allow in D in mitigation of damages to show that P has no reputation anyway to be damaged

(12.) Another 50% allow D to bring in anything in mitigation of damages.

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EXAM: 1. 5 Essay questions.
2. Negl. - blackest weighted.
3. Many issues. Not necessarily a central core.
   a. Must be recog. + some discussion of them. Recog. most important.
   b. Give priority + weight to issues and one issue will be the basis, central core. Weigh that most heavily.
4. Always be pertinent.

1958 EXAM

(1.) There is a disclaimer + it is effective since it is for consid. It is not against public policy.
Since the warr. was disclaimed, was Y negl.?
A. Maid was careful.
B. Damage to property done + not to maid.
C. There was negl. maybe in faulty design against Easby. First-time design was used.
D. May be recovery against Martoia since their name was prominently used in the advertisements.
E. Pursuant to the T.W.A. Case,

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She might not be able to recover against Sam, for damage to the machine.
F. Liad might be able to recover against Sam, for mental suffering if the pierc recognizes it, & if law can say it is a contact.
G. A possible, but weak argument, is strict liab. - Was this an inherently dangerous instrumentality.

II. A. Did Drugs have last clear chance? Two views:
1. Restatement, Torts
2. New Hampshire.
Should here argue the two views.

B. Proximate Cause:
C. "Coming to rest" of aspirin could be argued to sever and of chain of causation.
D. Foreseeability of the particular injury is never involved. But was the P w/in the foreseeable risk created by the negl. act? (See Palsgraf Case).
(Note: a remote third party, even if foreseeable, is not allowed recovery. See Ultramares Corp. Case. Also, see ~~Pocket~~ Pocahontas Case).

Check:
1. Negl. V. Intent. misrep.
2. "of one's own knowledge" statute
3. Basis of Liability.

Damages in Med School question:
1. Out of pocket loss.
2. Some money to compensate for the higher professional position the might have had.

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