



### David Properties v. Selk

- Jan. 1957: Selk sells land to David Properties (developer) for \$5,000 cash and \$45,000 "purchase money" loan
  - Selk takes back "purchase money" mortgage
- Despite sale, Selk remained in possession (with David Properties' consent), until David Properties sued to eject him
- During that time, what was Selk's status?



### Tenancy at Will

- During this time, Selk was likely either an express or implied **tenant at will**
  - Tenancy at will continues until **either L or T** decides to terminate it
  - Common law: notice to terminate resulted in **immediate** termination of T's estate
    - Today: in most states, some minimal **advance** notice is required



### David Properties v. Selk

- Oct. 20, 1959: DP leases land to Selk until Dec. 31, 1959, for rent of \$1
- During this 71-day period, Selk is a **tenant for years** (or fixed-term tenant)
  - Expires naturally at the end of the term (no need for notification to terminate)



### David Properties v. Selk

- As of Jan. 1, 1960, Selk becomes a **tenant at sufferance** (holdover tenant)
- L's options vs. holdover at common law
  - Treat holdover as trespasser and sue to evict (damages = fair rental value for time of holdover)
  - Try to negotiate new lease terms, or
  - **Hold T to a new term (up to 1 year), on same terms as original lease ("holdover rule")**



### Note 3: Holdover Rule

- Why allow L to bind holdover tenant to a new 1-year term?
  - Rationale 1: T's holding over demonstrates implied consent (it might in some cases, but not always)
  - Rationale 2: risk of "holdover term" discourages T from holding over (sparing L, and possibly new tenants, the costs of T's holdover)



### L's Options vs. Holdover

- Today, in most states, L no longer has this "holdover" option; unless lease provides an express remedy, L's choice is either to:
  - (a) enter new lease agreement with T, or
  - (b) treat T as a trespasser, evict, and recover damages (based on fair rental value)
    - In some states, statutes provide 2X/3X liability, e.g., double rent statute in Selk



### Which Option Did L Take?

- L's letter: "You are hereby instructed to vacate these premises immediately. Your continual occupation shall be at your own risk, and I shall charge rent for the use of these premises at the rate of \$300 per month."
- Court: this letter + Selk's staying in possession = periodic tenancy (renews automatically each period, until one party gives effective notice to terminate)



### Implied Periodic Tenancy

- Classic example: T goes into possession under oral lease that violates statute of frauds (leases > 1 year must be in writing), e.g., L, T orally agree to 3-yr lease @ \$500/mo. rent
  - T takes possession, pays rent each month
  - L accepts rent payment every month
  - Conduct of the parties justifies implying periodic tenancy, month-to-month (conduct reflects intent to be bound as L and T until further notice)



### Selk's Reasoning

- Suppose letter had said "if you remain in possession, the rent will be \$3,000/mo.?"
- If Selk does not respond and stays in possession, would this reflect Selk's consent to be bound?



### Selk's Reasoning

- Court treats Selk's silence and remaining in possession as acceptance of David Properties' offer of \$300/month rent
  - But generally, silence ≠ acceptance
  - Reasonably, Selk's silence might be construed as "I'm not agreeing to anything; if you want to evict me, evict me"




### Rethinking Selk

- Problem: if court treats Selk as a trespasser, DP can only recover either
  - Statutory "double the monthly rent" (2 x \$1) = \$2, or
  - Damages = fair rental value (but, trial court found FRV = \$0!)
- Court instead concludes DP and Selk formed implied periodic tenancy @ \$300/month (which was not terminated until Nov. 27, 1961)




### Rethinking Selk


- Trial court's finding that FRV = \$0 is clearly erroneous (lease covered all the land, not just the shack Selk lived in)
  - Court could've (maybe should've) remanded for damage award based on land's FRV)
  - FRV probably would've been something closer to \$300/month, so ultimate result in the case is not outrageous

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### Selk: Footnote 7


- Note: the lawyer who represented Selk at the sale did not represent Selk in signing the lease
- Should the lawyer have any duty to Selk when the lawyer gets the letter from DP? What should he/she do?



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### Lease Drafting: Holdovers

- Residential L asks you: should I put this provision in my form leases?
  - “In the event T holds over following the end of the term, T agrees to be bound to a new one-year term, at a monthly rent equal to the monthly rent stated herein + \$200.”

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### Concerns

- Does this create “de facto” renewal right for T, simply by holding over?
  - Note: if so, this would make it difficult for L to lease the premises to someone else until T had actually vacated
  - Even if L wanted to use such a provision, it should only occur at L’s option (so L could instead evict T and bargain with another tenant, if L desired)

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### Lease Drafting: Page 441

- L’s form lease states: “T shall have the right to extend the lease for an additional term by giving effective notice to the L in writing. To be effective, notice must be given to the L no later than 3 months before the date on which the term would otherwise have expired. T may not extend the lease at any time during which T shall be in default of its rental obligations under this lease.”
- Concerns you would raise if advising L?

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### Lease Drafting: Concerns

- How many extensions are permitted? [1 or more]
- Duration of extension? [original term may vary from lease to lease]
- Amount of rent? [if none stated, court may infer same rent as before]
- Amount of prior notice? [more than 3 months may be needed to enable L to effectively market its available space to prospective tenants]

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End of Lease Term

Transferred to T1 → Retained by T

**Sublease**  
T transfers to T1 for less than the remaining term of T’s lease; T has reversion following sublease

End of Lease Term

Transferred to T1 →

**Assignment**  
T transfers to T1 for the remaining term of T’s lease; T has no reversionary interest



### Transfer of Leasehold Estate

- Traditional rule: T's leasehold estate is T's property and is freely transferable (by assignment or sublease), absent an enforceable restriction in the lease
- If the lease contains a "no transfer" clause, to what extent should a court enforce it to prevent a transfer by T?



### Transfer of Leasehold Estate

- T's concerns?
  - T may want to assign or sublease if it does not want or need the space any longer
  - This may allow T to "manage" or reduce its liability for rent
- L's concerns?
  - Is transferee creditworthy?
  - Is proposed use by transferee an appropriate one?
  - Is transferee responsible?



### No-Transfer Restriction?

- L, T have a 5-year lease for space in the mall
- T wants to assign the lease to T1, who would operate a shoe store
- Can L object to assignment to T1?



### No-Transfer Restriction: Why Might L Refuse Consent?

- L may already have enough shoe stores in the mall (L wants to assure proper "tenant mix" to maximize customer traffic)
- Proposed transferee may not know anything about operating a shoe business (perhaps more likely to fail, default)