I. Estate (from Textbook p. 219)

A. Features:
   1. power to create present and future estates (to fragment ownership)
   2. fundamental concept: one doesn’t own a piece of land, but instead, an “estate” in land
   3. An estate is a property interest in land, a concept based on time
   4. ownership is cast upon a plane of time infinitely long (broken into units: estates)
      a. if plane of time not divided: fee simple absolute (forever estate)
      b. recognizable units of time: life estate, estate in years, etc…

B. Restatement, Property § 9 definition:
   1. is or may become possessory
   2. is ownership measured in terms of duration

C. Hierarchy of values (keep in mind w/ notion of an estate that is potentially durable forever):
   1. alienation inter vivos
   2. devise by will
   3. inheritance

D. Freehold Estates:
   1. Fee Simple Absolute
   2. Fee Simple Defeasible:
      a. Fee Simple Determinable
      b. Fee Simple on Condition Subsequent
      c. Fee Simple on Subject to an executory limitation
   3. Fee Tail (and its predecessor, the Fee Simple Conditional)
   4. Life Estate

E. Non-Freehold Estates:
   1. Term of Years
   2. Periodic (i.e. from month to month)
   3. At Will
   4. At Sufferance

F. Differences between freehold and non-freehold (p. 224): “seisin” = possession under claim of
   an estate of freehold b/c person who was seized (who held seisin) was the person who was
   responsible for the feudal services owed to the lord
   1. non-freehold: interests that arise in landlord-tenant relationship (referred to as
      tenancies, i.e. “tenancy for years”, “periodic tenancy”, etc…)

G. Key to understanding estates:
   1. know what language will create the estate
   2. what are its characteristics in terms of duration, alienability and inheritability

H. Possession can be expressed over chronological segments of time: estate is not so expressed:
   1. Example: O’C → B for life, C for life, D for 50 years, E in FSA
      a. interests occur at point #1
      b. estates: present in terms of existence, not in terms of possession
      c. C, D, E, F, above: non-possessory estates (also referred to as remainders)
   2. 2 descriptive terms:
      a. kind of estate
      b. description of nonpossession
   3. once termed estate: it is in the present: law of future interests: law of non-possessory estates
   4. reversion: must be of a particular kind of estate
II. Property Introduction

A. **Real property**: fundamentally land and anything attached to it

B. **Relationship**: we are examining relationship (not necessarily tangible/physical)
   1. Ex: on Pacific island with jeep, dog, idea, gorilla: object = focus of this relationship (the jeep, dog, gorilla, idea, etc…)
   2. social relationship: between person and society over a thing and peculiar to the person

C. **Legal Relations**: differing significances
   1. **Right**—A legally enforceable claim of one person against another, that the other shall or shall not do a given act. **Duty**: The correlative of a right, i.e., if a person has a right that you do something, you have a duty to do it.
      - a. Ex: A has right that you not walk on property
   2. **Privilege**—A legal freedom on the part of one person as against another to do or not do a given act. **Absence of right**: The correlative of a privilege is the absence of a right, i.e., if one has a privilege to do something, others have no right that you not do it.
      - a. exception to a duty
      - b. Ex: A cultivates field 1, doesn’t touch field 2, has privilege to do what he wants with field 3
   3. **Power**—An ability to change a given legal relation by doing or not doing a given act. **Liability**: The correlative of a power is a liability, i.e., if a person has a power to change the legal relations of another, the person subject to that power has a liability.
      - a. Ex: A, owner, gives B “power of attorney” to transfer property. B has power. A has liability
   4. **Immunity**—A freedom against having a particular legal relation altered by another. **Disability or absence of power**: The correlative of an immunity is a disability or an absence of power, i.e., if a person has an immunity against another changing a legal relation, then the other person has a disability or an absence of power.
      - a. any exemption from a duty, liability, or service of process
   5. **Interest**—Any aggregate of rights, privileges, powers, and immunities, or any one of them individually. **Complete property**: The totality of interests (rights, privileges, powers, and immunities) that it is legally possible for a person to have with respect to land or other things, and that differ from those that all members of a society possess.

D. **Legal interest v. Equitable interest**:
   1. Legal interest: developed by the courts
   2. Equity: fairness or interest

E. **Possessory** interest: physical control
   1. A physical relation to the land of a kind that gives a certain degree of physical control over the land
   2. Intent to exercise that control so as to exclude others from any present occupation.

F. **Private Property**: “to the world, keep off, unless you have my permission, which I can grant or withhold.”
   1. Connection: concepts of **value** and **relationship**: Land is private property, water is private property, air is not (because land and water are scarce and air is not)
   2. **Scarcity**: some level of scarcity, privation in order for these relationships to exist
   3. **Use/Dominion** (although capacity for use does not equal private property relationship)
   4. **Ability to Transfer** (also not necessary for private property)

G. **Capacity for Exclusion**: literally/figuratively is at essence of relationship of private property (w/ enforcement of law/government)
   1. Capacity to exclude: owner must be able to predict how government will respond if someone tries to remove that ability to exclude
2. **Police Power**: power of a government to act in protecting public health, safety, and general welfare: while the law protects exclusivity and other property interests, it also generally limits the scope of those interests in its exercise of the police power to protect public interests. As the degree of magnitude of public intrusion increases, the issue of a **taking** arises.
   a. power of **eminent domain** (or power to condemn, land only taken if):
      i. must be deemed public use
      ii. must take w/ just compensation
   b. **zoning**
   c. **anti-discrimination laws**

3. Private property can exist w/ decreased choice: some theorists say that when choice is eliminated then private property doesn’t exist

**H. Law of Real Property**: this is the focus of the cases we will study
1. Who has right to use/exclude (who is owner?)
2. What it is (subject matter of relationship)
3. Kind of freedoms that exist regarding the thing (also restrictions)
4. Matters concern acquisition and transfer of these relationships

**I. Law needs consistency**: people can predict how to govern themselves (not have to go to court)
1. faith: the law will hold
2. clarity: law/principles that are understandable
3. certainty in terms of result (litmus test)

**J. Policy**: How does law function? What principle holds: fairness, efficiency, peaceful solutions
1. When factors converge on a single solution
2. When factors diverge: ask courts to consider a new rule (or legislatures to solve)

**III. O’Connor Case (252 N.W. 826)**

A. O’Connor dies w/o a will (intestate): no lifetime transfer, no will, no heirs so state of Nebraska prevails.
   1. **Dispute**: is land subject to inheritance tax?
   2. State Argues: not taking by a succession in interest but taking as a party which already has an interest: the state (escheats)
   3. State was named in will but not compelled to take under a will (can renounce): so state renounces, land escheats and state gets out of tax

B. Definitions:
   1. **testate**: die w/ a will
   2. **Escheat** prerequisites: no heirs, no will, no transfer in contemplation of death
      a. True meaning of escheat = reversion (not all reversions are escheats)
      b. Concepts of escheat/reversion derive from tenure
      c. land and tenure: state original owner
      d. **Escheat**: kind of letting go, nothing new created. An escheat does not create a new property interest, but restores possession to the original owner (old def: “feudal incident”)
   3. **heirs at law**: take in absence of a will (will prevents heirs at law to take)
   4. **Substitution** involves replacing one tenant with another under the same agreement.
      a. modern day counter-part: “assignment”

5. **Subinfeudation** involves the creation of a new tenant. The prior tenant becomes a landlord of the new tenant and retains an escheat or reversion.
   a. Statute of Quia Emptores (1290): all attempts at subinfeudation became substitutions (applied to fee simple)
   b. modern day counter-part: “sub-lease”
6. **intestacy**: not a transfer by purchase

### IV. Fee Simple Absolute:

A. Future Estate: none

B. Language Creating:
   1. to “A and his heirs”
   2. to “A, his heirs and assigns”
   3. to “A”

C. Duration: unlimited. Estate measured by maximum duration: FSA = infinity
   1. unitary undivided ownership, the largest estate known to the law (duration)

D. Transferability- by deed, will or intestacy
   1. Alienable
   2. Inheritable
   3. Devisable, after the Statute of Wills (1540)

E. FSA: ordinarily most valuable interest and ordinarily a possessory interest
   1. The fee simple absolute is not “absolute ownership” and may be subject to restrictions on rights while retaining identity. Examples include: easements, restrictive covenants (equitable servitudes), mineral rights, mortgage, and first right of refusal, pollution restriction ordinances

F. **Cole v. Steinlauf.** 136 A.2d 744 (Conn 1957): 1945 deed: did not specifically say “and heirs”
   1. Court assumes: Free and Clear signifies marketable title
   2. Court agrees w/ plaintiff: breach occurred = doubt as to whether FSA was conveyed
   3. Scale as to vendor’s obligation:
      a. quitclaim deed: vendor promises to sell only what he has
      b. may promise a FSA
      c. warranty deed (?): a warranty deed expressly guarantees the grantor’s good, clear title (guarantees what is transferred)
         - may promise title that is guaranteed
         d. marketable title
         e. merchantable abstract of title (what is reported on records used to verify title)
         f. promise: satisfactory to purchaser’s lawyer
         g. promise: satisfactory to purchaser
   4. Market determines level of promise (home developers can’t make high promises of title, too much of burden on their business)
   5. This case changed the “and heirs” method of conveying FSA, now the N.Y. view from **Cole v. Steinlauf** is prevailing, someone conveys all that they have (FSA) unless otherwise noted

G. Definitions:
   1. **title**: recreation of history, not a document as such (history of ownership), reproduce what has passed on (what is in hands of purchaser)
      a. legal evidence of a person’s ownership rights in property
      b. legal link between the person who owns property and the property itself
   2. **title abstract** is a reconstruction of that history from public records (individual deeds don’t necessarily exist)
   3. **records**: medium that broadcasts interest to the world

H. **Words of Purchase v. Words of Limitation**
   1. at Issue:
      a. duration of interest
      b. interest taken: concurrently or consecutively
   2. **words of purchase**: who is taking, they exist in any transfer where law is not supplying the transfer (i.e. inheritance)
3. words of limitation: what they are taking, what interest (how it is limited): “how much” (courts will supply how much)

I. Johnson v. Whiton. 34 N.E. 542 (Mass 1893): 1/3 to Sarah and heirs on her father’s side, 2/3 to grandchildren and their heirs
   1. Issue: Could Sarah transfer FSA?
   2. Held: “heirs on father’s side” = words of limitation, Sarah has power to transfer FSA

J. fixed categories are restrictive (limit freedom in Anglo-American law):
   1. Ex: Johnson v. Whiton Dicta: “A man cannot create a new kind of inheritance”
   2. Fixed categories as to:
      a. duration
      b. method of creation
      c. characteristics

   3. Only certain kinds of estates recognized (must fall into category): if estate created under the category, then the set attributes/interests exist

V. Defeasible Fee Estates

1. Defeasible Estates: tenancy at will is only estate not defeasible
2. There is a strong presumption against forfeitures and defeasible estates. When forced to recognize defeasible estates, there is a preference for optional forfeitures such as conditions subsequent, rather than automatic ones such as determinable estates

<table>
<thead>
<tr>
<th>Defeasible Fee</th>
<th>Future Estate</th>
<th>Duration</th>
<th>Transferability</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fee Simple Determinable</td>
<td>Possibility of Reverter</td>
<td>Potentially infinite, so long as event does not occur</td>
<td>By deed, will or intestacy</td>
</tr>
<tr>
<td>Fee Simple on Condition Subsequent</td>
<td>Right of Entry or Power of Termination</td>
<td>Potentially infinite so long as the condition is not breached and, thereafter, until the holder of the right of entry timely exercises the power of termination</td>
<td>Same</td>
</tr>
<tr>
<td>Fee Simple subject to an Executory Limitation</td>
<td>Executory Interest</td>
<td>Potentially infinite, so long as stated contingency does not occur</td>
<td>Same</td>
</tr>
</tbody>
</table>

A. Fee simple determinable
   1. O → A and his heirs as long as the land is farmed
   2. O → A and his heirs until the land is farmed
   3. O → A and his heirs while the land is farmed
   4. Fee Simple Determinable: durational language needed, language of special limitation: so long as, while, during (symbolic language that consummates F.S. determinable: special limitation)

B. Fee Simple Upon a Condition Subsequent
   1. O → A and his heirs, but if the land not farmed, then O may reenter and claim the land
   2. O → A and his heirs provided that if land not farmed, then O may reenter and claim
   3. O → A and his heirs on condition that if the land not farmed, then O may reenter/claim
4. Conditional language is not enough: need express that if requirement not met, grantor has right to terminate

C. **Collette v. Town of Charlotte (9/17)**. 45 A.2d 203 (Vermont 1946): school ceased to be used for instructional purposes in 1936, sale in 1944 (1936 = breach)

1. Issue: If possibility of reverter, did it pass from Scofield to Collette? who owns what in 1936 if it is breach?
2. at issue: *destructability* of R of Re-entry and POR (punish people for trying to do this)
3. Holding: Fee Simple Determinable, possibility of reverter is alienable

D. Definitions:
   1. *notion of waiver* (regarding R of Re-Entry) must act within reasonable period of time
   2. **Fee Simple**: potentially can last forever even though we attach conditions to it (it will be cut short if conditions of defeasance are met)
   3. Nonpossessory interests: describe type of estate and describe type of nonpossession

E. **Differences in Operational Consequences v. Legal Consequences**
   1. Operational consequences: deal w/ duration, claim to possession (how long it lasts)
      a. P of R: becomes possessory automatically
      b. R of R: must exercise right to become possessory
   2. Legal consequences: alienability of possibility of reverter, right of re-entry
      a. Majority of jurisdictions today: R of R still held to be *inalienable* during one’s lifetime (in majority: are devisable)
      b. P of R today: law has changed and P of R is *alienable* during one’s lifetime, also devisable, inheritable

F. **Chouteau v. City of St Louis**. 55 S.W. 2d 299. (MO 1932): legis. act (land for courthouse)
   1. Holding: Doesn’t appear to have intention to create a determinable fee or fee on condition subsequent (No language of limitation that usually comes w/ defeasible fee)
   2. **Use of Language w/ Certain Contexts**
      a. Matter of interpretation: rules for creation of these interests not fool-proof, uncertainty exists
      b. If language itself doesn’t fit w/ context, there will be problems

G. **DeHart v. Ritenour**: substantial compliance: will influence determining if a defeasible estate

H. - **Conditions**:
   1. some require positive conditions
   2. some require negative conditions
   3. some conditions necessarily will be breached
   4. some conditions may never be breached

I. **Legislation**: time limits to these conditions (interest in limiting time they are valid, see below)
   1. these interests (P of R and R of R) can be regulated through police power (public health, safety, morals or general welfare)
   2. These statutes not just about preventing fraud: also about marketability

J. **Board of Education v. Miles**. 207 N.E.2d 181 (New York 1965)
   1. Issue: Do defendants still have reverter interest regarding Walton Academy?
   2. Statute enacted: 1958 (both prospective and retroactive), breach in 1962
   3. Mixing of language of reverter and condition
      a. have 3 years to record interest, if not: it is extinguished
      b. mechanics: recurrent obligation (must record every 10 years)
      c. **Goal**: most people won’t record (Objective of statute = people don’t record)
   5. Held: Court does not uphold Section 345 here: not concerned w/ fraud protection like previous recording acts

K. **Hiddleston v. Nebraska Jewish Education Society**. 186 Neb 786 (Nebraska 1971): statute’s language: 30 yrs. to record, retroactive
1. Holding: statute is constitutional, more than 30 years have passed so any R of R or P of R have been eliminated
2. Police power to be upheld if reasonable (Statute serves societal goal of marketability):
   a. nature of right affected: don’t hold much value (historically)
   b. extent of modification: not much b/c it doesn’t hold much value

L. Types of Recording Statutes:
   1. Pure Notice Statute
      a. Ex: New York statute
   2. Pure Race Statute (race to the Courthouse)
      a. Ex:  Time #1 A → B in FSA
             Time #2 A → C in FSA
      b pure race statute: B must record before time #2
   3. Race and Notice Combined
      a. most popular statute
      b. B must meet requirements of bona fide purchaser w/o notice and valuable consideration and B must record first
   4. For marketability: race statute = incentive to record (B will record to protect himself)
   5. For preventing fraud?: Pure race is the least used statute but may be the best

VI. Fee Tail

A. Future Interest: Reversion in conveyor, his heirs or devisees, or Remainder in a grantee or devisee other than the taker of the fee tail. Remainder is vested b/c line of descent will end.
B. Language Creating:
   1. To “A and the heirs of the his body”
   2. To “A and the heirs of his body, remainder to B.”
C Duration: For the life of the first taker (commonly called “tenant”) in tail and thereafter through succeeding generations so long as there are any living lineal descendants of the first tenant in tail
D. Transferability: By deed, but the transferee acquired an estate which would end at the transfereor’s death in favor of the latter’s bodily heirs. Descent limited to heirs of body. Not de devisable by will.
E Examples:
   1. O → A and the heirs of his body (general)
   2. O → A and the heirs of his body by W (special)
   3. O → A and the male heirs of his body (male)
   4. O → A and the female heirs of his body (female)
F. Fee Tail Statutes: (Fee Tail for most part = estate no longer recognized)
   1. in 3 states: can still create Fee Simple Conditional
   2. in 3?? other states: can create Fee Tail
   3. in all other states: Fee Tail affected by statutes (p. 241-243)
   4. Bibo and Evans v. Giles (Illinois and Missouri)
      a. Take fee tail and turn donee’s interest into life estate
      b. Then FSA goes to who would first take at comonno law
      c. As if to say: to B for life, remainder to the heirs of the body of B in FSA
G. Caccamo v. Banning  75 A.2d 222 (Delaware Superior Court, 1950): condition = “die w/o leaving lawful issue” (not determined until death)
   1. Issue: Fee Tail or F.S. subject to executory interest?
   2. Court’s Opinion: uses in rule in Shelley’s case to say Anna was given Fee Tail and said prevailing interpretation of this language: indefinite failure of issue but in many jurisdictions the opposite is presumed: definite failure of issue
H. **Indefinite Failure of Issue** (Fee Tail) v. **Definite Failure of Issue** (F.S. Defeasible):
- 1. **Indefinite Failure of Issue**—failure of issue (i.e. lineal descendants) at an undefined point in time. **B takes a fee tail.** This construction cuts down B’s interest (from a FS) to one that will last only so long as he has lineal descendants. Traditionally, there was a presumption in favor of this construction at common law.
- 2. **Definite Failure of Issue**—failure of issue at the time of B’s death only. **B takes a FS subject to an EL in C.** C will take only in the event that B dies leaving no lineal descendant surviving him. (Survivorship of issue is usually required, but the condition may be satisfied by merely having a child at some point)

- 1. Statute: not acting retroactively
  - a. effect of statute: eliminate tail
  - b. effect of remainder: extinguishes remainder
- 2. Court’s Opinion:
  - a. Words of Limitation, primary factor = intent of Philip Bibo
  - b. assumption: technical language is given its meaning
  - c. “bodily heirs” given significance of W of L creating F.T. (unless there was context demonstrating that was not the intent)
  - d. Statute (Section 6) doesn’t erase fee tail, it depends on construction of fee tail

J. Definitions:
- 1. **gift of the residue:** catch-all to prevent intestacy
- 2. **Rule in Shelley’s Case** (requires freehold estate in ancestor):
  - R Bs bodily heirs
  - B in FT
    - a. Ex: A→B for life:
      - R Bs heirs
      - B in FSA
- 3. **Doctrine of merger** also applies: 2 consecutive possessory, vested interests: smaller converts into larger

- 1. No dispute: devise created life estate in Leta followed by alternate contingent remainders
- 2. Held: no requirement of survivorship, nothing in context to support it, finds for defendant
- 3. **Intent:** At this point, not what Sard intended but instead what legislature has created and intended (Section 6 only requires “might be seized”)

**VII. Life Estate**

1. **definition:**
   - a. not terminable at any point in time
   - b. cannot last longer than life or lives of certain human beings

A. Future Interest: **Reversion** in grantor, his heirs, or devisees, or **Remainder** in grantee or devisee other than the life tenant
B. Language Creating:
   - 1. to “A for life”
   - 2. to “A for and during his natural life”
   - 3. to “A until he dies”
4. to “A for the life of B”
5. O → A and the heirs of his body by his wife. W: dies without issue
6. Also created by the operation of law (see marital estates infra):
   a. operation of law: dower/courtesy
   b. conversion of Fee Tail
C. Duration: For the life or lives of the person or persons indicated by the conveyor as the measuring life or lives. Usually the estate will be created for the life of the transferee. (An estate in one person for the life of another as in d above is a life estate pur autre vie.)
D. Transferability: By deed only. An estate pur autre vie held by the decedent at the time of this death will in most states pass by will or intestacy of the life tenant.
   1. generally not devisable or inheritable
E. Catch-all at common law:  A → B = life estate
   1. Life estate no longer catch-all estate (statute changed): F.S. is catch-all unless indicated that it is something else
F. Good Examples:
   1. Ex: A → B for lives of B, C, D = life of last to die
   2. Ex: A → B, C, D for their joint lives = estate for life of first to die
   3. Ex: A → B for life of B and B’s heirs = continuous set of lives to measure, life of group of people (those who qualify at B’s death)
   4. Ex: A → B and C for lives and lives of C’s heirs = life estate could end at B’s death
G. Chestnut v. Chestnut 151 A.339 (PA 1930)
   1. Issue: Was Sarah given a life estate with power to consume? (power to consume usually not give Life Estate)
   2. 2 Choices:
      a. life estate w/ remainder over
      b. Defeasible Fee
   3. Is there mandatory language in the will: life estate in Sarah and then over to Daniel?
      a. If that language is just a wish (precatory): then a F.S. created in Sarah
   4. Court found: “my will” = mandatory language (created life estate in Sarah w/ remainder over to Daniel). Also Held then: “power to consume” not inconsistent w/ life estate
H. Definitions:
   1. “Power to consume”: life estate can’t invade principal? How many features need to be added before we reach a Fee Simple? (What if B gets power to devise?)
      a. What is scope of power? (subject to standards? What is standard desired by testator?)
      b. What constitutes an act of consumption?
I. Thompson v. Baxter 119 N.W. 797 (Minnesota 1909): “while he shall wish to live in Albert Lea.”
   1. Issue: What kind of entity does the defendant hold? (legal effect of language here)?
   2. Held: Judgment for defendants. He received a determinable life estate
   3. Rationale: Answer from Court doesn’t come from the instrument itself (like Chestnut): Court found defeasible life estate here:
      a. can have ongoing payment of consideration (rent)
      b. can arise out of general grant (not just express terms)
      c. grant in general terms w/o limiting point of time can be life estate
         i. add condition (event): defeasible life estate
         ii. so long as not computible period as to when event will occur: can have defeasible life estate
J. Foley v. Gamester 170 N.E. 799 (Massachusetts 1930): gas station for many years as desired
   1. Def. argues periodic tenancy and plaintiff argues tenancy at will
      a. tenancy at will has mutuality (if tenant can terminate so can landlord)
   2. Held: Plaintiff prevailed
1. Gerrish elderly, rest of bldng. no one has L.E., lease provision: terminate at Gerrish’s choice
2. Held: for defendant (Gerrish), Defendant has a determinable life estate, not a tenancy at will

VIII. Marital Estates

A. Marital Life Estates at Common Law
   1. Estate by the Marital Right
   2. Tenancy by the Curtesy
      ▪ A tenancy by the Curtesy was, at common law, a LE to which the husband was entitled in all lands of which his wife was seized in FS or in FT at any time during the marriage, provided that there was issue born alive capable of inheriting the estate.
      ▪ On the birth of such qualified issue, the husband’s tenancy by the marital right was enlarged to an estate for his own life which he held “by curtesy of the law of England.” The husband’s estate for life was called curtesy initiate prior to his wife’s death and curtesy consummate after her death, but he had a present life estate in both situations and there was no substantial difference between the two types.
      ▪ In modern American law, curtesy is obsolescent as a source of life estates. Curtesy has been abolished in most of the states. Generally, the husband is given instead a statutory distributive share in the wife’s estate.
      ▪ At the present time, there are statutes in most states allowing the surviving spouse, whether it be the husband or the wife, to waive the provisions of the will of the deceased spouse and take a specified share of the decedent’s estate (usually 1/3) instead of a curtesy or dower.
   3. Dower
      ▪ At common law, a widow was entitled on the death of her husband to a life estate in one-third of the lands of which he had been seized at any time during the marriage of an estate in FS or FT, provided that the estate was one capable of being inherited by issue of the marriage.
      ▪ During the husband’s lifetime, the wife had a protected expectancy, called inchoate dower. On the husband’s death, the widow was entitled to have assigned or set-off to her the specific lands to be held in dower and she was said to have dower consummate. Once dower had become consummate, her status was the same as that of any other life tenant.
      ▪ In the 20th Century, common law dower has been abolished in most states. The statutes frequently give to the widow, as a substitute for dower, a fractional share in FS in the realty owned by the husband at his death.
      ▪ Further protection is given to the widow by making her a forced heir, that is, allowing her to take a distributive share in her husband’s estate despite the provisions of the will.
      ▪ In other states, the widow may elect to take in lieu of dower a distributive share in the husband’s estate. This distributive share, since it is absolute rather than a life interest in the assets, and extends to personality too, is usually more valuable than a dower estate.
      ▪ In most situations, both dower and curtesy are treated as derivative estates and therefore, the interest of the surviving spouse cannot outlast the basic estate from which the dower or curtesy derived.

B. Community Property
   ▪ Eight states (Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington) follow a system of marital property called Community Property.
• Starts with the theory that property acquired during the marriage results from the joint efforts of husband and wife, which entitles each to equal ownership, and that such equal ownership is to be recognized immediately when the property comes into the marriage.
• At the death of one spouse, one-half of the community property, subject to taxes and creditors and stuff like that, passes to the surviving spouse.

IX. Waste

A. defined: as lasting/permanent injury (↓ value of inheritance, destroy identity of property, impair evidence of title, ↑ burdens on property)
  1. Purpose of this body law: to protect the holder of a future interest (similar to remainders: substitute takers)
B. Principles to guide life tenant (in property, stocks, bonds, interest bearing savings accts…):
   1. entitled to interest or equivalent (annual benefit like investment)
   2. can’t invade principal (same idea to real estate)
   3. Life tenant obligation = not to injure principal
C. Definitions:
   1. voluntary waste: there is a duty to both refrain from injuring the property(active waste) and involuntary waste: passive waste
   2. permissive waste (the duty to repair and maintain): duty to expend reasonable efforts to prevent injury from occurring
   3. meliorating waste: which without changing the legal definition of waste, still allowed the tenant to change the course of husbandry upon the estate if such change be for the betterment of the estate.”
      a. the rule that any change in a building upon the premises constitutes waste has been greatly modified: will not be enjoined in equity when it clearly appears that the change will be, in effect, a meliorating change which rather improves the inheritance rather than injuring it.
      b. see Melms rationale below
   4. Homestead Legislation: designed to prevent disruption in family unit
      a. statutes: exemption for head of family
      b. defined area: property area and area of money (exemption from debts)
      c. creditors can’t touch what is in exemption
      d. Courts have given homestead many virtues of an estate (although originally created simply as an exemption from debts)
D. Melms v. Pabst Brewing Company 79 N.W. 738, Wisconsin 1899
   1. concerned with 2 properties: one where home sits: homestead, other property: brewery
   2. Issue: is there waste? (land surrounding homestead had changed, not generate income)
   3. Held: result for benefit of life tenant
   4. Rationale: 2 factors
      a. contract as qualifier
      b. change of circumstances
E. Double damages: absent a statute not allowed to seek double damages
   1. 21 jurisdictions allow double damages by statute
F. Can B be forced to forfeit interest?
   1. under common law was a remedy
   2. 19 jurisdiction. allow for forfeiture (limited circumstances: act must be egregious)
G. Who bears burdens/costs of owning real estate?
   1. Rule: entitled to current benefits, must pay current costs
2. The (life?) tenant has benefits of property (recurring obligation and tenant has recurring benefit)

H. **Gannon v. Peterson:** In 1890, Matt opened a coalmine on the lands and leased it.

1. Can holder of Executory Interest sue for waste?: *Gannon v. Peterson* seems to say executory interest cannot sue unless under rare circumstances
2. Held: F.S. Subject to Executory Interest, Matthew has a vested interest and the executory interest is a mere expectation
3. Issue #2: Are there any limitations upon owner in F.S. which is not absolute (Subj. to Exec. Int), Do conditions of defeasance affect holder’s rights to commit waste? What can Future Holders do and can they seek relief in facing waste?

I. **Conditions that impair the right to commit waste:** conditions can limit right to commit waste

1. **Ex:** language that land to be used “exclusively for school purposes” then to C in F.S.
   a. removing timber would violate above condition
2. these are conditions like *Collette* and *Brd. of Ed. v. Miles*
3. only Executory Interest and not Right of Re-Entry or Possibility of Reverter

J. **Are Conditions of Defeasance (especially towards waste) enough to inhibit the right to commit waste?**

1. Conditions that don’t dictate anything regarding waste
2. From *Mandelbaum:* capacity to alienate is paramount to F.S.(yet F.S. can be restricted)
3. Condition of defeasance: allows intrusion into choice
4. Generally, owners of FS Defeasible estates are not chargeable with legal waste
   a. owners of interests in FSA may only be prevented from committing waste through the exercise of the police power
   b. Courts inclined to say: B does what he pleases absent rare circumstances (in some circumstances the Courts will step in and stop w/ doctrine of “equitable estoppel”)
   c. No cases/fact patterns direct: must extrapolate guidelines by which we can act
5. **Policy:** Why give society right to decide person’s actions, account for public interest when condition of defeasance and forbid this when absolute?
6. if more certain that condition will be breached, more receptive to granting damages

K. **Equitable Waste:**

1. In cases of wanton or unconscionable waste, and especially when the probability that future estate will become possessory, there is possibility of enjoining from “equitable waste.”
2. Equitable waste = “that which a prudent man would not do with his own property.”

L. Options for Decisions Based on Waste Doctrine

1. If pub. interest is purpose of waste doctrine: determining factor is nature/quality of act
2. Other option: likelihood of breach

**X. Restraints on Alienability**

A. **Mandelbaum v. McDonnel**

1. John attempting to carve out entity and remove its attributes
2. The time periods upon (1) the executors and (2) the devisees are congruent
3. Issue: **disabling restraint,** is it valid when imposed upon a vested remainder (nonpossessory F.S.)?
4. Held: Fee Simple cannot be subjected to direct restraint

B. 3 Species of Direct Restraints:

1. **disabling restraint:** *(Mandelbaum):* most troubling
2. **forfeiture restraint:** end of interest if one tries to do act
   a. **Ex:** determinable fee, Fee Subject to Executory Interest
3. **promissory restraint**: essentially like a covenant (?)
   a. **Ex**: A $\rightarrow$ B in F.S. and B promises not to transfer to D
   b. recourse for breach of covenant: damages can result

C. **Conger v. Lowe**
   1. Held: direct restraint on life estate was allowed.
      a. The kids took possessory FSA when Sam breached condition.

D. **Rules affected by policy**: allowing alienation (many rules adopted on basis of this policy):
   disabling restraints: law is harsh b/c can’t alienate at all
   - preference for FSA over other estates
   - preference for:
   - vested over contingent interests
   - absolute over defeasible interests
   - Rule Against Perpetuities
   - rule against creating new estates
   - Rule in Shelly’s Case: ↑ alienability (many jurisdictions don’t follow)
   - Fee Tail statutes
   - Time Limits: P of R, R of RE (Hiddleston)

E. **Direct restraints can be upheld on estates less than a F.S.**
   - These cases: desire to protect family
   - F.S. defeasible: direct restraints not allowed (thing that makes it defeasible is the restraint itself)
   - Marketability of Life Estates limited: condition of uncertainty as to duration (virtually impossible to sell)

F. **Restrains on Possessory v. Non-Possessory Interests** (Which rule is the best?: Mandelbaum
   insubstantial impact, Period of Nonpossession, or Independent Uncertainty)
   1. Factor of Non-Possession:
      1. --------------------------- non-possession
      2. --------------------------- contingency (uncertainty)
      3. --------------------------- restraint
         - Both #1 and #2 are making the interest not marketable

G. **Restatement’s Position regarding validity of direct restraints on nonpossessory interests**:
   **reasonability = test**
   a. primary factor for reasonability is impact
      1. Variations of the rule:
         a. variation of the rule: struck by its terms (legality)
         b. variation of the rule: only cut it down, only enforce restraint for amount of
time the exception allows
      2. “A” variation appears too harsh: “B” variation should be allowed to allow restraints
         for a reasonable time. Problems w/ “B” rule: drafters would reach out for well beyond what law
         allows (to be pared back to what is reasonable)
      3. Problem w/ Restatement Rule and how to draft a valid restraint:
         a. must anticipate how court will react (many ingredients = ↓ predictability)
         b. case by case determination instead of guidelines/litmus test

H. Law has changed: **contingent remainders** now alienable in some jurisdictions

I. **Mountain Brow Lodge v. Toscano**
   1. 2 restrictions: restricted for use and benefit of Mountain Brow (looks somewhat like
      Conger) and prohibits actual transfer
   2. Held: restricted use provision enforceable and restriction prohibiting actual transfer not
   3. Also Held: use restriction not equal to direct restraint
   4. Held: all restrictions on use are allowed
      a. Dissent says a restriction on who may use is in effect a restraint on alienation
b. Dissent also says: most restrictions upon manner of use impair marketability

J. What is the fundamental difference between disabling and forfeiture restraint?
1. Disabling restraints most problematic b/c no one else gains benefit (Mandelbaum)
2. Forfeiture restraint: parties can still get together to transfer (still marketable)
3. Are promissory restraints really restraints at all?
   a. Cost for breaking the promise = damages (b/c of the cost, should be viewed as restraint)
   b. What about option to buy at a fixed price?
   b. It is a promise, is it enforced as a restraint?

XI. Tenancies

A. Tenancy at will:
1. indefiniteness of time (indefinite duration, basic uncertainty)
2. both parties can terminate (either landlord or tenant can terminate)
   i. terminated at death of 1st to die (landlord or tenant)
   ii. many jurisdictions: now have statutes requiring minimum time period for notice of termination
   iii. terminates if any attempt to transfer the interest
B. periodic tenancy:
1. must have uncertainty in duration (no prescribed, fixed time for tenant to be there; no ending point)
2. successive units of time (repetitive in nature): fixed date, anniversary
3. maximum period: 1 year
4. terminated by either landlord or tenant
   a. must be terminated on anniversary of the period (came about b/c historically it could be terminated w/o notice requirements)
   b. additional requirement: timely notice to terminate: up to 6 months, must be full period in advance
C. tenancy at sufferance:
1. occurs when the tenant stays after the lease expired
D. Lord Coke’s Rule: no certain duration as to one, no certain duration as to other
E. Confusion when language of limitation absent: uncertainty about what created
1. Life Estate: know its limit, uncertain when it will occur
2. Estate at Will: ends with first to die (amongst transferor or transferee): still uncertainty
F. Without Writing: rule out freehold estates (effect of Statute of Frauds)
1. Often gives 2 choices: estate at will or periodic tenancy
2. payment of periodic consideration: courts inclined to hold: periodic tenancy
   a. periodic payments not decisive if something else is present
G. A.H. Fetting v. Waltz: jewelry store leased for 5 years
1. Held: The tenant was a hold-over w/o having lease for this extra month
H. Definitions:
1. lease: condition of defeasance: gives landlord R of RE, reverts to landlord in FSA
   a. 2 lease provisions as conditions of defeasance (allowing landlord to re-enter):
      i. if tenant faults on rent…
      ii. ongoing obligation for losses landlord may incur attempting to re-let
2. surrender: term used to describe when person in possession restores interest to person in non-possession
   a. Can offer surrender but landlord may not accept
   b. Tenant cannot force a surrender upon a landlord
3. **release:** when landlord acts and allows the tenant out

I. **Obligation on Landlord to Re-let?**
   1. under old common law: no obligation to re-let (collect damages as they accrue)
   2. **lease:** hybrid involving contract
      a. Now: landlord has a duty to mitigate (must make effort to re-let the premises)
      b. if no attempt to mitigate: consequence is the lease terminates when notice is given to the landlord
   3. Can’t sue for rent until the date when the rent is due

J. **Notice to Terminate:** **Notice:** (what is proper notice?)
   1. many jurisdictions: a simple written notice is not enough
   2. Intent must be of irrevocable nature, timely and refer to proper date of termination (unequivocal)
   3. Now: some jurisdictions not at exact date but will take effect at next appropriate date

K. **Hold-Over Tenant:** tenant at sufferance
   1. landlord can essentially treat hold-over tenant as trespasser
   2. **American Rule:** landlord can hold tenant to new tenancy (despite the tenant’s dissent)
      a. Some Courts find: implied agreement
      b. Other Courts find: continued possession = assent manifested (despite what tenant has said)
      c. Obligation exists (duty of law): tenant’s possession = adequately sufficient despite the lack of tenant’s verbal assent
   3. Alternative to “American rule”: Impose **double-rent** provision
      a. remedy enacted by statute (as deterrent)
      b. legislatures and landlords use double-rent as perhaps a more effective deterrent than the “American rule”
   4. What constitutes **election** is fact:
      a. Owner must only manifest intention to bind tenant as a tenant and not treat tenant as a hold-over
      b. Law supplies terms, not the landlord
      c. When owner tried to elect to incorrect terms as above: it is allowed to bind to whatever the law allows

- Owner must only manifest intention to bind tenant as a tenant and not treat tenant as a hold-over

L. **What landlord must supply:**
   1. actual estate
   2. possession

(p. 36 on regular outline)