PROPERTY OUTLINE
PART ONE: FIRST AND SUBSEQUENT POSSESSION
INTRODUCTION

- Property – legal framework that governs the rights of individuals to things
  - Real – land, houses
  - Personal – tangible (chattel), intangible (patents, copyrights, etc)

- Property rights
  - Bundle of sticks – a # of distinct rights to possession
    - Alienation – Sale, gift, abandonment
    - Destruction
    - Consume
    - Alter – modification, improvements
    - Share
  - Sole and despotic dominion (Blackstone)
  - Why have property rights?
    - Stability
      - Preserve existing social order, social stability
    - Productivity
    - Efficiency
      - People tend to take care of what they own
      - Avoid “the tragedy of the commons”
    - Self-Sufficiency/Autonomy
      - Enable people to make certain decisions for themselves
      - So people don’t have to depend on others
    - Fairness
      - Allows individual opportunity
      - Also have to have a market system
    - Hoard/Accumulate
      - Allows individual to own more things that they can hold/carry at one time
      - Allows people to leave property at home w/o having to guard it all the time
      - Frees time to earn more property
    - Greed
      - Property rights are societal recognition of greed
    - Privacy
      - Ability to do what you want w/o the interference of the public
  - Instrumentalist theory of law - Have legal rules b/c there is a good reason for them
    - Law is a product of the human mind
    - Judges make law, not find law
    - Law can reflect public policy decisions
  - Natural Rights Theory/Formalist - have legal rules b/c that is the natural order of things
- External objective reality in which people should have property rights
- Find appropriate rule and apply it
  - Constraint on judges to “make law”

FIRST POSSESSION
- **ACQUISITION BY DISCOVERY**
  - Johnson v. M’Intosh – Johnson bought land from Indians, M’Intosh bought land from crown
    - Right of discovery gives you the right to perfect the title through possession
    - First in time = possession
      - Pros – likely the way things began, disruptive to change things
      - Cons – “might makes right” is unjust, arbitrary (chance is unjust)
  - Lockean Labor Theory – Indians had not mixed sufficient labor w/land to perfect their title
  - Acquisition by Conquest – first in time w/guns
    - Natives are absorbed into conquering nation
      - Retain property rights

- **ACQUISITION BY CAPTURE**
  - Pierson v. Post – possession of wild animals can be established by corporeal possession, use of snares, or mortal wounding and continued pursuit
    - Dissenting opinion – pursuer may possess wild animal when he is w/in reach or has a reasonable prospect of taking it
  - Ghen v. Rich – mortal wounding (Ghen) v. physical possession (Ellis → Rich)
    - If a hunter does all that is possible to claim the animal as his own, it is sufficient to deem it “his”
      - Custom should govern when it is accepted by an industry and has been established for a long time
  - Keeble v. Hickeringill – land owner has constructive possession of wild animals on their land
  - Synthesized rule - Person has constructive possession of animals on their land BUT if the land is not owned, possession belongs to whoever pursues and mortally wounds or establishes physical possession of animal; however, custom may be followed in exception to the general rule.

- **ACQUISITION BY CREATION**
  - INS v. AP - AP has the right to exclude others from improperly using the information for a reasonable amount of time (until news is no longer valuable)
    - Idea – expression distinction
    - Property rights are relational – no property right in relation to public, quasi right in relation to other news services
    - Similar to Keeble- policy of protecting business, not ownership
• Want to reward inventiveness and encourage future endeavors but also made important inventions available for public use
  ▪ Exception to the general rule of allowing copying
  ○ Cheney Brothers v. Doris Silk – copying is generally allowed, encourages competition
    ▪ Smith v. Chanel - “Imitation is the lifeblood of competition”
    ▪ Lack of exclusive rights are a benefit as long as the freedom of imitation does not destroy incentive for people to come up with new ideas
  ○ Creation of property rights of inventions
    ▪ Pros
      • Consistent w/first in time
      • Production incentives
      • Moral – I invented it, it’s mine
    ▪ Cons
      • Moral – certain things have a moral imperative to be distributed (AIDS vaccine)
      • Economic – competition drives market economy
        ○ Eliminates monopoly
      • Public good
  ○ Right to Exclude/Include
    ▪ Jacque v. Steenberg – right to exclude is an essential property right
      • Legal system must provide sufficient means of protecting that right – punitive damages even though no real loss
    ▪ State v. Shack - Landowners do not have the right to exclude if it will harm the well-being of others on the land.

SUBSEQUENT POSSESSION
• ACQUISITION BY FIND
  ○ Armory v. Delamirie – finder has possession against all except the true owner (and previous finders)
    ▪ Bailment – rightful possession by someone other than true owner
      • Car park service, dry cleaning
      • Baliee possesses goods but bailor is true owner
    ▪ Property rights are relational – not absolute
  ○ Hannah v. Peel – finder v. owner of locus in quo
    ▪ Owner of locus in quo has rights to chattel found attached to or under the land they occupied
    ▪ Here owner of LIQ had not occupied property (no constructive possession), chattel was on surface of land, not attached to it in any way
  ○ Bridges v. Hawkesworth – finder v. owner of LIQ
    ▪ Finder wins – chattel found in public area (shop)
  ○ South Staffordshire Water v. Sharman – finder/employee v. owner of LIQ/employer
- Owner/employer wins – finder was acting on behalf of owner when chattel was discovered
- Finder was on land for a limited purpose
  - McAvoy v. Medina – mislaid property belongs to owner of LIQ
    - Policy – best way to return item to true owner
      - Burden on owner of LIQ/shop owner to look after property
      - gets to keep it if true owner does not return to claim it
    - Involuntary bailment
- Abandoned property
  - Owner must relinquish possession and intend to terminate ownership of chattel
  - Finders become the true owners

**ACQUISITION BY ADVERSE POSSESSION**
- Required Elements of Adverse Possession
  - Actual possession for statutory period
  - Open and Notorious possession
    - Actual or constructive notice – what a reasonable owner would know upon inspection
  - Exclusive possession
  - Continuous and peaceable possession
    - W/o interruption by adverse possession
      - Being sued, ejectment, abandonment
  - Hostile and under claim of right
    - Claim is adverse/hostile to true owner
- Policies for allowing adverse possession
  - Promote productive use of land
  - Quite all titles
  - Provide proof of good title
  - Correct errors in conveyance
- Manillo v. Gorski – issues w/hostility and open and notorious elements
  - Hostility
    - Maine doctrine – have to intend to adversely possess property. This rewards the wrong-doer and encourages perjury
    - Connecticut doctrine – adverse possession based on mistake (didn’t know the land wasn’t yours) is acceptable
  - Open and Notorious
    - Minor encroachments are insufficient to put owners on reasonable notice
    - Even though no adverse possession, court can order D to sell the land to P if P had made substantial improvements which could not be removed w/o hardship or great expense
- Howard v. Kunto – continuity is based on what a reasonable owner would use the property for
  - Summer occupancy can establish continuity
- Allowed to tack on periods of possession by prior occupants even though there isn’t privity of estate
  - Privity was designed to prevent a succession of unrelated trespassers from taking adverse possession
- Disabilities
  - Statute of limitations for adverse possession is paused if the owner is under a legal disability at the time of entry
    - Insanity, youth, imprisonment
- Adverse possession does not run against the gov’t
- Adverse possession of chattels
  - O’Keeffe v. Snyder - Discovery rule – A cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action.
    - Discovery rule = minority rule
    - Applies to notice element of adverse possession
      - Shifts burden to owner – usually adverse possessor must prove actions that put owner on actual or constructive notice. Here owner has to prove their own due diligence in attempting to find the property

- ACQUISITION BY GIFT
  - Gift – gratuitous/free transfer
    - Inter vivos – gift b/t two living people
    - Cause mortis – gift made in expectation of donor’s death
  - Three requirements
    - Donative intent
    - Delivery – clear evidence of gift to witnesses, ‘wrench of delivery’ for donor, and gives donee clear evidence of intent (connection to possession – best evidence of ownership)
      - Manual delivery (if possible then required)
      - Constructive delivery (key or other object which gives donee access to gift)
      - Symbolic delivery (usually a written instrument)
    - Acceptance – law will assume acceptance for valuable gifts absent evidence to the contrary
  - Newman v. Bost – D tried to make a gift causa mortis by giving P (housekeeper) a set of keys
    - The court held that P was entitled to whatever furniture the keys actually opened (constructive delivery) and the furniture in her bedroom (constructive possession w/actual delivery)
    - P was not entitled to a life insurance policy b/c there was no manual delivery
    - Policy – encourages people to have wills
  - Gruen v. Gruen – can there be a valid inter vivos gift of a chattel when there is no delivery and the donor wishes to retain a life estate?
The court held that although the chattel was capable of being manually delivered, it would be non-sensical to require it
- Donor wished to retain possession but clearly intended to transfer present ownership and title

PART TWO: THE SYSTEM OF ESTATES

POSSESSORY ESTATES
- Fee Simple – most important estate, as close to complete and absolute ownership
  - Owner can sell estate or give it as a gift
  - Upon owner’s death, it will pass to his heirs
    - Only a dead person can have heirs
    - Issue → Ancestors → Collateral
    - If a person dies w/o heirs – property escheats to state
  - Important aspects of the transition from early to modern law
    - Rise of heritability
      - Per stirpes – each child gets an equal share
    - Rise of alienation
- Fee Tail – developed as a way to keep land in the family forever
  - O has 3 sons (A, B, C) – conveys land to A and his heirs, then to B and his heirs, then to C and his heirs
    - Once A’s line of descendents is gone, goes to B’s line
- Life Estate – only have interest in property during tenants life time
  - Always creates a future interest
    - If future interest is not specified, then property will go back to grantor (reversion)
  - Life tenant can sell her interest to another – life estate pur autre vie
    - Interest in property is still measured by the original life tenant’s life
  - White v. Brown – court had to decided whether will created a life estate or a fee simple w/an attempted restraint on alienation
    - Law always prefers fee simple to life estate, and dislikes partial intestacy
    - Restraints on alienation are void – court found there to be a fee simple created by the will
    - 4 main objections to restraints on alienation
      - Such restraints make property unmarketable
      - Restraints tend to perpetuate the concentration of wealth
        - Owner cannot sell and consume proceeds
      - Restraints discourage improvements on land
        - Won’t put $ into land if you can’t profit from it
      - Restraints prevent owner’s creditors from reaching the property
    - Problems w/technicality in drafting will
      - Useful b/c it allows a drafter to confidently portray exactly what they mean and the document remains after person dies
      - Problematic when lay person tries to draft their own will
There are a limited amount of forms an estate can take and courts have to place a will’s intent into a box.

- **Baker v. Weedon** – a court cannot order the sale of land unless it is in the best interest of all parties involved
  - Law of waste – one party should not be able to use the land in a way that reasonably interferes with the expectations of another party’s interest
    - Affirmative/voluntary waste – liability arises from affirmative acts by the present tenant that substantially reduce property’s value
      - Example – cutting down trees, strip mining
      - Open mines doctrine – if open, can take it all out
    - Permissive waste – doing nothing which substantially reduces the value of the land
      - Example – negligence in upkeep of land

- **Seisin** – formalistic concept, analogous to ownership
  - Conveyed through a ceremony called enfeoffment
  - Livery of seisin –
    - Same a delivery requirement of personal property
    - Served same functions – clarity, wrench of delivery

- **Defeasible fees**
  - Fee simple w/statement of intent is still fee simple absolute
  - Fee simple determinable (FSD) – fee that could last forever but which ends automatically when a certain event occurs
    - Created by language in grant that grantor is conveying interest only until the event happens
    - Magic words – until, while it is used for, only for the duration that it is used for, as long as, etc
    - Grantor retains the possibility of reverter
  - Fee simple subject to condition subsequent (FSSCS) – estate only reverts back to grantor/heirs when grantor/heirs do something to get it back
    - Grantor retains a right of re-entry
    - Example of language – upon condition that, provided that, but if,
      - This language plus language for re-entry upon occurrence of event = FSSCS, right of entry
  - Heritability of future interests
    - Majority rule – freely alienable and inheritable
  - Statute of limitations
    - For FSD – starts to run as soon as event happens
    - For FSSCS – starts to run when grantor exercises right of entry
      - Enter land, file lawsuit, give notice (letter, etc)
  - **Marenholz v. County Board of School Trustees** – IL followed minority rule that O’s future interests were not transferable inter vivos
  - **Mountain Brow Lodge v. Toscano** – court did not find a restraint upon alienation b/c of charitable donation

- **Future Interests**
  - Considered a property right even if it is a contingent interest
  - Interests retained by O/transferor
- **Reversion**
  - If not explicitly stated, law will assume reversion
  - Always vested
  - Freely alienable – can be deed to another party, still called a reversion
- **Possibility of reverter**
  - Interest retained by O when conveying FSD
- **Right of entry**
  - Interest retained by O when conveying FSSCS
  - Interests granted to 3rd parties
  - Remainders generally – must be capable of becoming possessory immediately upon the termination of the preceding estate
    - 4 requirements
      - Must be retained by transferee not grantor
      - Must be created at the same time as the estate before it
      - Capable of becoming possessory immediately upon termination of the preceding estate
      - Previous estate must be of lesser interest than that possessed by O
  - Vested remainder – must be given to an ascertained person and not subject to a condition precedent
    - Indefeasibly vested remainder – is certain to vest is person name or their heirs regardless of what happens
    - Vested remainder subject to open – gift to be shared by a class of people and the class may grow
    - Vested remainder subject to complete divestment – remainder that could be divested by a condition subsequent
      - i.e. To A for life, then to B and her heirs, but if B does not survive A then to C and his heirs
    - Preferred over contingent remainders
      - Accelerate into possession upon termination of preceding estate
      - Assignability
      - Rule of destructability of contingent remainders
      - Not subject to rule against perpetuities
  - Contingent remainder – when there is not an ascertained person OR there is a condition precedent
- **Executory interests**
  - Springing – divests grantor
  - Shifting – divests another transferee
- **IMPORTANT RULE** – 1st vested interest → 2nd executory interest; 1st contingent interest → 2nd contingent interest
  - Statute of Uses created fee simple subject to an executory limitation
    - When condition occurs, a third party divests the original interest
Example: From O to A, but if the property ever stops being used as a school then to B
  • A has a fee simple subject to an executory limitation
  • B has a shifting executory interest

**Rule against perpetuities**

- **Basic statement** – lives in being plus 21 years
- **Restricts against remotely contingent future interests**
- **Purpose** – promote alienability and marketability of land
- **Interest must vest or fail to vest w/in 21 years after the death of some life in being at the time of the creation of the interest**
  - If it is possible the interest will vest later than 21 years after lives in being, the interest is invalid and is struck from the deed
- **Measuring life needs to be somebody who can prove that the interest will vest w/in period of rule against perpetuities**
- **Scope of rule** – applies to contingent remainders, vested remainders in a class, and executory interests
  - Does not apply to present possessory estates, reversionary interests in grantor, or vested remainders in an individual
- For inter vivos transfers – looks at present conditions
- For wills – look at conditions when will takes effect

**CO-OWNERSHIP AND MARITAL INTERESTS**

- **Common Law Concurrent Interests**
  - **Types, Characteristics, Creation**
    - Co-ownership – when two or more people have concurrent rights of present or future possession
    - **Tenants in common**
      - Separate but undivided interest in property
      - No ROS, but interest is descendible and alienable
    - **Joint Tenants**
      - Have ROS
      - Four unities
        - Time – interest of each tenant must be acquired or vest at the same time
        - Title – must acquire title by the same instrument or joint adverse possession
        - Interest – must have equal undivided shares and identical interests measured by duration
        - Possession – must have right to possess the whole
      - If one of the unities is severed – JT becomes TIC
  - **Tenancy by the entirety**
    - Created only in husband and wife
    - Four unities plus marriage
    - Cannot defeat ROS by conveyance to a third party
  - Law usually assumes TIC unless JT is expressly declared
May require express ROS provision

- Severance of JT
  - Harms v. Sprague – JT cannot be severed by a mortgage, and upon mortgagor’s death the lien does not survive against the property
  - Severance issue – court holds to lien theory of mortgages, that title is given to mortgagee for a limited purpose, therefore mortgagor is still the legal owner
  - Survivorship issue – mortgage is extinguished at JT’s death, no interest to pass to mortgagee

- Relations Amount Concurrent Owners
  - Each T is entitled to possession of the whole yet cannot exercise this right w/o coming into conflict w/ other T’s reciprocal right
  - Partition
    - Only available to JT and TIC, not TBE
    - Partition in kind – physically divides property
    - Partition by sale – sale of land, proceeds divided by relative ownership interests
    - Delfino v. Vealencis - partition by sale should only be ordered when the physical division of land is impractical or inequitable and the interests of all owners would be better served by a partition by sale
  - Sharing the Benefits and Burdens of Co-ownership
    - Spiller v. Mackereth – co-T in possession is generally not liable to the other for their use of the property except when there is an agreement to pay rent or there is an ouster (beginning of running of statute of limitations for AP or liability of an occupying T for rent to other co-Ts)
      - No AP – P acknowledged co-tenancy
      - No ouster – locks were to protect merchandise, did not deny D right to enter
    - Swartzbaugh v. Sampson – co-T can lease away their interest (but not more) and not sever a JT (lease does not transfer title, only allows possession)

PART THREE: LEASEHOLDS: THE LAW OF LANDLORD AND TENANT
CHAPTER 6: TRADITION, TENSION, AND CHANGE IN LANDORD-TENANT LAW

- Leaseholds Generally
  - Do not sever tenancies
  - Lower than a life estate in hierarchy, even though they can last longer
  - Subordinate to freehold estates
  - Treated as personal property, but estates in real property
  - 3 features in common
    - Estate in the tenant
    - Reversion in landlord
    - Exclusive possession and control of land by tenant
• Possible 4th requirement - lease
  • The Leasehold Estates
    o The Term of Years
      • Estates that last for some fixed period of time
      • Can be terminable earlier upon some event or condition
        • i.e. non payment of rent
      • No notice of termination is necessary to end estate
      • Automatically terminates at the end of the fixed period
      • Death of L or T has no effect, tenancy will persist
      • Statute of Frauds applies – has to be in writing if more than one year, less than on year oral agreement is okay
        • If more than one year and not in writing, term of years becomes tenancy at will, but if rent payments then can become a periodic tenancy
    o Periodic Tenancy
      • Lease for a period of fixed duration that continues for succeeding periods until either L or T gives notice of termination
        • Ex. – from month to month, or year to year
      • If notice is not given, period automatically extended
      • Common law – 6 mo notice required to terminate year to year lease
        • For terms less than one year, notice must be give equal to the length of the period, not to exceed 6 months
        • Notice must terminate tenancy on the final day of the period, not in the middle
        • Death of L or T has not effect on duration
    o Tenancy at Will
      • No fixed period that endures so long as both L and T desire
      • Ends when one party terminates or at the death of one party
      • Must be a bilateral power of termination
        • Unilateral power of termination then something else
      • Garner v. Gerrish – lease which grants lessee the right to terminate does not automatically grant the lessor the right to terminate if the lease is not explicitly for a tenancy at will
        • Court wants to follow the intent of the grantor
    o Tenancy at Sufferance
      • When T remains in possession after tenancy is terminated
      • Common law gives L two options
        • Eviction (plus damages)
        • Consent (express or implied) to the creation of a new tenancy
      • Crechale & Polles v. Smith – once L elects to treat a hold over T as a trespasser and refuses to extend the lease, but then fails to pursue eviction and accepts monthly rent checks, he in effect agrees to the creation of a periodic tenancy
        • P tried to order D to vacate then gave implied consent to a new periodic tenancy measured by months
The Lease
- Lease gives rise to L-T relationship with certain rights and duties
- Conveyance vs. Contract
  - Conveyance – transfers possessory interest in land, creates property rights
  - Contract – contain a number of promises, creates contract rights
    - Courts rely on K principles when looking at
      - Does material breach by one excuse performance by the other?
      - If premises are destroyed, is T still liable for rent?
      - If T wrongfully abandons, must L mitigate damages?
      - Is a warranty of quality implied in leases?
- Form leases – possible to have unconscionable terms

Delivery of Possession
- Hannan v. Dusch – who is required to evict a holdover T – L or new T?
  - American rule – L is only required to place T in legal possession but not actual possession (majority rule in US)
  - English rule – T may terminate lease and sue L for damages b/c L has the duty to deliver actual possession
    - Policy – most in line w/good faith and fair dealing

Subleases and Assignments
- Sublease – from one lessee to another of less than the entire estate remaining
- Assignment – from one lessee to another of the entire remaining estate
- 2 approaches for determining if sublease or assignment
  - Formal approach
    - Sublease if conveying less than entire interest
    - Property law approach
  - Intention of the parties
    - What did the parties intend to create?
    - Courts look to the actual words uses, but this is not dispositive
  - Contract approach
- Privity of estate – mutual or successive relationship to the same right in property such that exists b/t L and T or their successors
  - All subtenants have privity of estate w/L
  - T who sublets remains in privity of estate w/L
  - T who assigns away interest no longer has privity of estate w/L
- Privity of contract – connection or relationship which binds 2 contracting parties
  - Parties to original lease are in privity of contract
  - Normally subtenants are not in privity of contract w/L
- Ernst v. Conditt – if assignment, then privity of estate b/t L and subtenant – subtenant liable for rent and L can sue subtenant directly. If sublease, no privity of estate b/t L and subtenant, L has to sue T
Kendall v. Ernest Pestana – policy against restraint on alienation and the implied K’ual duty of good faith and fair dealing favor the adoption of the minority rule that consent of an assignment can only be withheld for commercially reasonable objections

- NOTE – COMMERCIAL LEASE ONLY

- The Tenant Who Defaults
  - The Tenant in Possession
    - Berg v. Wiley: the only lawful means to dispossess T who has not abandoned or voluntarily surrendered but who claims possession adversely to a L claim of breach of written lease is by resort to judicial process
      - Represents minority view, but growing trend
      - Common law – L is allowed to use self help if L is legally entitled to possession and L’s means of reentry are peaceable
        - Remedies available to L
          - Accept surrender and relieve T of liability
          - L can retake possession to mitigate damages
            - T is still liable
          - Do nothing and sue for rent as it comes due
            - Some states impose duty to mitigate
  - The Tenant Who Has Abandoned Property
    - Sommer v. Kridel: L has a duty to mitigate damages where he seeks to recover rent due from a defaulting T. L has the burden of proving that he used reasonable diligence in attempting to re-let the premises
      - In line w/policy of good faith and fair dealing

- Duties, Rights and Remedies (regarding condition of leased premises)
  - L’s Duties: T’s Rights and Remedies
    - Early common law – implied covenant concerning title and possession but not about condition of premises
    - 2 ways disputes arose in regards to condition of premises
      - T might wish to vacate or pay less or no rent
      - T might be injured by defective premises and claim damages against L in tort
  - Implied Covenant of Quiet Enjoyment
    - 2 basic elements
      - L warrants that T will not be disturbed in possession by any other person w/superior legal title
      - L covenants that they will not actually or constructively evict T
        - Constructive eviction – substantial interference w/use and enjoyment of property which comes as a result of an act or omission of L or L’s agents
      - Common law – T has to abandon in order to sue under breach of implied covenant
- Trend – don’t have to actually abandon
- **Reste Realty v. Cooper** - Any act or omission by L which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes w/the beneficial enjoyment of the premises is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of T
  - Possible to waive covenant if you do not vacate in a reasonable amount of time
- If constructive eviction, always a breach of the implied covenant
  - Can breach by actual eviction or 3rd party w/superior title
- **Illegal Lease**
  - Version of an unconscionable K term
  - If lease is in significant violation of housing or fire code, and the violation is due to defects of which the L had actual or constructive notice, then the lease is illegal
    - T becomes a tenant at sufferance
    - L is entitled to the reasonable rental value of the premises notwithstanding anything in lease about a higher rent
    - Doesn’t require eviction – T holding an illegal lease can continue to exercise some right of possession
    - But tenant at sufferance can be evicted or bound over by L to an addition term – binding over would be subject to illegal lease unless L fixes the violation
    - Useful defense for T who get sued by L for nonpayment of rent
- **Implied Warranty of Habitability**
  - **Hilder v. St. Peter** - In any residential rental, an implied warranty exists that L will deliver and maintain premises that are safe, clean and fit for human habitation
    - Implied warranty of habitability – does NOT render pointless doctrines of quiet enjoyment, constructive eviction and illegal leases
      - Many jurisdictions haven’t adopted the warranty
      - Warranty may not apply to all residential leases
      - Warranty may not apply to commercial leases
  - Implied warranty of habitability is un-waiveable
  - Applies to all tenancies
  - T who enters w/ knowledge of defects has not assumed the risk
  - Implied on all residential leases
  - 6 elements of the warranty
    - T can use a substantial violation of housing code as prima facie evidence of violation of warranty (goes to health and safety of T)
    - T has to bring defect to L’s attention and allow reasonable time for repair
    - Regular K remedies are available to T
Damage is the difference b/t value of premises as warranted and value as is
- T allowed to recover damages for discomfort and annoyance that arise from the breach
- T can withhold rent if there is a breach
  - L has burden of bringing suit
  - T does not have to abandon property to use breach as a defense for non payment of rent
- If T ends up fixing defect himself, can charge L for cost of repairs
- Punitive damages are available if breach is willful or wanton
  - Still need constructive eviction b/c it applies to commercial leases
  - No residential T needs to use constructive eviction anymore

PART FIVE: LAND USE CONTROLS
NUISANCE
- Introduction
  - One should use one’s own property in such a way as not to injure the property or person of another
  - Externalities
    - Cost of using property that the owner does not take into account when deciding to use that property in a certain way
    - Cost of inconvenience to neighbors
  - Morgan v. High Penn Oil – a private nuisance exists when one makes an improper use of his own property and in that way injures the land or some incorporeal right of one’s neighbor
    - Two kinds of nuisance
      - Nuisance per se – nuisance at all times under all circumstances regardless of location or surroundings
        - Nuclear waste dump, blasting, highly dangerous or illegal activities, nuclear testing
      - Nuisance per accidens – becomes a nuisance by virtue of its location or by how it is operated
    - Two kinds of private nuisance
      - Intentional act – nuisance when conduct is unreasonable under the specific circumstances
      - Unintentional act – actionable nuisance if conduct is negligent, reckless or ultra-hazardous
- Public vs Private Nuisance
  - Public – affects entire community at large (air pollution, loud noises)
  - Private – affect a particular piece of land, interferes w/use and enjoyment
- Unreasonableness
  - 6 factors for whether an activity is reasonable
    - Whether activity is customary or suited to the area
• Whether activity creates observable effects that most people would find to be unreasonable or disagreeable
• Whether activity is carried out by methods that produce more disturbance than other available methods
• Whether activity is of little value to D
• Whether activity has value to society
• Whether activity was being engaged in when P moved to the land

o 2 approaches to applying the reasonableness factors
  • Morgan approach – unreasonableness is an order of magnitude
    • Threshold of unreasonableness when it becomes a nuisance as a matter of law
  • Restatement approach – balancing test
    • Whether gravity of harm outweighs the conduct’s utility
• Difference b/t approaches
  • Restatement balances equities to decide if there is a nuisance
  • In cases w/moderate injury but substantial public interest in letting it continue, Restatement would find no nuisance and therefore no damages
    o Morgan/Majority rule – nuisance, but would not issue an injunction but could allow damages

• Remedies
  o Estancias Dallas Corp. v. Schultz – court balances the equities, balance injury to P against injury to D to abate the nuisance and the interest to society for allowing the nuisance to continue (doctrine of necessity)
  o Boomer v. Atlantic Cement Co. – court allowed the injunction to be vacated upon payment of damages b/c of the hardship on D and society in general if an injunction was issued and enforced
    • Example of a public nuisance
  o Spur Industries v. Del E. Webb Development – example of coming to the nuisance – D was aware of P’s presence and activities prior to moving in
    • Even though D has unclean hands, P’s activity is a public nuisance – issues an injunction but D has to indemnify P for any costs
  o Four possible ways to resolve nuisance
    • Abate activity by granting an injunction (Estancias, Morgan)
      • Nuisance – P wins
    • Let activity continue if D pays damages (Boomer)
      • Nuisance – D wins but pays
    • Let activity continue by denying relief
      • No nuisance – D wins
    • Abate activity if P pays damages (Spur)
      • No nuisance (may be nuisance but in a different sense that seen in Spur) – P wins but pays
  o Factors for deciding if there is a public nuisance
    • Does conduct interfere w/public health, safety, peace, comfort or convenience?
- Is conduct proscribed by statute or ordinance?
- Is conduct of a continuing nature or has produced a permanent or long-lasting effect?
- Must be substantial harm caused by intentional and unreasonable conduct OR conduct that is negligent, reckless or abnormally dangerous
  - Only members of the public who can show special injury of a different kind than that suffered by the general public can bring suit for public nuisance

**THE LAW OF SERVITUDES**

- **Introduction**
  - Servitudes – interests in land, binding and benefiting not only the parties to the agreement but also their successors
  - Types of servitudes
    - Easements (affirmative and negative)
    - Covenants (real covenants and equitable servitudes)
    - Profits – right to enter and take something from the land
    - Licenses
  - Easements – legal interest in land
    - Granted by a servient owner, gave a neighbor the right to make some specific use or restrict some specific use of the servient land
    - Easement appurtenant – gives the right to whomever owns the land that the easement benefits (dominant tenement)
      - Usually transferable – cannot be severed from the dominant tenement w/o consent of both dominant and servient tenants
      - Easement goes w/the land if it is sold
    - Law favors easements appurtenant
    - Easement in gross – benefits easement owner personally rather than in connection w/use of the land the person owns
      - Can be alienated by dominant tenant w/o servient tenant’s consent
    - Creation of easements
      - By prescription – adversely possession an easement
        - Same five elements as adverse possession of real property
        - Hostility/adversity – use easement in the absence of permission, license or other indicia that you are subordinate to the rights of the land owner
          - Hostile in the use of the land, not hostile in claiming title in the land
        - Exclusivity – always shared use since easement is use of another person’s land
          - Must have a different claim than the person you are sharing use with
      - Express provision
        - **Willard v. First Church of Christ, Scientist** – although the old common law rule held that a grantor could not reserve

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17
an easement interest to a third party, court recognized
grantor’s intent since no reliance on old rule
  o Reservation – provision in deed creating a new
    servitude which did not exist before as an
    independent interest
  o Exception – provision in deed that excludes from
    the grant some preexisting servitude on the land
  ▪ By implication – must arise from the division of one plot
    • Necessity
      o Othen v. Rosier – must show that dominant and
        servient estates were previously one plot, roadway
        is a necessity and not a mere convenience, and the
        necessity existed at the time of severance of the two
        estates
    • Prior Existing Use/Quasi-easement
      o 3 factors
        ▪ Use of land for quasi-easement must be
          apparent
        ▪ Must be continuous and permanent
        ▪ Reasonably necessary to the enjoyment of
          the quasi-dominant tenement
      o Van Sandt v. Royster – use was apparent and very
        necessary to enjoy the land
  ▪ Estoppel
  ▪ Eminent domain
• Licenses
  o Oral or written agreement given by owner allowing licensee to do some
    act that otherwise would be a trespass
  o Generally revocable, but 2 exceptions
    ▪ License coupled w/an interest in land
    ▪ License that becomes irrevocable b/c of estoppel
  o Holbrook v. Taylor – if licensee builds substantial structures or make a
    substantial investment in land b/c of reliance on license, it cannot be
    revoked
• Covenants
  o Real Covenants – agreement b/t 2 land owners that one of them will do or
    won’t do something in regards to their land
    ▪ Privity of contract b/t 2 owners in the agreement
    ▪ 4 requirements necessary for a covenant to run w/the land
      • In writing – Statute of Frauds
      • Intent – parties must intend for covenant to run w/land
      • Must touch and concern the land
        o Covenant must increase value of benefited land,
          increase its usefulness to its owner or decrease the
          value of the burdened land
• Privity of estate – must have some form of successive relationship to the land from one of the covenanting parties
  o Horizontal privity – relationship b/t grantor/grantee
    ▪ Abolished by Restatement
  o Vertical privity – required for both benefited and burdened estate for covenant to run
    ▪ Successor’s estate must be of the same duration as promisor
    ▪ For benefit to run, just need to transfer some portion of the estate
  ▪ Remedy – always damages, and not injunctive relief (equity)
  o Equitable Servitudes
    ▪ Tulk v. Moxhay – would have been a real covenant but English law required L-T relationship for the burden to run. Would have been inequitable to deprive P of benefit since D knew of the covenant when he purchased the land
      • Wouldn’t have been enforceable against subsequent bona fide purchasers that take w/o notice of covenant
      • Equitable servitudes are interests in land (distinguished from real covenants, blend of K and property)
    ▪ 4 requirements for equitable servitudes
      ▪ Writing
      ▪ Intent
      ▪ Touch and concern the land
      ▪ Notice – replaces privity of estate
  • Validity of Servitudes
    o Valid unless it is illegal or unconstitutional or violates public policy
      ▪ Violates public policy if it:
        ▪ Is arbitrary, spiteful or capricious
        ▪ Unreasonably burdens a fundamental constitutional right
        ▪ Imposes an unreasonable restraint on alienation
        ▪ Imposes an unreasonable restraint in trade or competition
        ▪ Is unconscionable
    o Shelley v. Kraemer – unreasonably burdens a constitutional right
      ▪ Unenforceable b/c court action to enforce the racially restrictive covenant would be state action (prohibited by 14th amendment)
      ▪ Problem – enforcement of any covenant would be state action so the exception swallows the rule
      ▪ Covenant is also an unreasonable restraint upon alienation
  • Common Interest Communities
    o Nahrstedt v. Lakeside Village – restrictive covenants contained w/in master deed are presumptively valid and enforceable unless they are unreasonable (burden imposed must substantially outweigh the benefit)

ZONING
• Zoning – attempt by legislative public bodies to control the uses of land through applicable rules and regulations
Big questions – To what extent do we want to allow zoning?
  - How much authority over controlling land use CAN we vest in zoning boards? – Constitutional question
  - How much authority SHOULD we vest in zoning boards?

Village of Euclid v. Ambler Realty Co. – issue – is the ordinance invalid in that it violates the constitutional protection ‘by attempted regulations which are unreasonable and confiscatory’?
  - Court sustains zoning as constitutional b/c it will protect single family homes from nuisance and allow people to use land and be free from unreasonable interferences

4 hallmarks of the Garden City mov’t
  - Separation of uses
  - Protection of the single family home (although inefficient use of land)
  - Low rise development
  - Medium density population

Zoning issues
  - Inherent segregation (class and race), culture re-enforcing effects

PA Northwestern Distributors v. Zoning Hearing Board – issue – whether a zoning ordinance which requires amortization and discontinuance of a lawful preexisting nonconforming use is confiscatory and violative of the constitution as a taking of the property w/o just compensation
  - Municipalities lack the power to compel a change in the nature of an existing lawful use of property – owner has a vested right that cannot be abrogated or destroyed unless it is a nuisance, is abandoned or is extinguished by eminent domain
  - Amortization and discontinuance of a lawful preexisting nonconforming use is per se confiscatory and violative of the state constitution

State ex rel. Stoyanoff v. Berkeley – court upholds aesthetic zoning ordinances here b/c it is tied to something that is objectively verifiable like property values

City of Ladue v. Gilleo – ordinance restricting signs on private property was deemed invalid b/c it violated the 1st amendment b/c it prohibits an entire form of communication