Blackstone – Commentaries on the Laws of England

- **Property** – those things which a man may acquire in and to such external things as are unconnected with his person
  - It is a gift from nature to all mankind
  - **Originally**, the idea was that the right of possession continued for the same time only that the act of possession lasted
    - It is not permanent property, but as long as you use it, it is yours and it is contrary to the law of nature to drive one away by force
    - But once you stop using the land, one may seize it without injustice
  - **As mankind increased** in number, craft, and ambition, it become necessary to entertain conceptions of more permanent dominion
    - Should be able to protect young, have shelter and safety...have a permanent home...thus private ownership rather than just the use of the thing
    - **Thus who bestow bodily labor upon their subject, which before was common to all men, is allowed to give the fairest and most reasonably title to an exclusive property therein**
    - As the population increased, it became more difficult to find new spots to inhabit, without encroaching on former occupants and by constantly occupying the same spot, the fruits of the earth were consumed without any provision for a future supply. Thus became the necessity of **agriculture**
      - But who would till it, if another might watch for an opportunity to seize it and enjoy the product of another’s labor.
    - Use property rules to structure society
      - Determine who has to work and who has to think
  - But how does property actually become vested?
    - **Occupancy/first taker** (some say this is a degree of bodily labor) also gave the original right to permanent property in the substance of the earth itself
    - **Owner must declare an intention to abandon it...losing it/hiding it does not allow someone else possession**
    - Can do this by exchanging/transfer of items
    - By death...though person can decide how he wants to dispose of it
      - He knows his work will not die with him
      - Plus, his heirs are the ones most likely around him at death thus the first to acquire the property

John Locke – Second Treatise of Government

- **Labor Theory of Property…Pro aristocracy**
- God gave the world to men in common for their support and the comfort of their being
- Although the earth is common to all men, every man has a property to his own person and the labor of his body are properly his...**labor thus gives a right to property**
  - Whatever he removes out of the state that nature provided and mixed his labor with, he thereby makes it his property
    - The labor includes that of his servants
- **The taking of any thing that is in common and removing it from the state nature leaves it in begins the property** and does not depend on the consent of all the commoners.
- But by giving us property, we are bound to it
  - We can enjoy as much as any one can make use of before it spoils. Beyond this is more than one’s share and belongs to others...no reason to labor for more than you can use
  - How do disparities in property arise then?
- But he can barter or exchange extra for things he will use before they spoil...plums for nuts
- Thus came the use of money, some lasting thing that men would exchange for the truly useful, but perishable supports of life
- Mankind benefits since there are more things available in the market (common stock of mankind is increased since people are more likely to work hard and more is likely to be produced)
- But can lead to inequity because one can have much more than another
  - One who appropriates land to himself by his labor, does not lessen, but increases the common stock of mankind
  - Labor is what adds the value to things
  - This is economically efficient, but what about group labor?

Charles Reich – The New Property

- The Public Interest State
  - Property rights are a creature of the gov...they are no longer a natural right
  - Property is not owned, but held conditionally as long as the gov. agrees
  - Triumph of society over private property?
  - The Erosion of Independence
    - The recipient of largess (gov funds or gov contracts), whether an organization or an individual, feels the government’s power through additional regulations, inspections, and pressures
    - It affects businesses, universities, businessman, teachers, and the professional man
  - Pressures Against the Bill of Rights
    - Largess brings pressure against first amendment rights (freedom of speech)
    - You are free to exercise your rights, but at the risk of economic loss or loss of livelihood
  - The New Fuedalism
    - Wealth flows from gov and held to it’s recipients conditionally, subject to confiscation in the interest of the state.
    - Flemming v. Nestor
      - Man deported and wife’s social security benefits cut off because of a retroactive law due to his having joined the communist party.
      - It did not matter that his joining was legal at the time, taking his retirement insurance was not unconstitutional
- Property and the Public Interest: An Old Debate Revisited
  - Property and Liberty
    - Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind
    - It draws a boundary between public and private power.
    - Like the Bill of Rights, property represents a general long range protection of individual and private interests, created by the majority for the ultimate good of all.
    - Why has the view been accepted today that property and liberty are separable things and there are conflicts between the two?
      - Great aggregations of property resulted in private control of entire industries and basic services capable of affecting a whole area
      - As corporations merged, they became private governments and sought the aid and partnership of the state and thus became part of the state
      - These changes led to a movement for reform, which sought to limit arbitrary private power and protect the common man
      - Property rights were considered more the enemy than the friend of liberty
      - Thus property was subjected to reasonable limitations in the interests of society
      - The power taken from corporations was given to the gov.
      - Today, it’s the combined power of the gov and corporations that presses against the individual
      - But the mere fact that the power is now derived from the majority does not make it less oppressive
      - The great error of the public interest state is that it assumes an identity between the public interest and the interest of the majority.
Largess and the Public Interest

- Public interest has meant that gov largess may be denied or taken away (an individual’s rights, liberties, and ability to work) if this will serve some legitimate public policy

Toward Individual Stakes in the Commonwealth

- If private property can no longer perform its protective functions, it will be necessary to establish institutions to carry on the work that private property once did but can no longer do

- Largess must begin to do the work of property
  - We need to recognize gov. largess as a new property (licenses, unemployment, social security, etc). Thus these are protected

Constitutional Limits

- Gov should not have the power to “buy up” rights guaranteed by the Constitution due to its role as dispenser of wealth

Procedural Safeguards

- Use it to restrain arbitrary action
- Prevent branches from mixing, fair procedures, due process

From Largess to Right

- There must be a zone of privacy for each individual beyond which neither gov. nor private power can push
- Confiscation if used at all should be the ultimate, not the most common and convenient penalty.
  - And if used, perhaps payment of just compensation would be appropriate.
  - The individual should not bear the entire loss for a remedy primarily intended to benefit the community
- Concept of right is most urgently needed with respect to benefits like unemployment compensation, public assistance, and old age insurance

What is the purpose of property?

- It creates a private sphere (division of society into public and private spheres)
- Greed
- Common good
- Encourages productivity (you get to keep what you earn…the fruits of your labor)
- Enhances productivity/efficiency
- Civilization/stability
- Control/propriety (keep existing social order)
- Allocation of scarce resources
- Promote self/individual development
- Dispute resolution

First Possession: Acquisition of Property by Discovery, Capture, and Creation

Arguments for first in time

- It is a certain and clear rule
- Better than alternatives
- Allows them to continue productivity

Arguments against:

- It rewards speed or luck
- Unfair distribution/may not be most productive

Acquisition by Discovery
Johnson v. M’Intosh – same piece of land given to Johnson by the Indians and M’Intosh by the gov.

European nations claimed exclusive title to land by discovery + possession (put something into the land) (not just first in time here) subject only to the right of occupancy in the Native Americans (though the right of occupancy can be extinguished)

- Johnson just bought this right of occupancy
- Locke: Indians were not first in time because they did not put labor into land (did not farm it)

Alternative holding: can also get title to land by conquest…if you put enough labor into fighting the land, then you take over the land and the people

- Title by conquest and maintained by force

Acquisition by Capture

- Summary
  - Wild animals
    - Mere chase is not enough. It must be captured or practically certain of capture (mortally wounded or trapped).
    - A competitor can interfere with another’s attempt to capture only if he intends to capture the animal himself

  - Pierson v. Post – A pursues the fox; B sees the fox and kills it
    - Majority/Formalist
      - First possession or first pursuit?
        - Pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be mortally wounded or actually taken
        - Occupancy = physical possession = pursuit + mortal wounding
      - Rewarding capture, an objective act, is a clear rule that would avoid further disputes…people know what to expect
    - Dissent/Instrumentalist…first in time is first pursuit
      - Property in animals may be acquired without bodily touch, provided the pursuer be within reach or have a reasonable prospect of taking, what he has thus discovered with an intention of converting to his own use
      - Look to standards/custom: hot pursuit = right to first possession/good sportsmanship
      - Thought more pernicious beasts would be thus captured (not for sure)

  - Ghen v. Rich – fin-back whale killed by fisherman, found by another
    - Custom, if a more effective way of getting animals killed, may dictate that a captor doesn’t have to acquire physical control over the animal…otherwise no one would bother to hunt whales
    - Both win…one gets whale, the other gets the finder’s fee
    - When should custom be embraced
      - It governs an entire industry
      - It has limited application
      - It is a custom of long standing
      - Here if you mark it (some physical mark/possession), follow the custom in this community
      - Problems with custom: externalities not taken into account, it could be an archaic rule, factual problem of knowing what the rule is, overharvesting, and limited application
      - Can be resolved without custom…Pierson v. Post…first to mortally wound

  - Keeble v. Hickeringill – PP put out decoys to attract ducks and DD shoots his gun to scare them away
- **A person cannot interfere in another’s livelihood unless he is doing so for his own livelihood** (method was malicious interference with trade)
  - only if he wants to capture the animal himself (thus it promotes killing, not conservation) (values industriousness)
  - competition is the only exception
- PP has constructive possession (enough since he owns the land)… ratione soli…it was on his land, but once it leaves his land…it’s no longer his
- Law is structured to max mkt and killing of ducks

- **Harold Demsetz, Toward a Theory of Property Rights (page 48)**
  - **The Concept and Role of Property Rights**
    - Law should be an instrument of whatever social policy we want to create in the world
    - Property rights specify how persons may be benefited and harmed, and, therefore, who must pay whom to modify the actions taken by persons.
    - **If transaction costs are sufficiently low, economic incentives are going to cause resources to be used efficiently…they will bargain around the table (Coase Theorem…allocative efficiency, not distributive efficiency)**
    - **Externalities**: external costs, external benefits, and pecuniary, as well as nonpecuniary externalities…some effect X ignores/does not take into account because it falls on others…the cost of the activity of X doesn’t have to be borne by X
      - As a consequence, resources tend to be misused or misallocated
    - A primary function of property rights is that of guiding incentives to achieve a greater internalization of externalities
    - **Ways to internalize externality** (ex. Richard’s driveway, smell and noise annoys neighbors)
      - Those affected buy one not affected (pay him…collective action/freerider prob)
      - Make it a tort (noise, cost of lawyers)
      - Create gov regulation (license, enforcement and oversight problems)
      - Make it all have one owner (internalizes it…beauacratic inefficiency…don’t care as much)
  - **The Coalescence and Ownership of Property Rights**
    - **Communal ownership** – right which can be exercised by all members of the community
      - If one seeks to max the value of his communal rights, he’ll overhunt and overwork the land be some of the costs of his doing so are borne by others
      - Every member can agree to curtail the rate at which they work, but the negotiating and policing costs could be high
      - Results in high externalities
    - **Private ownership** – community recognizes the right of the owner to exclude others from exercising the owner’s private rights….this is what he suggests
      - the owner acts as a broker whose wealth depends on how well he takes into account the competing claims of the present and future
      - concentration of benefits and costs creates incentives to utilize resources more efficiently
      - But he does not economize in the use of his land in a way that takes into account the effects he produces on the land rights of others
      - The few externalities that remain do not affect all owners and thus it will be necessary for only a few to reach an agreement that takes these effects into account
        - The cost of negotiating an internalization of these effects in thereby reduced considerably.
    - **State ownership** – the state may exclude anyone from the use of a right as long as the state follows accepted political procedures for determining who may not use state-owned property
    - **Free ride** – the freerider reasons that no contribution to a group payment is necessary, because the contributions of others will amount to enough to induce X to change, so that the freerider benefits at no cost
  - **Criticism**
- How does the transformation from common ownership to private property occur since there must be cooperation for it to happen...but cooperation was the problem of common ownership
- Custom can work as an effective means of common resource management and impose less cost than private ownership
- Coase theorem...talks about allocative efficiency, but not distributive efficiency
  - Allocative...are resources being used to their highest and best use
  - Distributive...not really about efficiency...distribution of ownership...is it fair to have this distribution of ownership...strong could take from weak

**Acquisition by Creation**

- **Summary**
  - The assertion that if you create something – if in that sense you are first in time – then that something is yours to exploit for you expended labor and money.
  - But the as we see in the following cases, the fruits of your labor are not always yours alone to exploit

**Copycats:**

- **International News Service v. Associated Press** – DD sought to restrain the pirating of their news by the PP...both gather and distribute news for profit
  - The news agency has a quasi-property interest in news it has gathered and can prohibit competitors from disseminating the news until its commercial value has passed away
  - It appropriates the work of others...what others have sown (labor and investment) and amounts to an unauthorized interference with the normal operation of complaint’s business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to the defendant since he’s not burdened with any part of the expense...unfair competition
  - Misappropriation – can’t sell complainant’s goods as its own
  - If it went with INS, it would diminish the incentive for news gathering (similar to Pierson v. Post)
  - Public can benefit from imitation just as long as freedom to imitate doesn’t reduce the incentive to produce the news in the first place

- **Cheney Brothers v. Doris Silk Corp. (page 64)** – PP manufactures many styles of silk, one of which DD copied and undercut the price of
  - To avoid monopoly and encourage competition, the common law allows copying and imitation
  - Judge binds INS v. AP to its own facts to distinguish it

- **Smith v. Chanel, Inc. (notecase)** – sued another for claiming there product was the equivalent of Chanel #5
  - Imitation of an unpatented product (Chanel #5) is allowed because it encourages competition
  - The unimpeded availability of substantially equivalent products permits the normal operation of supply and demand to yield the fair price society pays for a given commodity...serves an important public interest

  - In a mkt economy, granting one exclusive rights to property is an effective way of allocating scarce resources
  - Granting exclusive rights to information, does not, however, necessarily promote a market economy.
  - Competition depends upon imitation
  - The public as a whole may be better off, as long as this freedom to imitate doesn’t destroy the incentive for people to come up with new devices

- **Pro property rights**
  - Economic (encourages those to put their labor into it)
o Lockean/morality argument...you put your labor into it

- Against property rights
  o Economic (consumption incentives/better prices)
  o Share the wealth (distributive justice)
  o Improvements
  o Public goods argument
    • Pure public goods have two characteristics: Once the good is provided, it is impossible to prevent anyone from consuming it; and consumption by one person does not diminish or otherwise affect the ability of others to consume as well (stock market trading tips)
    • Solution that Congress has provided to this public goods problem
      o Patents, copyrights, and trademarks...grant a limited monopoly over protected material...a monopoly to promote creative activity, but limited in order to advance competition
      o Patent – 20 years – creator has been rewarded
        • Things you can’t patent
          • Fundamental ideas
      o Copyright
        • You get life + 70 years
        • Why?
          • Gives two generations of protection...its enough to reward those who invent
    • If our goal is to max production, the peg should be set at the point where copyright only allows enough to give them economic benefit
    • Moral: reward they deserve for creating the music in the first place
  o Virtual Works, Inc. V. Volkswagen of America, Inc. – company registered vw.net for the purpose of selling it to Volkswagen at huge profit
    • Found PP engaged in cybersquatting
      • the deliberate, bad-faith, and abusive registration of Internet domain names in violation of the rights of trademark owners
      • practice of registering “well-known brand names as Internet domain names” in order to force the rightful owners of the marks to “pay for the right to engage in electronic commerce under their own brand name”
    • Under the ACPA, a person alleged to be a cybersquatter is liable to the owner of a protected mark if that person:
      • Has a bad faith intent to profit from that mark (pg 71 for details)and
        • Safe harbor – bad faith intent shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was fair use or otherwise lawful
      • Registers, traffics in, or uses a domain name that
        • In the case of a mark that is distinctive...is identical or confusingly similar to that mark
        • In the case of a famous mark is identical or confusingly similar to or dilutive of that mark
    • Since Volkswagen first owned the ownership of VW, they are first in time and have possession...they own it...trademark...consumer association
    • The ACPA Rule consequence
      • Not allocative rule, otherwise they’d bargain around it...Coase theorem
      • This is a distributive case...they don’t have to bargain around the rule
      • Legal phrasing gives the entitlement to the people who expended the effort and money

The Right to Include, The Right to Exclude
Jacque v. Steenberg Homes, Inc. – mobile home delivered through the land of PP
  ▪ The right to exclude (right to exclusive possession) others from one’s property is one of the most
    essential bundle of rights that are commonly characterized as property
  ▪ **Coase theory** doesn’t work…there are things more impt. than economic efficiency

State v. Shack – DD came on property to aid migrant farmworkers
  ▪ **Exception to right of exclusive possession**
  ▪ One must be allowed to receive visitors of their own choice, so long as there is no behavior
    hurtful to others (union workers and lawyer)….have right to unionize
  ▪ It has long been true that necessity, private or public, may justify entry upon the lands of another
  ▪ Constitutional law wins over property rights

Subsequent Possession: Acquisition of Property by Find, Adverse Possession, and Gift

Acquisition by Find

Summary

- If lost, finder is entitled to possession against all the world except the true owner
  ▪ **Exceptions**
  ▪ Finder is an employee, guest or if property is found in a highly private locus or is buried,
    then owner of locus gets possessory rights
  - If mislaid, owner of premises is entitled to possession against all the world except the true owner

Armory v. Delamirie – chimney sweeper finds jewel…jeweler gives boy ring without stones back
  ▪ Chimney sweeper as prior possessor has right to jewel or its value over jeweler (subsequent
    possessor)
  ▪ Right over everyone but the true owner…doesn’t have absolute property or ownership
  ▪ If jeweler pays and can’t find boy…who gets it?
    ▪ Sold his rights to the jewel…then the true owner gets it back…jeweler has taken the risk
  ▪ First in time trumps actual possession
  ▪ Jeweler is bailee….balor is the rightful owner
  ▪ Pro
    ▪ Clear rule is better than no rule
    ▪ Lockean…labor into it by finding it
    ▪ Utilitarian…bring it into society/into use
    ▪ ownership encourages the productive use of resources….will improve upon the good
    ▪ by giving property right to owner, give incentive to display and thus true owner might
      get it back

Hannah v Peel – (page 111) PP found brooch in house owned but not ever lived in by DD…PP was a
  ▪ soldier quartered in the house
  ▪ If the owner of the house hasn’t lived in the house, he is not in constructive possession of articles
    therein of which he is unaware…..need actual physical possession otherwise you don’t have
    constructive possession
  ▪ If DD had lived there or PP had been there unlawfully, DD would have gotten it

Bridges v. Hawkesworth – (note) PP found a bag of money at DDs shop
  ▪ Since the notes were incidentially dropped, by mere accident by the owner
  ▪ General right of finder to any article which has been lost, as against all the world, expect the true
    owner
o South Staffordshire Water Co. v. Sharman (note) – DD (employee) cleaned pool of water on land and found rings in the mud (private home)
  - PPs were freeholders of the locus in quo and exercise control of it and as such have a right to forbid anybody from coming on their land or in any way interfering with it
  - The possession of land carries with it possession of everything which is attached to or under that land, and, in the absence of a better title elsewhere, the right to possess it also
    • In constructive possession of the things on your land

o Elwes v. Brigg Gas Co. (note) – PP leased premises to DD, but was entitled to boat found embedded in the soil
  - If the object is found under or embedded in the soil, it is awarded to the owner of the premises, not the finder
  - Owners of the land expect that objects found underneath the soil belong to them….they are objects of the land itself

o McAvoy v Medina – PP found pocketbook in DD’s barber shop
  - Here it is mislaid (property that is intentionally placed somewhere then forgotten) rather than lost (property that the owner accidentally and casually lost)
  - Mislaid property goes to the owner of the premises
    • Helps facilitate its return as true owner is likely to return
  - Richards says it’d be better for owner to keep it for a bit and then return it…or split profit
  - Says it doesn’t really work/make sense

**Acquisition by Adverse Possession**

- The Theory and Elements of Adverse Possession
  - Richard R. Powell, The Law of Real Property
    • State of limitations – the period of time beyond which the owner of land can no longer bring an action, or undertake self-help for the recovery of land from another person in possession
      • Transfers interests in land without the consent of the prior owner

- Henry W. Ballantine, title by Adverse Possession
  • The policy rewards those using the land in a way that is beneficial for the community

- Oliver Wendell Holmes, The Path of the Law
  • It’s morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependent party

**Requirements of Adverse Possession**

- Generalization: use of the property in the manner that an average true owner would use it under the circumstances, such that neighbors and other observers would regard the occupant as a person exercising exclusive dominion.
- You own anything above and below your land (cave)
- You must actually possess the land
  o to be on it and even fence it
- An open and notorious possession
  o gives the actual owner notice that someone is taking their land OR
  o that a reasonable owner could find out upon investigation
- Must be exclusive/sole physical possession
  o Occupancy without permission…enforcing their fence
  o Can’t share with owner
- Must be **continuous**
  - Without abatement or interruption by the adverse possessor.
    - but don’t have to reside there or even use it for long periods
- Possession must be **hostile**
  - this is my property against all of the world
  - some claim of right/exclusion….your legal position is adverse to theirs
  - must be without permission of owner (so a lease wouldn’t work)

  - **NACHOE….IT’S NOT YOUR PROPERTY**

- If a land owner doesn’t bring an action to eject an adverse possessor in the statutory period, the owner is therefore barred from bringing an ejectment action and the adverse possessor has legal title

Why do we want adverse property? Doesn’t it sanction robbery?
- encourage productive use of land…not lie fallow for 20 years
- we have settled expectations of who owns what…legal ownership would show actual ownership
- to quiet title: resolve legal disputes as to that title….Howard v. Kunto
- rewarding expectancy, sentimental value

  - **Mannillo v. Gorski** – DD modified the design of her front steps causing them to encroach on PPs land to the extent of 15 inches…thought it was her land, but wasn’t
    - Maine doctrine
      - If a party through mistake encroaches on another’s boundary, an indispensable element of adverse possession is wanting
      - Rewards the possessor who enters with a premeditated hostility…the intentional wrongdoer…and disfavors an honest, mistaken entrant
    - **Connecticut doctrine**
      - The very nature of the act (entry and possession) is an assertion of his own title, and the denial of the title to all others. It matters not that the possessor was mistaken, and had he been better informed, would not have entered on the land
      - However, here there was only a minor encroachment, the court must decide whether the true owner had actual knowledge of the encroachment…if not, it’s not **open and notorious**
      - But if it’s not open and notorious, court can use equitable principles to allow the encroacher to buy/force a sale of that part of the law (neighbors at least get some money).

**Mechanics of Adverse Possession**

  - **Howard v. Kunto** – descriptions in deeds don’t fit the land the deed holders occupy for their summer homes
    - Even though DD only lived there for the summer, there was uninterrupted possession for they must only act “as ordinarily marks the conduct of owners in general in holding, managing, and caring for property of like nature and condition”
      - The predecessors who sold them the home also counts towards the adverse possession of 10 years if there’s privity of estate
        - Sufficient privity of estate (that a possessor voluntarily transferred to a subsequent possessor either an estate in land or physical possession) to result in tacking – joining of periods of possession of consecutive adverse possessor for establishing title by adverse possession
  - **Disabilities (page 161)**
    - if one is a minor, of unsound mind, or imprisoned, may bring an action within 10 years or remainder of 21 years (whichever is longer) after such disability is removed
    - But it must exist at the time when the cause of action occurred…even for heir…not born then doesn’t count
    - No tacking occurs….runs from the true owner
Adverse possession against the gov
  ▪ in common law, it can’t occur against the gov.
    ● no time runs against the king
  ▪ the gov however can still acquire land in adverse possession
  ▪ some states however do permit adverse possession against the gov on the same terms as private land

Acquisition by Gift

Types
  - Gift causa mortis
    o a gift in anticipation of death
    o if one doesn’t die, the gift is no longer is a gift
    o it's a substitute for a will
  - Gift inter vivos
    o a gift btw two people who are alive…and not actively in contemplation of death
  - A will

Requirements to make a gift:
  - Donative intent: one must manifest intent to make a gift to the donee
    o Intention can be shown by oral evidence
  - Delivery - requires objective acts…but if one has it, it’s hers (ring left by mother)
    ▪ Past…livery of seisen…symbolic ceremony transferring possession by delivering a clod of dirt or a branch to the grantee
    ▪ 1677 Statue of Frauds abolished livery of seisen and required a deed to pass title to land
    ▪ However, the ceremony of transferring possession still survives if the object transferred is on top of the land
    o Why do we want delivery requirement?
      ▪ Wrench of delivery…owner is aware of what he is doing
      ▪ Evidence to witnesses…it is clear…people see it…less issue of fraud
        ○ It’s a reliable, objective measure of grantor’s intent to give
      ▪ Giving evidence to donee that he has it
    o Only if manual delivery is not practical, two types of delivery may suffice
      ▪ Constructive – handing over a key or some object that will open up access to the subject matter of the gift…allows them to obtain possession and control of the object, but not everything inside
      ▪ Symbolic delivery – handing over something symbolic of the property given…often a writing stating the gift
  - Acceptance of the gift
    o Assumed if it’s valuable

  o Newman v. Bost (page 180) – housekeeper given bureau which had life insurance policy while DD was dying
    ▪ Where the things intended to be given are not present or where present are incapable of manual delivery from their size or weight, constructive delivery is allowed
    ▪ However, where the articles are present and capable of manual delivery, this must be had
      ○ policy could have been handed her just like the keys
      ○ gets anything the keys could open…constructive
      ○ bedroom furniture…gift inter vivos
      ○ she gets the furniture the keys open, just not what is inside
    ▪ Courts are against gifts causa mortis and says no such thing as symbolic delivery
    ▪ Want them to make a will…strong incentive to do so…make and example out of them

  o Gruen v. Gruen – PP wants painting left to him by his father
• A valid inter vivos gift of a chattel may be made which reserves a life estate for the donor can occur even if a donee never takes possession
• A remainder interest, which has no physical existence, can be transferred by written assignment, but not true for a present gift
• Delivery criteria: more lenient than Newman v. Bost
  • Must be flexible under the circumstances…represents modern view
  • Can be handed over must be handed over…that is for present right of possession…not future right
• The law will presume acceptance when a gift is of value to the donee

Chapter Three: Possessory Estates

Present Possessory Estates
- Life Estate
- Fee Simple
  • Remainder in fee simple
- Fee Tail
- Term of Years

Up from Feudalism
- Tenure
  • Each person’s position is defined in terms of his relationship to land.
  • Feudal pyramid: King…tenant in chief…mesne lord…tenant in demesne
    • Each got land in exchange for performing services to the one above them
    • Mesne lord – lord to those who stood below him in the feudal ladder and tenant to those above
    • Tenant in demesne – had seisen or posesory use of the land….the lords above him had the rights to services
- Feudal Tenures and Services

Fee Simple and how it developed
- Two things impt in the transition from status to contract
  • Heritability – ability of an owner to pass his lands to his heirs at death
    • Ownership of land can be perpetual
    • Allows people to have settled expectations in their use of the land
      • Otherwise when a tenant would die, the land would escheat to the lord/king…given only a lifetime tenure
    • In order to transfer property that is heritable, conyeances (documents by which interests in land would be transferred) must include the phrase to “A and his heirs”
  • Alienability - right of owner/holder of land to separate selves from the land…sell, give, convey interest in land at any time during life or death
- With the rise of these concepts, the fee simple estate in land developed as a freehold estate (not just a holding any longer)
- Closest to the Blackstonian ideal of sole and exclusive dominion

Rise of the Fee Simple Estate
- can be conveyed (alienable) to another (just ignore restrictions on alienability)
- passed under a will or descended to heirs
- creditors can reach the fee simple and sell it to pay debts in default
- it is absolute ownership and largest estate in terms of duration and may endure forever
- Can’t own more than a fee simple…there is nothing more
- Courts prefer Fee Simple

- Creation of a Fee Simple
Early common law: “to A and his heirs”
  - A’s son would get land if A still owned the land at his death, but has no interest in it during A’s lifetime
  - Today, “to A” is enough

Inheritance of a Fee Simple

- Concept of consanguinity (kinship)
  - Spouses have no consanguinity, they have affinity
  - Common law rights known as dower and courtesy

- Heirs
  - If a person dies intestate, descendant’s real property descends to the heirs
  - No one is a heir to the living…only know heirs at one’s death
  - Ignore spouses for now

Order
  - Issue (children/descendants)
    - Take to the exclusion of all others
    - But if child dies…share goes to that person’s children…issue per stirpes
  - Then ancestors (parents)
  - Then collaterals…all others related by blood
    - Siblings, nieces, aunts, cousins, etc.
  - Escheat – to the overlord in feudal times…now to the state

How it works today

- A - B

O dies, A and B get equal shares
A dies, but then A has two kids…B gets 50% and A1 and A2 get 25% each
A1 and A2 take by right of representation…as a rep of A

The Fee Tail

- arose out of the desire to make land inalienable…where current owner could not cut off the inheritance rights of his issue
- “to A and the heirs of his body”
  - descends to As lineal descendants generation after generation and expires when the original tenant in fee tail, A, and all of A’s descendants are dead.
  - When the fee tail ends, the land reverts to grantor or his heirs or other specified individual
    - Every fee tail has a reversion or remainder after it
- Now it’s only available in 4 states
  - The holder of the land doesn’t have a fee simple interest…depending on the state it’s either a life estate of fee simple
No new estates can be created
  - just fee simple, fee tail, life estate, and leasehold estate
  - to A and the heirs on his father’s side…look for closest estate applicable instead

Life Estate

- measured by life span, not years
- grantor of life estate controls who takes property at the life tenant’s death
  - supplemented fee tail as a device to control inheritance
- every life estate is followed by a future interest – a reversion in the transferor or a remainder in the transferee
- freely alienable: A can transfer life estate to B
B has a life estate *per autre vie*…a life estate measured by A’s lifespan
- If B dies during A’s lifetime, the life estate passes to B’s heirs until A dies
- Forfeiture restrictions are okay
  - White v. Brown – decedent left a will giving PP her home to live in and not to be sold…PP claimed a fee simple…DD’s (decedent’s ancestors) claimed a life estate leaving the remainder to them
    - First courts will look at intent/words of intestator and the surrounding circumstances
    - *Btwn a life estate and fee simple, courts will presume fee simple*
    - Presumption against partial intestacy…want to dispose of as much as possible
    - Here a fee simple, but the court voided the restraint on alienation as contrary to public policy (and contrary to the definition of a fee simple)

**Restraints on alienation**
- are disfavored because:
  - the property is not available for its highest and best use
  - perpetuates the concentration of wealth by not allowing capital to be dissipated
  - discourages improvements on the land…only make repairs for oneself
  - prevent owner’s creditors from reaching the property
- Restatement says that an absolute restraint on a fee simple is void
- But a partial restraint (limiting conveyances to certain persons or putting a time limit on the constraint) is valid, if under all the circumstances of the case, the restraint is found to be reasonable in purpose, effect, and duration
  - Baker v. Weedon – decedent left a life estate to the DD and at her death, to her children. If she died without issue, the property would go to his grandkids from a previous marriage. DD wants to sell because she can’t afford to live comfortably, but land is appreciating in value significantly
    - Where you have future and present interest in land and where circumstances change and there is better use of the land, the court has the right to order judicial sale of the land which is subject to a future interest in order to *maximize all the interests in the parties both present and future.*
    - Suggest that they sell enough land for her reasonable needs and thus won’t hurt the interest of the remainderman

**Waste**
- The idea of the waste concept is that A should not be able to use the property in a manner that unreasonably interferes with the expectations of B
- The longer a person has the interest or more certain one has an interest in the land, you get more protection in waste theory (decides what a stronger claim the land is…helps internalize the externality)
- Designed to avoid the use of property that fails to maximize the property’s value
- Two types of waste:
  - *affirmative or voluntary waste*
    - liability arises from affirmative acts that substantially decrease the value/harms the land
      - coal mining, cutting all the trees down
      - exception: open mines doctrine…applies to minerals
        - applies if the grantor had already started the mining/mines opened by grantor
      - is it waste if you improve the value of the land (put in a shopping mall)?
        - American rule: no waste because no decrease in value
        - English: can be waste if the grantor intended the land to be used differently…intent was to give the house…followed in minority of states
  - *Permissive waste*
    - Act of omission that reduces the value of the land
    - Failure to keep up property…negligence
      - Duty to maintain basic repairs
      - Must pay interest on the mortgage
      - Do not have to insure
      - Limited to the amount of income one receives from the land
Leasehold Estates

- Nonfreehold possessory estates
- Landlord has seisen..tenants do not

Defeasible Fee Simple
- one that may last forever or may come to an end upon the happening of an event in the future
- the future interest that remains in the grantor can be transferred by will or by inter vivos conveyance and are inheritable (some states, however, do now allow it to be devisable and inheritable)

- Fee Simple Determinable
  o Fee simple that will end automatically when a stated event happens
  o So long as, while, during, until…any words with durational aspect
  o It is accompanied by a future interest
    ▪ In the transferor (it’s a reversion that is refereed to as a possibility of reverter)
  o Most states, they are freely alienable, but are still subject to the limitation no matter who holds it

- Fee Simple Condition Subsequent (courts prefer)
  o fee simple that does not automatically terminate but may be cut short or divested at the transferor’s election when a stated condition happens
  o but if, provided however, on condition that…saying that the estate may be cut short at the transferor’s election
  o future interest retained by the transferor
    ▪ right of entry
  o most states, they are freely alienable until the X event happens and the grantor retains the right of entry

Why does it matter if one is fee simple determinable or conditional?
- Adverse possession
  o Fee simple determinable…as soon as land reverts…adverse possession runs
  o Fee simple condition…adverse possession runs as soon as one enters OR
    ▪ statue of limitations starts running on the possibility of reverter as soon as the determinable fee ends

- Mesne profits
  o because your possession once the fee determines is unlawful, the grantor who holds the reversionary interest for as long as your on the land until you give it back is entitled to damages from you until you give the land back
  o damages are called mesne profits and the grantor can recover them
  o conditional subsequent…once the condition has happened it isn’t wrongful

  o Mahrenholtz v. County Board of School Trustees (page 242) – land was given to DD by grantor’s provided that “this land to be used for school purpose only; otherwise to revert to grantors herein”
    ▪ if as the PP’s argue, there was a possibility of reverter, it was the grantor’s son’s land in 73 when the school stopped using the land and he could devise it the PPs in 77
    ▪ this is what the courts believe the grantors wanted
    ▪ However, if as the DD’s argue, it is a right of entry, the son had to act to retake the land before he could devise it
    ▪ Upon a grant of exclusive use followed by an express provision for reverter when that use ceases, courts have agreed that a fee simple determinable, rather than a fee simple subject to a condition subsequent is created.
      ▪ Courts go against their usual preferences and against precedent
      ▪ A grant for a specific use + an explicit reversion = fee simple determinable

  o Mountain Brow Lodge No. 82, Independent Order of Odd Fellows v. Toscano – “said property is restricted for the use and benefit of the second party, only; and in the event the same fails to be used by the
second party or in the event of sale or transfer by the second party of all or any part of said lot, the same is to revert to the first parties herein, their successors, heirs of assigns.”

- Court upheld the restraint (on alienation) that the property can only be used by grantee
- Restraints on use of property are almost always upheld…even if it’s that it can only be used by the grantee
- Otherwise you can view any type of defeasible fee as a restraint on alienation

In family interests…
- personal use instructions are found void as a restraint upon alienation

Future Interests

- property right to use and enjoyment of a piece of land/property, whether real or personal at a future time
  - a presently existing interest via deed or will that may become possessory in the future
  - it is a real property right with legal rights
    - can sell or give away your remainder
    - B can enjoin A from committing waste
    - Sue third parties injuring her land
  - All of the property rights in a land must add up to a fee simple absolute..can’t be more and can’t be less

- Future interests recognized by our legal system
  - Interests retained by the grantor
    - When he gives less than a fee simple absolute to the grantee
    - None are subject to the Rule Against Perpetuities
      - Reversion
      - Possibility of Reverter
      - Right of Entry
  - Interests created in a transferee
    - Vested remainder
      - Indefeasibly
      - Subject to partial divestment
      - Subject to complete divestment
    - Contingent remainder
    - Executory interest

Interests retained by the transferor

- Reversion
  - Kept by the grantor whenever he gives less than the durational estate
    - O has a fee simple and gives less away
    - when a reversion is retained, it may or may not be certain to become possessory in the future
    - it is transferable during life and devisable at death
  - Ex: O to A for life
    - A = life estate
    - O = reversion
  - O to A for life, A to B for life
    - A = reversion for life (if B dies before A, A gets it back)
    - B = life estate per autre vie (ends when either A or B dies, whoever first)
    - O = reversion
  - O to A for life, then to B and his heirs if B survives A
    - A = life estate
    - B = contingent remainder in fee simple
    - O = reversion (if B dies, O gets it back)
- **Possibility of Reverter**
  - A future interest remaining in the transferor or his heirs when a **fee simple determinable** is created
  - Not a reversion because O gives away a fee simple
  - Can be transferred freely
  - EX: O to A and his heirs, so long as, no liquor is consumed on the premises
    - A = fee simple determinable
    - O = possibility of reverter

- **Right of Entry**
  - When an owner transfers an estate subject to condition subsequent and retains the power to cut short or terminate the estate, the transferor has a right of entry
    - Grantor must expressly reserve the right to reenter and retake
  - Doesn’t automatically revert, O must do something
  - Right of Entry can’t be transferred by an inter vivos conveyance (in some states), but is devisable

**Interests created in the transferee**

- **Reminders**
  - Future interest that waits politely until the termination of the **preceding possessory estate**, at which time the remainder moves **into immediate possession** if it if then vested.
  - **What do you need to create a remainder**?
    - must be created in someone besides O (otherwise it’d be reversion)…not the grantor…a third party
    - must be created at same time and same estate that precedes it
    - must be limited in some way that it becomes possessory immediately upon the termination of the preceding estate…fee tail, life estate, or term of years
    - The preceding estate must be less than all that O owns…so there’s something left for B…A gets something…B gets less

- **Vested Remainsder (preferred over contingent)**
  - A future interest in a transferee that is certain to become possessory upon the expiration of the prior estate….given to an ascertained person
  - Remainder transferable during life and at death
    - “to A for life, then to B and her heirs”
      - A = life estate
      - B = vested remainder in fee simple
    - to A for life, and in the event of A’s death to B and her heirs
      - A = life estate
      - B = vested remainder in fee simple (A is known to die)

- **Vested subject to open or partial divestment (class gift)**
  - Where it is vested in a class of people and later born children/ later entering people are entitled to share in the gift
  - Transferable during life and at death
  - EX: O to A for life, then to A’s kids
    - A = life estate
    - A’s kids: vested remainder subject to open
    - O = nothing

- **Remainder vested subject to divestment (gets confused with a contingent remainder)**
  - Transferable during life
  - Classify interests in sequence as they are written. See which interest it applies to by looking at comma placement.
    - If after words giving a vested interest, a clause is added divesting it, the remainder is vested.
      - Cuts off right after the grant...comma after and then limitation
Contingent Remainder (CHECK FOR RULE AGAINST PERPETUITIES)
- Something has to happen or something has to be known before the remainder can become possessory
- Types
  - Condition that must be satisfied
    - EX: O to A for life, then to B and her heirs if B is 21 at A’s death
      - B = contingent remainder…see if B is 21 before B gets it
      - O = reversion
  - If the grantee isn’t in existence at the time of the grant
    - O to A for life, remainder to As kids (A has no kids at the time)
      - A’s kids = contingent remainder (on them being born)
      - Once a child is born, it’s a vested remainder subject to open
  - Unascertained person (can’t identify by name)
    - To A for life, then to B’s heirs
      - A = life estate, B = contingent remainder (don’t know who heirs are until B dies)
    - O to A for life, then to As widow (A is married to B)
      - B = contingent remainder (can’t identify As widow until his death)
  - Alternative contingent remainders
    - Where if the remainder in one vests it cannot vest in the other and vice versa
    - EX: to A for life, then to B and her heirs if B survives A, and if B does not survive A to C and her heirs

What difference does it make whether a remainder is vested or contingent?
- a vested remainder accelerates into possession whenever, however the last remainder ends. If you have contingent, O gets interest for a few years than a vested remainder
- assignability…used to matter…doesn’t matter…all future interest are freely assignable and thus reachable by creditors
- rule of destructablity of contingent remainders. The law used to say the interests were destroyed if it could not become possessory immediately… most states don’t follow that anymore
- because of the rule against perpetuities
  - applies to contingent remainders, but not to vested remainders
  - places limit on dead hand to control land forever
  - many states have absolved this, but many still use it or a form of it

Executory interest (CHECK FOR RULE AGAINST PERPETUITIES)
- Future interest in a transferee that can take effect only by divesting another interest
  - Cuts short the interest that comes before it
- EX: O to A for life, then to B and his heirs, but if at Bs death, B is not survived by issue, then to C and her heirs
  - B = fee simple subject to complete divestment
  - C = executory interest…cuts short C’s interest
- Divesting the transferor in the future
  - To A upon her marriage…to B when he turns 45
- Always destructible and freely alienable

The Rule Against Perpetuities
- No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest
- Validating/Measuring life – any person alive that is somehow related to the grant
  - Will enable you to prove that the contingent interest will vest or fail within the life of, or at the death of, the person, or within 21 years after the death of the person…tells you if the remainder is valid
  - Validity is determined at the time of creation of a deed or death if it’s by will, not based on what happens
  - O to A and his heirs so long as no liquor is consumed on the premises, and if liquor is consumed on the premises, title shall go to B and his heirs
    - A = fee simple determinable subject to an executory interest
    - B = executory limitation
    - O = nothing
    - But B’s interest could vest outside the perpetuities period
    - Thus B’s interest in void and A = fee simple determinable
    - O = possibility of reverter

- Scope of the rule (what does the rule apply to)?
  - All contingent remainders (whether an individual or in a class)
  - Executory interests
  - Open (vested) remainders in a class

- Class Gift
  - Described as vested to subject open
  - not vested until all members of the class are ascertained
  - example: children…unvested/unascertained until parent dies
  - to A for life, then to A’s children for their lives, then to A’s grandchildren in fee simple
    - A’s kids will vest at A’s death
    - But A’s grandkids might not vest within 21 years

- Unborn widow/spouse
  - O to A for life, then to As widow for life, then to A’s children who are living at his widow’s death (or it says his issue)
    - As widow = contingent remainder for life (she’s not identified)
      - Good against the rule
    - As kids = contingent remainder for life (contingent on being identified and living longer than As widow
      - Void
      - At the time of the grant, the person who is A’s widow may not be born…thus not life in being
      - Contingent remainder can’t vest until widow dies….gift might not vest 21 years after A’s death
  - O to A for life, then to As widow for life, then to A’s children
    - Not void
    - A’s children’s interest will vest when they are born…don’t have to wait till A dies
      - Vested subject to open

  - Jee v. Audley - From O to A for life, then to B and the issue of her body for their lives, and in default of such issue then to the daughters of John and Elizabeth Jee then living.
    - The fertile octogenarian
    - Won’t know who will take the gift inside the perpetuity period

- Alternatives
  - Wait and see
    - don’t strike out rule immediately
    - wait and see if the interest will vest in the period
  - Wait and see for 90 years
  - Cy pyres…fudge it…reform the grant to meet grantor’s interest without violating the rule
Chapter Five: Co-ownership and Marital Interests

Concurrent Interests

- **Tenants in common**
  - Will presume this in ambiguous cases
  - Separate but undivided interests in the property
  - Each is descendible and may be conveyed by deed or will (alienable, transferable)
  - Right to partition
    - If anyone wants to get out from common ownership, they can get a partition (through agreement or through the courts)
    - If lines can’t be drawn, court can order a sale
  - Each tenant in commons owns an undivided share of the whole (right to use whole)
    - Tree example

- **Joint tenants**
  - Are regarded as a single owner
    - Right of partition
    - Severance
      - Involuntary destruction…if one of the four unities is disturbed, it turns into a tenancy in common
        - A conveyance by one of the joint tenants
        - Contract of sale…occurs on signing of the contract
  - Right of survivorship immediately upon death (thus not devisable by will)
  - Must use magic words… Use word joint and survivorship interest and say its not a tenancy in common
  - Popular…avoids wills
  - Four unities essential to a joint tenancy (otherwise it’s a tenancy in common)
    - Time…must be acquired or vested at the same time
    - Title…must acquire title by the same instrument or by joint adverse possession
    - Interest … have equal and undivided shares and identical interests (fee simple and fee simple)
    - Possession… each must have a right to possession of the whole
    - EX: To A and B for their joint lives, remainder to survivor
      - Joint tenancy in fee simple
    - If one of these interests is severed, it becomes a tenancy in common
      - So one tenant could convey his interest to a third party and thus destroy the joint tenancy
      - But if there are 3 joint tenants and A sells to D…B and C still are joint tenants

- **Tenancy by the entirety**
  - Only created in a husband and wife
  - Need four unities + marriage
  - Surviving tenant has right of survivorship
  - Husband and wife hold as one person
  - Thus neither husband nor wife can defeat the right of survivorship of the other by a conveyance to a third party, only a conveyance by husband and wife together can do so…no right to partition
  - Divorce terminates the tenancy by the entirety because it terminates the marriage

- **Severance of Joint Tenancies**
  - Harms v. Sprague – decedent used his joint tenancy as collateral on mortgage, died before it was all paid off
    - Time and title are at issue here (title given to the bank)
- The execution of a mortgage by a joint tenant, on his interest in the property, wouldn’t destroy the unity of title and sever the joint tenancy.
- The giving of a mortgage is not a separation of title, for the holder of a mortgage takes only a lien (a cause of action giving a claim against the property, but not actually the property) …until sale of the land, purchaser acquires no title to the land.
- The mortgage doesn’t survive death as a lien.

- Partition
  - Keep in mind efficiency and fairness.
  - Delfino v. Vealencis – DD owned a rubbish business on land she shared in tenancy in common with PPs…PPs want to develop the property into a residential development…wanted division of the property by sale.
    - Courts favor a partition in kind over a partition by sale (it’s a drastic remedy, want people to stay on the land they’ve lived in for years).
    - Partition by sale will occur only when:
      - The physical attributes of the land are such that a partition in kind is impracticable or inequitable.
      - The interests of all owners would better be promoted by a partition by sale (must be shown by requesting party).
    - In this case, a partition by kind is practical and will serve the best interests of the parties.
    - Trial Court’s argument
      - Land should go to the highest and best use (economically efficient).

- Sharing the Benefits and Burdens of Co-ownership
  - Spiller v. Mackereth – DD and PP owned building as tenants in common…PP began using the building as a warehouse. DD demand that PP either vacate or pay half the rental value.
    - Unless one in actual possession of the building denies to the other the right to enter, or agrees to pay rent, nothing can be claimed for such occupation as each has an equal right to occupy.
    - Doesn’t have to pay rent unless he agrees to or if there’s an ouster.
      - Two types of ousters (if ousted, the ousted individual can get his share of the reasonable rental value or suit to partition the property).
        - Beginning statute of limitations for adverse possession…even though door is locked, DD didn’t ask for key…lacks hostile possession.
        - General ouster: exclude co-tenant from use and enjoyment of the property, but affirm co-tenancy relationship.
      - Makes use of property…productive use.
  - Swartzbaugh v. Sampson – husband and wife owned land as joint tenants…husband leased land for a boxing pavilion against wife’s objections.
    - A joint tenant has right to do with his land as he wishes (boxing owner will stand in his shoes for the term of the lease).
    - No hostility…he has right to do what he wants with his share.
    - The act of one joint tenant without express or implied authority or consent of his cotenant can’t bind or prejudicially affect the right of the latter.
    - But she can try and get boxing owner to oust her and then she would get it.

Leasehold Estates in Land

Tradition, Tension, and Change in Landlord-Tenant Law

The Leasehold Estates
- All leasehold estates have 3 features in common:
  o estate in the tenant
  o reversion in the landlord
  o right of exclusive possession, enjoyment, and use of land by tenant
  o many, but not all have a lease…the paper itself isn’t necessary
  o does comply with the statute of frauds

- **The Term of Years**
  o Estate that lasts for some fixed period of time (can be one day, two months, 5 years)
    ▪ To A for 10 years
  o A term must be for a fixed period, but can be terminable earlier upon the happening of some event or condition
  o No notice of termination is necessary to bring the estate to an end
  o Cannot have unilateral power of termination
  o The statute of frauds applies to all leases and especially to tenancy for a term of years
    ▪ to be good or valid, tenancies of a year or more must be in writing
    ▪ if it’s not good under the statute, it becomes a tenancy at will

- **Periodic Tenancy**
  o A lease for some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination
    ▪ To A from month to month, to B from year to year
  o Can have unilateral power of termination
  o If notice isn’t given, the period is automatically extended for another period
    ▪ Half a year’s notice is required to terminate a year to year tenancy
    ▪ For any periodic tenancy of less than a year, notice of termination must be given equal the length of the period, but not more than 6 months
    ▪ The notice must terminate the tenancy on the final day of the period, not in the middle of tenancy
    ▪ Death of landlord or tenant has no effect on the duration of a term of years or periodic tenancy, but it does on a tenancy at will

- **Tenancy at Will**
  o Tenancy of no fixed period that endures so long as both tenant and landlord desire
  o Doesn’t automatically renew
  o Bilateral power to terminate…must just give a period of notice

- **Tenancy at sufferance**
  o When a tenant remains in possession (holds over) after termination of the tenancy
  o Landlord has two options
    ▪ Eviction + damages (sue him)
    ▪ Consent (express or implied) to the creation of a new tenancy
      ▪ Becomes a periodic tenancy
  o Problem of holdover tenant…left to whims of landlord…can either evict…or bind the tenant to a new lease

  o **Garner v. Gerrish** – lease gave tenant right to terminate at his will. Leasor dies and executor tries to evict DD…Lease of no certain duration
    ▪ Restatement adopts the view that there’s no reason why a lease granting the tenant alone the right to terminate at will should be converted into a tenancy at will terminable by either party
    ▪ Since we no longer have livery of seisen, there’s no reason to follow common law and require a bilateral right to terminate
    ▪ If the agreement doesn’t create a term of years or periodic tenancy, but the tenancy is to continues so long as the tenant wills, the tenant has a life estate determinable (not a tenancy at will)

  o **Crechale & Polles, Inc. v. Smith** – DD held over for 3 months and the check for the first 2 months was accepted by the PP, but not for the last month
By remaining in possession of leased premises after the expiration of a lease, a tenant gives the landlord the option of treating him as a trespasser or as a tenant for another year.

Once a landlord elects to treat a tenant as a trespasser and refuses to extend the lease on a month-to-month basis but fails to pursue his remedy of ejecting the tenant, and accepts monthly checks for rent due, he in effect agrees to an extension of the lease on a month-to-month basis.

According to the Restatement, holding over results in a periodic tenancy measured by the way the rest in computed, up to a max of one year.

- **The Lease/Form Lease**
  - Both a conveyance of possessory interest in land and a contract that creates certain rights
  - No bargaining power…bad when there’s no competition
  - But can be sign of an efficient mkt…innovative

- **Delivery of Possession**
  - **Hannan v. Dusch** – PP rented the premises from DD. There was a holdover tenant, which DD would not get rid of.
    - **American Rule**
      - Recognizes the lessee’s legal right to possession, but implies no such duty upon the lessor as against wrongdoers (if the lease is silent/unless stated otherwise)
      - Tenant’s remedy is against the wrongdoer not against the landlord…he can sue for possession and damages
      - Can have express provision stating otherwise
    - **Advantages**
      - Doesn’t hold innocent landlord liable for 3rd party’s wrong (contract)
      - Looks to formal rules and who owns what at that time and gives them rights according to that (goes w property rule)
  - **English Rule**
    - Implies a covenant on the landlord that the premises shall be open to entry by the tenant at the time fixed by the lease…requires the lessor to put the lessee in actual/physical possession
    - **Advantages**
      - Landlord more likely to know there’s a holdover tenant and kick them out
      - More of an ability to get tenant off…unlawful detainer (tenant can’t do it until he’s in possession)
      - More incentive (wants money)
      - Meets expectations of tenants and intentions of both parties
      - More fair and efficient
        - More familiar with eviction procedures and can evict the holdover at less cost
    - **Tenant’s Remedies**
      - Unlawful detainer against holdover tenant
      - Break lease and sue for damages
      - Retain the lease, but not pay the rent for possession

- Under either rule, that if a stranger trespasses upon the property once the tenant is in possession and wrongfully obtains possession of it form lessee, his remedy is against the stranger and not against the lessor.

- **Subleases and assignments**
  - **Assignment** - conveys the whole term, leaving no interest or reversionary interest in the grantor or assignor
    - Originally, before any assignment, there’s privity of estate (a current shared relationship and/or a successive relationship in grantor/grantee who share a successive interest in land) and privity of contract
    - Assigned to a 3rd party…new assignee and landlord are in privity of estate, not contract
    - Original tenant and landlord…no privity of estate, but still privity of contract
- Original tenant and new leasee…privity of contract and privity of estate
  - **Sublease** – transaction whereby a tenant grants an interest in the leased premises less than his own or reserves to himself a reversionary interest in the term…
    - After sublease: Original tenant and landlord are in privity of estate and contract
    - Leasee and landlord…no relationship
    - Original tenant and leasee…privity of contract and privity of estate
  - Diff btwn the two
    - Landlord has privity of estate with 2nd tenant in assignment, but not in sublease

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<tr>
<th>Sublease</th>
<th>Assignment</th>
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<td>Privity of contract and estate</td>
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- Privity of estate means the tenant is liable to the landlord on all covenants that run with the land
- Privity of contract means the tenant remains liable for rent and all other covenants in the lease

- **Ernst v. Conditt** – DD took over lease, which included land and a race track from PP. He was to pay rent, but stopped after a few months. The contract stated that the premises were subletted to him and the original leasee was to be liable for performance of the terms and conditions
  - First, see how much of lease was given
  - Second, look to parties intentions
  - The court held this was an assignment of the lease
    - Thus privity exists btwn PP and DD and DD is liable directly for expenses
  - Regardless of written terms, parties intentions show they transferred the lessee’s estate for the entire remainder, it’s an assignment (no right to reenter; no privity left)
  - Said they were using contract, but actually used property

- **Kendall v. Ernest Pestana, Inc.** – PP wanted to assign the lease/sublease from one Bixler, but DD wouldn’t allow the assignment and stated he had the right to arbitrarily refuse any such request
  - Court finds the minority rule preferable
    - Where a lease provides for assignment only with the prior consent of the lessor, such consent may be withheld only where the lessor **has a commercially reasonable objection to the assignment**, even if there’s a provision to the contrary…also said by **Restatement**
      - If it’s a form contract, they could bargain around it
    - Allows free alienability of property (Property)
    - Upholds the implied contractual duty of good faith and fair dealing (contract)
  - The DD’s four arguments:
    - the landlord is the owner and thus can do whatever he wants
    - he personally selected the tenant and thus should be able to pick the new one
      - court argues…this is not an absolute right…obligation to mitigate on landlord’s part
    - contract objection…this language is clear and landlord has ability to reject…tenant could have bartered for a different term
      - it’s not rewriting a contract to recognize an obligation imposed by the duty of good faith and fair dealing, which duty is implied by law in every contract
    - Stare decisis…lawyers rely on it
- The Tenant Who Defaults
- The Tenant in Possession
  - Berg v. Wiley – PP leased space from DD to open a restaurant. If PP did not follow the terms of the lease, DD had right to retake possession…she remodeled without his permission and allegedly violated health code provisions…while she was closed for remodeling, he entered with an officer and changed the locks
  - A landlord may rightfully use self-help to retake leased premises from a tenant in possession without incurring liability for wrongful eviction provided:
    - The landlord is legally entitled to possession, such as where a tenant holds over after the lease term or where a tenant breaches a lease containing a reentry clause AND
    - The landlord’s means of reentry are peaceable
  - The court found that the DD’s reentry was forcible…he should resort to judicial means
    - Only reason violence didn’t break out is bc PP wasn’t present
    - Thus only lawful means to dispossess a tenant who hasn’t abandonment nor voluntarily surrendered but who claims possession adversely to a landlord’s claims of breach of a written lease is by resort to judicial process
      - Would probably also apply to residential homes
        - Loss of residence has greater psychological impact than of business
        - Need for immediate replacement is vital
        - Less likely to be equal bargaining power
  - Sommer v. Kridel – broken engagement so dumped marine couldn’t pay for lease and broke it…PP wanted to charge DD for entire lease and didn’t accept new tenant
    - Clear case of abandonment
    - Landlord has three options
      - Accepts abandonment and relive tenant of all further liability
      - Retake and relet premises
      - Do nothing and send a bill every month and bring a lawsuit at the end of it (most don’t allow this)
      - Landlord has an obligation to make a reasonable effort to mitigate damages in this situation and DD will pay those costs
        - Follows principles of contract
        - Justified as a matter of basic fairness
        - Economically efficient

Duties, Rights, and Remedies (Especially Regarding the Condition of the Leased Premises)
- Landlord’s Duties; Tenant’s Rights and Remedies
  - Moral hazard – once a lease is entered into, the landlord has an incentive to neglect everyday repairs because the costs of neglect are borne primarily by tenants and tenants have an incentive to neglect maintenance, especially toward the end of the term, because the costs of neglect will shift to the landlord
- Two basic elements of a covenant to quiet enjoyment
  - The landlord will guarantee that tenant will not be disturbed in actual possession of the premises by any other person with a superior legal title
  - The landlord covenants he will not evict the tenant actually or constructively (controversial element)
o Constructive enjoyment
  ▪ When there’s a substantial interference with the use and enjoyment of property due to act or omission of landlord
    • EX: Lack of heat

o Elements that abandoning tenant must show for constructive eviction
  ▪ Permanent interference
  ▪ Must abandon with a reasonable amount of time
  ▪ Show that the inspection of the premises if there was one wouldn’t have revealed the defect to a reasonable person

- Quiet Enjoyment and Constructive Eviction
  o Disputes regarding the condition of the premises arise in two ways:
    ▪ The tenant might wish to vacate or stay, but pay less or no rent….Restatement says you can
      • Gives tenant what he bargained for
    ▪ Tenant might be injured by allegedly defective premises and claim damages against the landlord in tort

  o Remedies
    ▪ Once tenant vacates, there’s no further rent liability, but the tenant might be able to recover damages for losses suffered
      • Difference btwn rent paid and reasonable rent value
      • Expenses in obtaining substitute premises
      • Loss of profits

  o Reste Realty Corp. v. Cooper – DD leased basement of building for jewelry business training, which continually flooded and originally manager of building would clean it, but he died. DD finally left when there was no one who would clean it
    ▪ The landlord was guilty of a breach of a covenant that justified tenant’s removal from the premises
      • Express covenant of quiet enjoyment was breached and thus constitutes a constructive eviction of the tenant
        o Rendered the premises substantially unsuitable for the purpose for which it was leased, or seriously interfered with the beneficial enjoyment of the premises
          ▪ Look at:
            • Purpose for which the premises were leased
            • Forseeability of this type of interference
            • Potential duration of the interference
            • Nature and degree of harm caused
            • Availability of means to abate the interference

    ▪ Constructive eviction can’t arise unless the condition interferes with the permanent use
      • It does because the reoccurrence of flooding occurs regularly…it doesn’t have to be everlasting and unending and defect was permanent
    ▪ Constructive eviction will be lost if one doesn’t vacate the premises within a reasonable time after the right comes into existence
      • After manager died, she complained, waited, and hoped for relief. She left after the crowning blow
    ▪ The fact that she examined premises doesn’t mean she should know the condition of the driveway (not really part of the premises)
      • But lessor knew and had a duty to disclose it to the tenant
      • And by taking the second lease, she didn’t accept the premises in their defective condition…it was to be fixed and was taken care of each time…she had right to rely on the promise

- The Illegal lease
  o Refusal by the courts to uphold a contract that is against public policy
If a lease is signed and is a significant violation and landlord had constructive or actual notice of the violation, there’s an illegal lease.

- Does not apply if code violations develop after the making of the lease
- Minor technical violations don’t count
- Nor do violations which the landlord had neither actual nor constructive notice
- The tenant is treated as a tenant of sufferance and landlord is entitled to the legal value of the premises
- Tenant can stay for the duration of the lease and withhold rent
  - Better as a defense to the landlord

- **Implied Warranty of Habitability (only for residences, not businesses)**

  - **Hilder v. St. Peter** – broken kitchen window, no lock on door, broken toilet, water leaks throughout, plaster fell from bedroom, broken sewage pipe in basement…DD promised to fix, but never did
    - Constructive eviction…but she hasn’t left
    - Court held that the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of tenancy, **premises that are safe, clean, and fit for human habitation**
    - Warranty of habitability cannot be waived…no assumption of the risk
    - However, landlord could just end tenancy and not fix problems
    - To bring a cause of action for a breach of the warranty, one must
      - Notify the landlord
      - Allow a reasonable time for correction
    - Available remedies
      - Damages for discomfort or annoyance
      - Withhold payment (Thus the one who can better afford it brings suit)
      - Deduct amount spent on repairing defects
      - Punitive damages as appropriate (willful and wanton or health or safety risk)
      - Damages for rent already paid
    - Measure of damages = value of property
      - Here it’s zero, according to the court

- How does the implied warranty of habitability differ from the covenant of quiet enjoyment?
  - Habitability = all the rationales are for residential leases and for those that own apt buildings
  - Habitability = rich, sophisticated landlord with money and poor, unhandy tenants.
  - Habitability…can stay…quiet enjoyment…not sure
  - Can’t waive habitability rights…min requirement of every lease
    - Can waive covenant of quiet enjoyment
  - Quiet enjoyment…broader coverage
  - Even if one enters with knowledge of problems…doesn’t negate warranty of habitability
  - Quiet of enjoyment hard to enforce with a tenancy at will…habitability applies to all tenancies

### Chapter Nine: Private Land Use Controls: The Law of Nuisance

- **An Introduction to the Substantive Law**
  - Use your property so as not to injure another’s use of another’s property
  - Unprivileged interference with a person’s use and enjoyment of her land

  - **Ct. says there are two different types of nuisance**
    - **Nuisances per se**
      - It’s always a nuisance under all circumstances and at all times
        - Explosions…things that are extremely dangerous
        - Pollution, immoral/illegal/indecent…brothels…crack houses
    - **Nuisances per accidens**
- Becomes a nuisance because of location or because of the way it’s used or operated
  - Can be a right thing in the wrong place

- **Private nuisance**
  - Any substantial nonrespsosory invasion of another’s interest in the private use and enjoyment of land by any type of liability forming conduct
  - one must have a property interest that is affected or causes bodily harm to herself as a result of the activities

- **Public Nuisance**
  - Affects the general public, not particular individuals
  - Gambling, prostitution, pollution, rock festivals

- **Test to see if it is a nuisance**
  - Conduct that causes a substantial interference with the private use of land and is either
     - **Intentional and unreasonable OR**
       - Continues over time and is known to interfere with another’s enjoyment of land
         - **Intent**
           - Substantial certainty
           - Really do know
           - Acting to cause the tort
         - **How do you know it’s unreasonable?**
           - What the intent is (GW + flowers)
           - Who was there first
           - Are there methods that could mitigate the smell…something simple that can be done
           - B < PL…look at those factors
           - What’s the social/society’s interest
           - Do we care about neighbors and what’s going on around the area
           - what is the surrounding use of land
           - who’s in the wrong/inappropriate place
           - Does the activity have observable effects that a reasonable/avg. person would find offensive
     - **Unintentional but negligent, reckless, or resulting from an abnormally dangerous activity**
       - Risk of harm makes the conduct unreasonable

- **There’s two approaches by courts to see if it’s a nuisance and they will compensate you**
  - **Majority…order of magnitude approach…**
    - Unreasonableness is an order of magnitude
    - There’s a certain pt. that one can cross
    - Basically, is the activity unreasonable past a certain point? Then it’s a nuisance
      - Will get some type of remedy
  - **Balance the equities**
    - Minority…restatement approach
    - Allocative efficiency…minority (how things are best used for society) vs. fairness (distributive efficiency…everyone gets their share)...majority

- Restatement…few courts have followed…to determine unreasonableness in a case of intentional nuisance
  - whether gravity of harm outweighs the social usefulness/utility of the actor’s conduct OR
    - Gravity of harm determined by:
      - Extent of the harm
      - Character of the harm
      - Social value of the use or enjoyment invaded
Suitability of the use invaded to the locality
- Burden on the person harmed of avoiding the harm
- Utility
  - Social value of the primary purpose of the conduct
  - Suitability of the conduct to the character of the locality
  - Impracticability of preventing or avoiding the invasion
- the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others wouldn’t make the continuation of the conduct not feasible
  - in this case…other party/factory would win
    - loss to society from this huge oil refinery is great
    - moving the trailer parks and few houses isn’t that difficult
- We balance the equities first and even if it’s a nuisance, the one affected may get nothing
- Values social utility, but do we care about other things?

- Types of unreasonable interference
  - Serious discomfort and inconvenience in the use of land
    - Measured by the sensibilities of the average person
    - Allows injunctive relief so behavior will no longer be continued
    - Morgan v. High Penn
  - Serious harm, but has great social value
    - Allow damages to be paid, but the activity to continue
      - Balances the equities
    - Ability to bargain at a high price taken off the table…damages determined by court…conditional injunction
      - Boomer
  - Serious harm and no great social value
    - Don’t need air conditioners, since there are other apts available in the city
    - Allow PP an injunction, which he can sell and let the activity continue
      - Estancias
  - Priority in time…coming to the nuisance
    - Allow nothing to be done
    - Allow an injunction, but make the other party seeking the injunction pay for it
      - Del Web
  - Neither party alone causes conflict…they harm each other….nursery/shooting gallery
    - Try and have them come to own solution OTHERWISE
    - Consider what had the greater social/economic value…who was there first?
      - Then give damages or injunction or have one move
        - The one that has greater economic value could pay to move the other
        - The one that must move could pay

- Four Rules of Nuisance
  - Abate the activity by granting PP injunctive relief (Morgan, Estancias, nursery example??)
    - Typical case
  - Let the activity continue, but DD pays damages (Boomer)
    - There’s public necessity or DD had made a huge investment
  - Let the activity continue by denying all relief
    - No nuisance or when one comes to the nuisance or sensitive people
  - Abate the activity if PP pays damages (Del Webb)
    - Where the PP is at fault, but there’s an overriding public interest in abating the activity

  - Morgan v. High Penn Oil Co. – PPs own land with dwelling house with 32 habitable trailers. Five years later, DD operates an oil refinery, which emits nauseating odors and gases in great quantities and causes normal people to be uncomfortable and sick…impairs their use and enjoyment of the land
    - Private nuisance exists when:
• Rules of nuisance
  o one makes an improper use of his own property and in that way injures the land or some incorporeal right of one’s neighbor
  o substantial nontrespassory invasion of another’s interest in the private use and enjoyment of land by any type of liability forming conduct
• Here, DD intentionally (court looks at factors) and unreasonably causes noxious odors to escape onto PPs land as to impair in a substantial manner the PPs use and enjoyment of land
• Court allows injunctive relief

  o Estancias Dallas Corp. v. Schultz – PP operated air conditioning equipment that served 155 apts in 8 buildings and caused excessive noise which was continuous and permanent
    ▪ Basic rule: If the court finds that the injury to the complainant is slight in comparison to the injury caused the DD and public by enjoining the nuisance, relief will ordinarily be refused…balance the equities…High Point majority test
    ▪ PP would get compensation and the public interests would remain intact
    ▪ Here the air condition is not necessary and PPs have right to get an injunction
    ▪ Coase theorem…Schultz’s price too high to bargain
    ▪ Four elements to get an injunction:
      ▪ Likelihood of success on the merits
      ▪ Harm on DD
      ▪ Harm to PP
      ▪ Harm to public

  o Boomer v. Atlantic Cement Co. - DD operated a large cement plant whose dirt, smoke, and vibration from the plant caused injury to the PPs (individual owners seek specific relief from a single plant operation)
    ▪ Although the damage to the PP may be slight compared with the value of the DDs operation and the expense of abating the condition, that’s not a good reason for refusing the injunction
    ▪ Remedies
      ▪ Grant the injunction, but postpone its effect to allow technical advances to permit DD to eliminate the nuisance
      ▪ Grant injunction conditioned on the payment of permanent damages to PP to compensate them for total economic loss caused by DDs operation (this is what court chooses)
        ▪ Balances the equities
        ▪ Allows DD to choose and mitigate the harm from an injunction
        ▪ Can purchase an easement (Manillo v. Gorski)
        ▪ Economically efficient…everyone gets something

  ▪ Dissent
    ▪ Majority is licensing a continued wrong
      ▪ You can use your land in a way that harms others as long as you pay those damages as you go
    ▪ We need more for deterrence and the incentive to alleviate the wrong would be eliminated
      ▪ Won’t buy new technology even if it’s cheap…not reason to

  o Spur Industries, Inc. v. Del E. Webb Development Co. – Originally, there were cattle feedlots in the area which caused quite an odor and flies, when the area was later developed for an urban retirement area with 500 homes
    ▪ Private nuisance
      ▪ Affects a single individual or a definite small number of persons in the enjoyment of private rights not common to the public
      ▪ Protects rights in the use and enjoyment of the land
    ▪ Public nuisance
      ▪ Affects a considerable number of people or an entire community or neighborhood
      ▪ An unreasonable interference with a right common to the general public
• Considerations
  o Conduct interferes with public health, safety, peace, comfort, or convenience
  o Whether the conduct is proscribed by statues or ordinance
  o Conduct is of continuing nature or has produced a permanent or long-lasting effect

  • If the injury is slight, the remedy for minor inconveniences lies in an action for damages rather than in one for an injunction
  • Here it’s both a private and public nuisance and thus the injunction against feedlot was upheld
  • Court of equity is also concerned with protecting the operator of a lawful, albeit noxious business from the knowing and willful encroachment by others near his business (coming to the nuisance…first in time)

  • Where one comes to the nuisance, the courts do not give relief
    o However, because the DD was not the only one affected, the courts make an exception, but make the DD pay the costs of moving for the PP (only for an innocent nuisance)

Chapter Ten: Private Land Use Controls: The Law of Servitudes

As the manorial economy broke down, farmers aimed to meet the demands of the market, not the needs of a great household and local villagers. Thus increased the demand for enclosures of land in separately owned tracts, thereby withdrawing some portion of open fields or wasteland from use in common. Easements came about to regulate interdependent land uses.

Easements
  - Easements
  - Profits
  - (Licenses)

Covenants
  - Real Covenants
  - Equitable Servitudes

Easements
  - the right to enter land that is in possession of another and do something on it
  - easements: the right to enter onto land and use it.
    o Walk across the land of O
    o Right to string phone lines across it
  - Profits or usufructuary privileges
    o the right to enter onto the land and take something
      - remove apples
  - both are not estates in land, but are legal interests in land
  - You can have easements for life, fee simple, defeasible interest

Three ways you can have easements/profits
  - Must either be appurtenant or in gross
    o **Appurtenant**
      - when in it’s creation, it is attached to another piece of land and where it benefits the owner of this other piece of land in his or her enjoyment of the land
      - Passes with the land to the next owner
      - requires two pieces of land
        • dominant tenement
          o the one whose land is benefited
          o ex: who goes through another’s land to get to road
        • servient tenement
          o the one burdened by the tenement
          o ex: the one whose land the road goes through
- In gross
  - If it does not benefit the owner of a piece of land but intended to exist without a dominant estate
  - Does not benefit its owner in the use and enjoyment of his land, but gives him right to use servient tenement
    - One can pick apples in another’s land
    - One can sit by lake on another’s property
    - One can take gravel from the land
    - One can come onto land and jog

- Alienability
  - Dominant and servient tenant must agree to allow an easement in appurtenant
  - Easements in gross can be alienated without agreement of servient tenement

- Ambiguous cases
  - courts prefer easement appurtenant

2nd way to classify easements
  - by the means of their creation
    - easement by prescription
      - claimant’s use must be open and notorious
      - must be actual use
      - must be continuous
      - must be hostile
        - not hostility to owner’s ownership of the estate but hostility to ability to use the property
      - Does not have to be exclusive
      - tried by Holbrook, but lost
    - creation by reservation….statute of frauds….must be in writing
      - easement is reserved by the grantor over the land granted. If the grantor conveys land, reserving an easement, the land conveyed is the servient tenement
        - Reservation in favor of a third party
          - Willard
    - easement by express provision…subject to statute of frauds…must be in writing
      - use of deed/will
    - easement by implication (by operation of law, not a written instrument)
      - severance of title of land in common ownership (one land to multiple plots)
        - Two types
          - Apparent use that is continuous and existing when the severance occurred
            - If before the land is divided, a use exists on the servient part that is reasonably necessary for the enjoyment of the dominant part and which the court finds the parties intended to continue after the tract is divided
            - Requirements
              - Existing use that is apparent and continuous at the time of tract division…quasi-easement
                - Use of the land that would resemble an easement if the tract were divided into two lots…becomes an easement when the land is actually divided into two lots
                  - Van Sandt
              - Reasonable necessity
                - Look at cost and difficulty of establishing a new road
                - Alternate use
          - Reasonable necessity of the use at the time of the severance
            - Implied is the owner of a tract of land divides the tract into two lots and by this division deprives one lot of access to a public road
            - Requirements
              - NO existing use required
              - Implied when the land is divided
              - Must be necessary, not just convenient
- Terminates when the necessity ceases
- Other…not here

- **Public Easements**
  - Public can acquire a public easement in private land by prescription if members of the public use the private land in manner meeting the requirements of prescription
  - Matthew v. Bayhead

3rd way…distinction between easement and profit
- essentially the same thing
- are created the same way
- their categorical classification
- they can be appurtenant or in gross
- easement – right to use land without taking anything from it
- profit – has right to go to another’s land and take something from it and includes the implied right to use the land to the extent necessary to take the profit…shake the apple tree to get apples…..right to come onto land to shoot and take the animal with you

- Termination of easement
  - Stops using it for a long period

- **Williard v. First Church of Christ, Scientist** – PP wanted to buy land across from a church, but original seller wanted to give DD right to use land for a parking lot on the weekend
  - Old rule
    - Can’t reserve and easement in a third party, just yourself (makes it freely alienable)
    - Court balances the injustice of refusing to give effect to the grantor’s intent against the injustice for failing to give reliance on the old rule and the policy against disturbing settled titles…grantor’s intent wins…contract

- **License**
  - Oral or written permission to do some act that otherwise would be a trespass
  - Similar to an easement, but revocable
  - Exceptions:
    - License coupled with an interest
      - Ex: A has right to hunt on O’s land and take animal…can’t revoke
    - Estoppel
      - Holbrook
      - Ex: houseguests, we have license to be in law school, the cable guy, maids
      - An irrevocable license are functionally the same as easements

- **Holbrook v. Taylor** – PP used DDs roadway to build $25,000 home without objection (had a license), but DDs later demanded $500 to sell the road…only outlet
  - Right to use by prescription
    - When the owner of a tenement has openly, peaceably, continuously, and under a claim of right adverse to the owner of the soil, and with his knowledge and acquiescence, used a way over the lands of another for as much as 15 years
      - Not applicable in this case as road was used with permission (no hostility)
  - Right to use by estoppel (stopped from telling him what he can and cannot do)
    - A license which includes the right to erect structures and acquire an interest in the land in the nature of an easement by the construction of improvements thereon, the licensor may not revoke the license and restore his premises to their former condition after the licensee has exercised the privilege given by the license and erected improvements at considerable expense
    - He acted in a reasonable manner…equity should allow him to use the land
      - **Permission + reasonably relied to make a substantial investment**…he wins here
        - This is applicable
• But, if the house burns down, the investment is gone, the use of the road is then gone

o **Van Sandt v. Royster** – PP wanted to enjoin DD from maintaining a underground lateral sewer through and across his land after his basement was flooded
  
  ▪ Court found that there was an implied easement...originally a quasi easement (use of one part of the land for the benefit of the other part...allows there to be an easement in one’s own land and when that part is sold, the quasi easement turns into an implied easement)
  ▫ Easement implied by an existing use and one that is or easily could be apparent
  ▫ All implied easements derive from one large lot to multiple, smaller lots
    o Must show your and yours neighbors land were once owned by the same person
  
  ▪ **Factors determining the implication of an easement:**
    ▫ The terms of the conveyance and the consideration given for it
    ▫ Is the use of the easement apparent?
    ▫ Is the use of the quasi easement continuous or permanent?
      o Is there concrete down? Or do you make your own road?
    ▫ Is the use of the land reasonably necessary to the enjoyment of the quasi dominant tenant?...just one of the factors courts consider (but in Oten...it’s everything)
  
  ▪ In this case, the use was continuous and permanent, though not necessary, the alternatives would be expensive and unreasonable, knew about the plumbing and that it drained into the sewer (not innocent)
  
  ▪ Since it’s a prior easement and necessary to enjoy the property, it’s unnecessary that he’s compensated

o **Othen v. Rosier** – brought the suit to enforce a roadway easement, which he must use to get to a highway.

  The DDs build a levee, which caused the land to be flooded and impassable

  ▪ **Before an easement by necessity can be held to be created by implied reservation, it must be shown**
    ▫ There was a unity of ownership of the alleged dominant and servient estates
    ▫ The roadway is a necessity, not a mere convenience
    ▫ The necessity existed at the time of severance of the two estates
  
  ▪ The court found no easement of necessity
    ▫ PP did not show that the land was landlocked at the time of severance or that it was more than a mere convenience at that time (he conveyed another part of the land 2 years later)
    ▫ Having no other outlet is not enough
  
  ▪ No easement by prescription...gate was not locked...given implied permission....was licensed
    ▫ Acquired in the same manner as adverse possession, except
      o Open and notorious
      o Continuous hostile – legal hostility – use the easement in the absence of permission
        ▪ call it easement hostility – not hostility to owner’s ownership of the estate but hostility to ability to use the property
      o exclusivity
        ▪ you can have a shared use and still have a prescriptive easement
      o to defeat a claim
        ▪ must stop a person from using your property
        ▪ or you can license it

o **Matthews v. Bay Head Improvement Association** – public wanted to use dry sand area of beach owned by a quasi-public body (DD)

  ▪ **Public Trust Doctrine = easement by necessity**
    ▫ All navigable rivers in which the tide ebbs and flows and the coasts of the sea, including the water and land under the water, are common to all citizens and each has a right to use them according to his necessities...this includes municipality owned dry sand area
Where use of the dry sand is essential or reasonably necessary for enjoyment of the ocean (need way to get to the ocean and somewhere to rest and relax), the doctrine warrants the public’s access and use of the dry sand area subject to an accommodation of the interests of the owner.

What are the arguments that it is not a fair result?
- Taking over someone else’s private land who paid for it.
- DD would have burden of cleaning the beach the public dirty.
- This is socialism…dedication of private property rights to the public.

Why is this fair?
- Economic…best use of public land
- Solves the taking problem…you just have to pay for access
- Like giving an easement by necessity to the public (parking lot = landlocked) and thus don’t require compensation.

- **Affirmative and Negative Easements**
  - **Affirmative**
    - Allows the holder to do something on the land of another…park in someone’s lot, chunnel raw sewage through the underground of their land.
  - **Negative**
    - Takes away from the owner of the serviant estate the right to do something…stop someone from using their land in a certain way.
      - A might agree not to put something on his land to block B’s view of the ocean.
      - Conservation – stopped from doing something to destroy the characteristic of the home.

- **Real Covenants** (enforceable in law…only money damages)
  - An agreement (or contract) between a grantor and grantee that one will or will not do something with their land.
    - If it’s between two landowners, only contracts applies, not property law.
    - The way property owners bargain/work to allocate their resources efficiently.
  - Are enforceable by and against successors…assignable.
    - We call this enforceability…running with the land (does the covenant…run with the land).
  - **Four common law requirements for a covenant to run with the land**
    - It must be in writing.
    - Must have intent that the covenant will run with the land (successors or assignees).
    - Must touch and concern the land.
      - Performance of the covenant makes the land more valuable or more useful.
    - Must be privity of estate.
      - Horizontal.
        - Original owners who created the covenants and giving/selling the land to the other.
        - A successive relationship in land…grantor/grantee relationship.
      - Vertical.
        - Privity of estate between one of the covenanting parties and a successor in interest.
  - **Requirements for burden of covenant to run at law:**
    - The parties must intend that successors to the promisor to be bound by the covenant.
      - Found in language of deed.
      - Run with the land…or promises for his and her promisee’s.
    - Horizontal and vertical privity (of the full estate) (Ernst v. Conditt…need same duration of estate to be given) of estate may be required.
    - The covenant must touch and concern land owned by the promisee.
      - If performance of the covenant makes the land more valuable or more useful than it touches and concerns the land.
        - Putting up a fence counts.
        - But not picking up landlord’s mail.
    - The subsequent purchaser of the promisor’s land must have notice of the covenant.
- **Requirements of the benefit to run:**
  - The parties must intend for it to run
  - Horizontal and vertical privity (part of the estate)
  - The benefit must touch and concern the land

- Courts are much more likely to allow benefits to run over the burden to run
- Since real covenants are an action of law and therefore the only damages were available as a remedy

- **Equitable servitude distinguished**
  - Covenant enforced in equity…injunction or specific performance
    - By and against successors to the land of the original parties to the contract
    - Don’t need privity for benefit or burden to run
    - Do Need
      - Intent that the restriction be enforced by successors in interest
      - Notice to the subsequent purchasers
      - Restriction must touch and concern the land

**Covenants Enforceable in Equity: Equitable Servitudes**

- **Tulk v. Moxhay** – PP sold part of Leicester Square with covenant stating garden would remain and tenants would be able to use it…but DD sold to another who wanted to build on it
  - Deemed inequitable that a covenant should be unenforceable against a subsequent purchaser where the purchaser acquired the land with knowledge of the restriction…wrong to let him win on a mere technicality…equity favors the PP, though there’s no legal remedy
  - In one fell swoop, the court smashes the privity nonsense to bits
    - Eliminates roadblock of privity as it applies to covenants
    - Eliminates prohibition of negative easements

- **Diff btwn equitable servitudes and real covenants**
  - Real covenants is an attempt to expand contract to regulate private land use agreements
  - More than a contract, but in its heart, it is a contract
  - Equitable are interest in land that are enforceable in equity…might be less than fee simple, but in its heart, it’s a property interest…right to exclude
  - Equitable servitude and negative easement…no way to really distinguish
  - **Real covenant**
    - Must have a covenant in writing
    - Must run with the land
    - Touching concern of some kind
    - Privity of estate in some form
  - **Equitable servitudes**
    - Covenant in writing
    - Intent to run with the land binding to successors
    - Touching concern requirement
    - That it’s fair to enforce it…that there’s notice
    - A person who succeeds to the land with notice of the restriction, can’t violate the restriction in equity

- **Covenants Running with the Land**
  - **Shelley v. Kraemer** – covenant restricting non-whites to use home
    - The 14th Amendment (equal protection of the laws) inhibits only action of the State…it is no shield against merely private conduct
    - But here the agreements would have to be secured by judicial enforcement by state courts, which would be an action of the state
• Is there a problem with this ruling?
  • But anything could be state action…gifts, property, contracts, marriage
    o If Richards gives property to the clan…the order of the courts to dispose of the property in that way…it’d be state action
  • Creates a larger Pandora’s box of problems
    o Courts have tended to limit the Shelley problem to its problem
• Do we need the Constitution to reach the right result?
  • Lack of notice? If you don’t have notice of restriction, you can’t take the property?
    o Deed was recorded, so that won’t help
  • What about privity? Equitable servitude?
    o We don’t have horizontal privity, just vertical privity. Is that enough to stop injunction of sale? You can’t get damages because there’s no horizontal privity…but can get an injunction…doesn’t help Shelley’s
  • What about language of the grant?
  • What fundamental precept of property law is being violated here that makes this covenant unenforceable
    o Restriction on alienation
  o Nahrstedt v. Lakeside Village Condominium Association, Inc. – PP wanted right to keep cats in her home against the homeowners restriction otherwise
    • Civil Code § 1354
      • Requires courts enforce covenants, conditions, and restrictions contained in the recorded declaration of a common interest development unless unreasonable to the community (can’t be arbitrary, against public policy)
        o More deference than a deed created by the governing board
        o Tenants have agreed to this when they bought the condo
    • PP must show that the restriction imposes a burden on affected properties, which substantially outweighs the benefits of the restrictions
    • Inherent in the condo concept is the concept that each owner must give up a certain degree of freedom for the well-being of all
    • She gets all the benefit…they all get burden…thus covenant is enforceable
      • Litigation costs borne by the other homeowners would be unfair…fact finding is expensive
      • Allows homeowners expectations to be settled
      • Upholds the social fabric of the community
        o Majority
          ▪ Stable expectations would be disrupted
        o Minority/Dissents view
          ▪ Of the benefits of having cats and oppressiveness about not allowing cats
          ▪ Rights of individuals and rights of all of us as a larger society…rule is arbitrary, unreasonable, unfair
          ▪ Home is your castle
            - Rights shouldn’t infringe on your private space…it’s inhumane
        o Are these communities good?
          ▪ Right of alienability
          ▪ Wealth and racial segregation occurs
          ▪ What are the limitations…why is it bad…should we restrict people where and how they can live…ponder this!!!!!

Chapter Eleven: Legislative Land Use Controls: The Law of Zoning

- Historical background
- Industrialism in the 19th century produced extraordinary changes – congestion, overcrowding, noise,
- tenement housing, moral turpitude, foul orders, danger of fire
these were beyond the corrective powers of doctrines such as nuisance and servitude
- even nuisance only gave damages or an injunction after the fact
- thus city planners turned to zoning to PREVENT harmful effects from being visited upon neighbors
- thus came garden cities…giving people ample space to live healthy and useful lives
- belief that rational planning was possible and could control the uncoordinated decisions of uncoordinated
- decisions of individual landowners which resulted in ugly and chaotic cities
- single family home protection
- separation of uses
- low rise development
- medium density population
- stable, suburban communities…people not piled on each other
- less crime, cleaner
- IS THIS PREFERABLE TO THE COMPLEXITIES OF THE FREE MKT IN DEVELOPING LIVABLE
- CITIES WITH OPPORTUNITIES FOR SELF REALIZATION FOR EACH INDIVIDUAL

- **Village of Euclid v. Ambler Realty Co.** – DD owned 68 acres of land upon which he hoped to develop for industrial use. However, the land had been divided into 6 classes of use districts. Thus 130 acres could not have industries upon them. This reduces the mkt value from 10,000 per acre to 2,500 per acre
  - In deciding whether the power exists to forbid the erection of a building of a particular kind for a particular use is to be determined by considering it in connection with the circumstances and the locality (pig in a parlor)
  - The court held that the ordinance in its general scope is a valid exercise of authority
    - Police power – power of state and local gov. held by the states to regulate for health, safety, and moral welfare of society.
  - Arguments against
    - Prohibits free exercise and use of land
    - Land is not put to best use
    - Like socialism
    - Unfair distribution of wealth
    - Promotes economic and racial segregation
    - More cars, more traffic, people don’t walk places

- **PA Northwestern Distributors, Inc. v. Zoning Hearing Board** – DDs adult bookstore was no longer allowed due to a new town zoning ordinance. They gave defendant a 90 day amortization period to meet the std and not operate the book store
  - A zoning ordinance’s validity must be tempered by the Court’s appreciation of the fact that zoning involves governmental restrictions upon a property owner’s constitutionally guaranteed right to use his or her property, unfettered by governmental restrictions, except where the use violates any law, the use creates a nuisance, or the owner violates any covenant, restriction, or easement
  - The effect here is to deprive PP of the lawful use of his property. If the gov decides to interfere with the owner’s use, where the use is lawful and not a nuisance, it must compensate the owner for the resulting loss
  - If municipalities were free to amortize nonconforming uses out of existence, future economic development could be seriously compromised
  - Factors many courts use to assess the reasonableness of a particular amortization period
    - Nature of the use in question
    - Amount invested in it
    - Public detriment caused by the use
    - Character of the surrounding neighborhood
    - Amt. of time needed to amortize the investment
  - Ways to deal with nonconforming use if amortization is illegal
    - Nuisances
• Illegal
• Abandoned
• Are taken by eminent domain and given compensation
  ▪ Is amortization fair?
    • Doesn’t follow first in time
    • Lowers the magnitude of the injury, but doesn’t get rid of it
    • But what about progress?

Aesthetic Regulation

  o **State ex rel. Stoyanoff v. Berkeley** – DD wanted to build a unusual house, but was denied a residential building permit
    ▪ The stabilizing of property values and assurance to the public that, if property is purchased in a residential district, its value as such will be preserved, is probably the most cogent reason back of zoning ordinances (i.e. Amber Realty)
      • But unlike Amber…it’s not for protection of kids
    ▪ Property use, which offends the sensibilities and debases property values causes the tax base of the community to be affected and the public suffers economically as a result.
    ▪ Beauty of a fashionable residence neighborhood in a city is for the comfort and happiness of the residents
      • But beauty cannot be sole factor of issuance of a permit

  o **Anderson v. City of Issaquah** – PP wanted to build a commercial building for retail tenants, but was denied by the DD multiple times after making changes and attempting to comply
    ▪ A statute which forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential due process of law
      • The purpose of the void for vagueness doctrine is to limit arbitrary and discretionary enforcements of the law
    ▪ Here the court upheld that the code sections did not give effective or meaningful guidance to applicants, design professional, or public officials responsible for enforcing the code
    ▪ You can zone, but to be enforceable, the statement must be written down in code, in understandable terms…parties must be given clear guidance

  o **City of Ladue v. Gilleo** – city ordinance prohibited homeowner form displaying signs on the property except residence identification, for sale, and signs warning of safety hazards in residences…thus DDS say no to war sign was prohibited
    ▪ Two grounds for challenging the constitutionality of a municipal ordinance regulating the display of signs
      • If the measure in effect restricts too little speech because it’s exemptions discriminate on the basis of the signs’ messages
        o May give one side an advantage in expressing its views
      • If they prohibit too much protected speech
        o here the city has foreclosed a venerated means of communication that is both unique and important
        o foreclosed a medium to political, religious, or personal messages
Notes:
Problems 212

#1) A – life estate
   B – 1600 no fee simple given…no and his heirs….give him a life estate
   2002: A – life estate….B – fee simple
   If both dies and even if they have children…it goes back to O
   B has a remainder in a fee simple

2)  C gets remainder in fee simple…once A dies…fee simple

3)  B has nothing yet and thus no interest
   A can do what she wants
   B has only a hope or expectancy