PROPERTY THEORIES

- **Efficiency Theory:** most laws exist to protect property, to give ppl enforceable expectations of using good.
- **Tragedy of the commons:** refers to the proven observation that, when property is open t use by all, each person overuses it, thus depleting
  - Example: Pollution: each factory has incentives to pollute rather than spend money to clean its emissions, b/c the cost/harm of each one’s pollution is spread to others
- **Occupation Theory:** He who seizes the land/property owns it
- **Labor Theory:** Whoever labors to create property should own it
- **Natural Rights Theory:** The right to own property is a natural right
- **Legal Theory:** private property is whatever the law recognizes as property
- **Social Utility Theory:** society allows private property b/c doing so benefits the social welfare.

I. FINDINGS (ch7)

A. **Doctrine of accretion:**
   - According to the doctrine of accretion, the landowner gets the benefit of any land that gradually builds up. If there is a sudden change to the land, an avulsion occurs, and the moved land does not go to the landowner.
     - Accretion: if land gradually builds up, then landowner get the benefit of the build-up
     - Avulsion: (sudden change) the land that is thereby moved does not become that of the beneficiary
       - Ex: Goodard v. Winchell (85) → D finds aerolite in P’s land

B. **Lost Property:**
   - The finder of lost property has a superior title to all but the true owners. If the lost property is found in a public place, the finder has superior title, even above the landowner. If the lost property is found in a private place, a finder is not entitled to the lost object if the landowner is trying to exercise control over the area and the things on or in it. If the finder is an employee, he is not entitled to the lost object if it was not within his scope. Where a houseowner has no prior possession or control over property lost in his house, the property belongs to its finder, not the houseowner. The occupation or possession of property lost, abandoned or without an owner must depend upon an actual taking of the property with the intent to possess it.

   - The occupation or possession of property lost, abandoned or w/out an owner must depend upon an actual taking of the property with the intent to possess it.
     - Ex: Eads v. Brazelton (91) → finds abandoned shipwreck and marks it intending to return to recover
       - Simply manifesting intent to possess (using buoys to mark the wreck) is not act of possession.
   - The finder of lost property has a superior title to all but the true owners (ie. Finders keepers)
     - Ex: Armorie v. Delaminie (95) → finds jewel to pawn shop; shop owner refuses to return
       - Purpose is to protect finders and to avoid stealing.
   - When lost property is found in a shop, the finder’s claim to the property is greater than that of all but the true owner including the shopowner.
     - Ex: Bridges v. Hawkesworth (96) → P found package on floor of D’s store; true owner not found; D wouldn’t return it
       - Distinction b/w lost property (in ex, it is lost b/c it is found on floor) and mislaid property
A finder of a lost object is not entitled to the lost object if the landowner is trying to exercise control over the area.
  - Ex: South Staffordshire Water Co v. Sharman (97) → found 2 gold rings at bottom of pool while hired to clean the pool; it was out of the scope of his employment to take the rings

Where a houseowner has no prior possession or control over property lost in his house, the property belongs to its finder, not the houseowner.

The extent to which the landowner attempts to exercise control will tell us whether the landowner or finder gets the lost property.
  - Ex: Hannah v. Peel (97) → Hannah (soldier stationed at house while requisitioned by army) found brooch
    - Draws distinction b/w Staffordshire and Bridges (found to be more akin to this case)

C. Mislaid property

Mislaid property is property that the true owner intentionally placed in a given location and then left, or intentionally left intending to return for it later. The landowner acquires possessory right that is superior to all but the rightful owner. Finder has no title to property that is mislaid.
  - Ex: McAvoy v. Medina (102) → customer left pocketbook on counter at barber shop
    - With mislaid property, some responsibility is given to the landowner to take care of the property
    - Policy: Encouraging return of the object to its rightful owner (to avoid stealing).
  - Ex: Schley v. Couch (103) → P (workman) found money buried in glass jar in D’s garage
    - In this case, there seems to be a deliberate, conscious, and voluntary act of the owner desiring to hide his money in a place where he thought it was safe and secure, and with the intention of returning to claim it. For these reasons, it is decided that it was mislaid, and not lost, property.

II. BAILMENTS (ch8)

A bailment is a temporary transfer of the right to possess property from the bailor (owner) to the bailee (temporary possessor). To have a bailment, the bailee must have possession of the property, control over the property, and expectation of obligation from the parties involved. However, if the objects that are to be safeguarded are not within the expectations of the parties, then those objects are not part of the bailment and the bailee is not responsible.

- Bailment is one step further than mislaid property
- Bailment is the relationship b/w the owner of some object and one who possesses it lawfully
- Relationship implies obligation to safeguard the object on the part of the possessor
- The issue is often whether or not the circumstances were such that the bailee has the obligation to safeguard it
- If the objects that are to be safeguarded are not within the expectations, then it is not part of the bailment and the bailee is not responsible.
- Need to look at the circumstances to see what the implied obligation to safeguard is.
- For bailment, need to consider:
  a. Possession
  b. Control
  c. Expectations of obligation
    - Ex: Allen v. Hyatt Regency-Nashville (114) → parked car in lot w/ security guard, limited access
      - Because there was a security guard and limited access to the parking lot, the hotel (bailee) was obligated to safeguard the car and is strictly liable for damages therefrom
III. BONA FIDE PURCHASE (ch9)

A Bona Fide Purchaser (BFP) is a purchaser who buys property in good faith from a seller who has no title of the foods. According to the traditional doctrine, there was no such thing as BFP, because a seller cannot convey better title that he has. However, under the modern approach, a purchaser is a BFP if he reasonably believes that the seller really owns the object. According to the notion of estoppel, a true owner cannot proceed against a BFP. A BFP who obtains an object from a seller who has a voidable title will be protected.

A. Bona fide purchase (b.f.p.): situation where purchaser buys in good faith (for value and without knowledge) from a seller who has no title of the goods and has wrongful possession of the goods (i.e. thief, finder)

- Traditional v. Modern Approach
  - **Traditional** doctrine
    - nobody can convey a better title than he has
    - nobody can sell or transfer something he doesn’t own
    - cannot take a title from a thief
    - we don’t want to encourage traffic in stolen goods
    - should put owner above anything else
    - there was no such thing as BFP
  - **Modern** approach
    - reasonably believes that seller has the authority to sell
    - more of a pro-commercial view (encourages commerce)
    - more flexible
    - allows for transfer if purchaser reasonably believes that the seller really owns it
    - can be modified either by strict court limitation or specific state laws

2. Estoppel

- **Estoppel: true owner cannot proceed against BFP**
  - Statutory
  - Equitable

- Ex: Porter v. Wertz (123) → Porter gave painting to Von Maker (who was using Wertz’ name) to hang in his home to decide if he wants to buy it; Von Maker sold it to Feigen, who sold it to Brenner, who sold it in Venezuela; the purported BFP is Feigen
  - Apparent authority was not transferred beyond mere possession, so the purported BFP is not entitled to the object and the transaction is void.

3. Voidable Title

- **Voidable Title: BFP who takes from one who has a voidable title will be protected**

- Ex: Sheridan Suzuki Inc v. Caruso Auto Sales (129) → Bouton bought motorcycle from Suzuki with a bad check, and sold it to Caruso the next day without even having Certificate of Title
  - Since the voidable title was not perfected (a statutory requirement), BFP (Caruso) is not protected under the “voidable title” defense
  - Not invalidating the exception of “voidable title” which protects a BFP, but the statute adds additional elements that would have to be met
IV. UNAUTHORIZED POSSESSION (ch10)

A. Possession of Non-Owner Third Persons

A non-owner third party who has acquired possession of property, by whatever means, has a right to retain that possession against all but the rightful owner. If the true owner is unknown, the first possessor gets to keep the property. If the true owner is known, then the most recent possessor gets to keep the property.

- One who has acquired possession of property, by whatever means, has a right to retain that possession against all but the rightful owner
- **If true owner is unknown, the finder/first possessor gets to keep it**
  - Ex: *Anderson v. Gouldberg* (132) → D took possession of logs cut by P while P was trespassing an unknown third party’s land
    - Even though P did not rightfully cut down the logs, he had possession of them
    - The property goes to the person who has possession if the true owner is unknown (the court wants to avoid reprisals)
    - In this case, P had possession by cutting them down and taking them
    - When two non-owners are competing against one another for the property, most courts will hold that the first one to get possession gets to keep it

4. **If true owner is known, most recent possessor gets to keep it**
   - Ex: *Russell v. Hill* (133) → P bought lumber from McKoy (who lived on land she thought was hers, but was really Busbee’s) and floated it down the river. D took the logs from the river and sold them for $686
     - P didn’t have actual ownership since he bought it from someone who wasn’t even the actual owner
     - Since the true owner is known, the most recent possessor gets to keep the property b/c courts wants to avoid double recovery

B. Adverse Possession

A non-owner third party has adverse possession if he comes into possession of an object and is deemed the owner because of various circumstances which are often governed by statutory time limitations. According to the discovery rule, the statutory time limitation usually does not begin until after the injured party discovers, or by reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action. An adverse possessor can pass good title.

- In order to have adverse possession, there must be:
  a. Possession: open, notorious, visible; use of the land which would be similar to that which a typical owner of similar property would make
  b. Hostile: possession without owner’s consent/permission/license
  c. Adverse: against the interests of the owner
  d. Continuous, long, uninterrupted occupation
- Often, there are statutory limitations to govern when the time limit has passed.
- **Adverse possession is enough to pass good title.**
  - Ex: *Chapin v. Freeland* (136) → P bought shop w/ D’s counters from someone who was the adverse possessor.
    - Through adverse possession, title had passed.
    - Through statute of limitations, time had run out to reclaim the counters
    - Policy: don’t want people going around and just taking stuff claiming to be the true owners
  - **Discovery Rule**
    - Ex: *O’Keeffe v. Snyder* (138) → P’s painting was stolen from her gallery; O’Keeffe discovered the painting in an art gallery in 1975; Frank had the painting and sold it to Snyder in 1976.
Discovery rule: the cause of action will not accrue until the injured party discovers, or by reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action
Discovery rule as to adverse possession only applies with personal property (distinguishing b/w real property and personal property)

V. ACCESSION (ch11)

Accession is the improvement of another person’s chattel, usually by labor or added materials. A trespasser, in good faith, has title to the improved chattel if he expends own labor on the property and the circumstances are such that it would be grossly unjust to permit the other party to receive the full benefit of that labor w/ nothing paid to the laborer. This determination is made by the disproportionate value test, which considers how much the value has been increased. If there is a mistaken improvement, or mistaken trespassing, the improver gets the benefit of the increased value of the chattel.

A. Title of Accession
- Accession: improving the value of another person’s chattel (usually w/ labor or added materials)
- When a trespasser, in good faith, expends own labor on the property and the circumstances are such that it would be grossly unjust to permit the other party to receive the full benefit of that labor w/ nothing paid to the laborer
  - Ex: Wetherbee v. Green (151) → D cut timber (value = $25) from P’s land and made hoops (value = $700)
    - The original owner should get value of what they lost (value of original item); they shouldn’t get the property, in its improved and increased value, b/c they didn’t labor and/or spend money to get their property to that state
  - Rejected theory → “Different species test”: Figuring out if identity of property is changed.
  - Accepted theory → “Disproportionate value test”: How much the value has been increased
    - some line that if you improve the property enough (substantial value increase), then you are entitled to keep it (as long as you compensate original )
    - if there is very little change, it stays with the original owner
    - argue both sides: this is common law, so there is no specific rule
    - the court LIKES improvements and doesn’t want to discourage it (economic theory, labor theory); but people also cannot just go around and make improvements on whatever they want b/c of the good faith requirement
  - Ex: Isle Royal Mining Co v. Hertin (151) → D cut land (labor) from P’s land; P took it from D
    - Since there was no great disparity in value b/w the pre-conversion and post-conversion of the property, the doctrine of accession does not apply
    - Courts tend to not want to interfere with the parties’ position: in this case, P (original owner) has current possession and taking it out of his hands would be very disruptive

B. Improvements
- Mistaken improvement (or mistaken trespassing): improver gets the benefit of the increased value
  - Ex: Hardy v. Burroughs (136) → P mistakenly built house on D’s land; D took possession of house without any reimbursement to P (labor + cost $1250)
    - Since P built the house mistakenly in good faith, he is entitled to sue in equity for the value of those reimbursements
VI. DONATIVE TRANSFERS (aka GIFTS) (ch12)

A donative transfer is a gift. Under the traditional approach, manual delivery of the gift was required. Under the modern approach, any act or instrument showing intention to transfer the gift is sufficient. For a gift cause mortis to be valid, the dying person must die from the reason he thinks he is going to die from and there must be actual delivery of the gift.

A. Gifts
- One who claims ownership by voluntary transfer must show that the transferor manifested intent to transfer the claimed interest and that formalities required by common law or statute have been observed.
  - Traditional approach
    - manual delivery is required
    - gift had to be physically handed over to know that the gift has really been transferred over
    - protection for people who gave gifts against whims
  - Modern approach:
    - any act showing intention is sufficient to constitute a gift
    - do not require manual or physical delivery
    - as society becomes more complex, ways to make sure that law protects transfer of gifts are needed
  - Ex: In re Cohn (160) → Man wrote promise to give wife 500 shares as bday gift; died 6 days later
    - The gift is valid b/c there was an instrument of gift and proof of the intent to make a gift
    - If there is a reasonable and satisfactory excuse, the property need not be delivered at that time
  - Ex: Gruen v. Gruen (164) → father gave painting to son as gift, but wanted to keep it until his death; when father dies, stepmother (who had possession) refused to give the painting to the son
    - Donors may make living gifts while reserving the right to keep the item for their lifetime
    - It is clear that father had the intention to give the gift, so it is a gift under the modern rule
    - Policy: The reason we can apply the modern approach comfortable is b/c the title that was transferred was very specific; we knew exactly what was being transferred and how it was carried out, as the donor had specified how he wanted the gift to be transferred to his son.

B. Gift Causa Mortis
- When one is dying, and transfers gift before dying, it is a valid gift transfer if:
  1. Person dies from the reason he/she thinks she is going to die from
  2. There is actual delivery of the gift
  - Ex: Foster v. Reiss (166) → Wife, on her deathbed, gave note to husband to take hidden prop from house
    - Court finds that formal delivery of the items is required (traditional approach)
    - Dissenting opinion takes on the modern approach of the delivery requirement
    - Trying to put a check on people’s whims; also trying to prevent beneficiaries of gifts from taking advantage of the dying person and the circumstances
  - Ex: Scherer v. Hyland (173) → woman left endorsed check for husband on counter and committed suicide
    - There was evidence that donative intent was clear, concrete, and indisputable since it was left in a place where only the two of them had access and where he would very likely find it
      - Donative intent
      - Intent for immediate transfer
      - Donor took steps that were sufficient to effectuate transfer

C. Engagement Ring
- Engagement ring is a conditional gift and must be returned if marriage does not occur (varies by state)
  - Ex: Lindh v. Surman (179) → Man broke engagement (2nd time); fiancé refused to return ring
According to Penn law, the ring must be returned. The court decides that it was an exchange, with the notion of what was going to be done with the gift. There are three approaches which vary by state:
- Fault-based: decided based on who was responsible for the engagement failing
- Modified no-fault: groom is not entitled to his ring back only if he did not break off the wedding
- No-fault: must be returned to donor if the marriage does not occur (such as in this case)

VII. HIST’L DEVELOPMENT OF ESTATES DOCTRINE (ch13)

A. Feudalism
- The modern understanding of property in America is based on feudalism
- The notion if feudalism is that land itself cannot be owned, that land itself is held by one party and is under the subordination of a person who is higher up on the hierarchy, who is subject to higher person.
- As there was violence (people trying to conquer land or steal), there was the feudalization of Europe.
- Feudalization of Europe: get reciprocity of rights and duties; usually some kind of personal service or supply of goods for security. Usually, there is going to be someone at the bottom who provides something to his lord, who provides to his lord, and so on it goes up the ladder as such. There are services of a different nature: military, money, scrubbing floors, etc.
- The point of feudalism is that there is reciprocity with rights being exchanged; there is no concept about absolute land ownership; land is not something that can be owned, but is just held; the only absolute owner is god.
- Feudalism is a set up for modern prop law, b/c there are lots of property notions that are not based on absolute ownership (land is used for some purpose).
- People are not owners, but users of land.
  - Ex: In re O’Connor’s Estate (195) → landowner died w/out will so land escheated to the state; county demanded inheritance tax from state
  - The state is not liable to pay tax, b/c state (government) is the ultimate and absolute owner (sort of as though the notion that god is the ultimate owner has been transferred to government

VIII. FREEHOLD ESTATES (ch14)

A. Fee Simple Absolute
- Fee Simple Absolute: may last indefinitely, and which, if not sold or passed by will, passes to the owner’s heirs; a fee simple absolute is created by a grantor and given to A
  - Traditional approach: must include “to A and its heirs”
  - Modern approach: intent is enough; language is not necessary; “to A” is sufficient
  - Ex: Cole v. Seinlauf (200) → D did not have marketable title since the deed lacked the words “and its heirs”
    - This court takes traditional approach by requiring language of "and its heirs"
- Testamentary power of land (history)
  - Statute of wills in 1540 made it alright to will land
  - English common law moved further and faster in giving testamentary disposition over land to individuals
  - land was allowed to be willed away, while personal property was subject to debts
  - children are likely to take
  - gov. is ultimate owner
fee simple absolute has to include specific language under the traditional rule, then modern rule develops

**Rules of Descent and Distribution**
- society decides who takes the property in absence of a will
- without a will, property is going to pass a certain way (example of rules (based on Illinois on p 206-208)
- usually, starts with closest family member (spouse, children, etc)
- if no kin, estate is escheated to the state

**B. Fee Simple Determinable (defeasible fee)**
- *Fee Simple Determinable: G to A for as long / until / while as nobody smokes on the land. Reversion in G.*
- *Automatically reverts to G if condition is not met.*
  - Ex: Oldfield v. Stoeco Homes, Inc (225) →
    - The court looks at what the intent was, and decides that it was a fee simple determinable
    - There are contradictory statements that lead toward both fee simple determinable and fee simple subject to condition subsequent
  - Reversion
    - Grantor gives estate to A for life → grantor gives the estate to A until A dies, then it goes back to G (if G is dead, it goes to G’s heirs)

**C. Fee Simple Subject to Condition Subsequent (defeasible fee)**
- *Fee Simple Subject to Condition Subsequent (and right of re-entry): G to A on condition that nobody smokes on the land; and if anybody does, then G may re-enter and terminate the estate.*
- Does not automatically revert; is more flexible than a fee simple determinable.
- Must take affirmative action to repossess

**D. Fee Simple Determinable with Executory Interest (defeasible fee)**
- *Fee Simple Determinable with Executory interest: G to A on condition that nobody smokes on the land; and if anybody smokes, then to C.*
  - C has springing executory interest. (Does not cut short)

**E. Life Estate “pur autre vie”** (French for ‘for somebody else’s life’)
- *G to A for the life of B*
- G gives estate to A, who transfers it to B, and life estate lasts until B dies.

**E. Fee Tail**
- *G to A and the heirs of his body. Reversion in G.*
- Not used much today; used in the past to restrict heirs to be only blood relatives.
  - Traditional = only blood line
  - Modern = includes adopted children

**VIV. FREEHOLD ESTATES (ch15)**

**A. Vested remainder**
- *G to A for life, and then to B*

**B. Vested remainder subject to open (or “partial divestment”)**
- *G to A for life, and then to A’s children. If no children born at time of grant, contingent remainder in unborn children, reversion in G. If children at time of grant, vested remainder subject to open in children.*
- Adopted children count as children, so it doesn’t matter if A cannot physically have children.
C. Vested remainder subject to total divestment
   - G to A for life, remainder to B and his heirs; but if B doesn’t have children, to C. B has vested remainder subject to total divestment

D. Contingent remainder
   - G to A for life, and then to B if outlives A
   - Destructibility
     - G to A for life, then to B if B becomes a cowboy. If A dies before B can take, contingent remainder destroyed.
     - Traditional rule: If B does not become cowboy, then reverts to G.
     - Modern rule: If B does become a cowboy, then springing executory interest.
   - Rule in Shelley’s Case
     - G to A for life, and then to A’s heirs = fee simple absolute in A
     - The limitation creates a remainder, which merges with the life estate to create a fee simple absolute.
   - Doctrine of Worthier Title
     - G to A for life, and then to G’s heirs = reversion in G

X. CONCURRENT OWNERSHIP (ch16)

Concurrent ownerships refer to 2 or more persons who simultaneously have equal rights in real or personal property. If owners do not get along, then the property can be partitioned,

A. Tenants in Common

Tenants in common are two or more parties who own a fractional, undivided interest that can be equal or unequal, which is obtained through inheritance or conveyance. No co-tenant has a superior right of possession. If there are disputes b/w the parties, the legal remedies include: partition, leasing and apportioning the rent, or purchase by one cotenant of the other’s interest. Traditionally, the presumption was that land conveyed to 2+ persons is a joint tenancy. Modernly, the presumption is that land conveyed to 2+ persons is a tenancy in common.

- Two or more parties own a fractional, undivided interest that can be equal or unequal, which is obtained through inheritance or conveyance.
- No co-tenant has a superior right of possession. None can evict the other.
- If there are disputes b/w the parties, the legal remedies include: partition, leasing and apportioning the rent, or purchase by one cotenant of the other’s interest.
- Courts prefer tenancy in common b/c it is easier to alienate.
  - In re Michael (325)
    - Tenancy in common is preferred over joint tenancy
    - If one wants to create a joint tenancy w/ right of survivorship, there must be clear intention
  - Laura v. Christian (328)
    - Cotenant who pays more than his share of a debt, secured by a mortgage or other lien on the common property, is entitled to reimbursement (contribution) from his cotenants to the extent to which he paid their shares of the indebtedness.
    - Cotenants may benefit from one cotenant paying off debt if they contribute within a reasonable time.
    - Otherwise, the nonpaying cotenants lose their interest in the property.
B. Joint Tenancy

Each joint tenant has an equal interest in the whole property, with a right of survivorship. Right of survivorship is terminated when one party conveys his interest away. Traditionally, the presumption was that land conveyed to 2+ persons is a joint tenancy. Modernly, the presumption is that land conveyed to 2+ persons is a tenancy in common, unless there is explicit language to indicate a joint tenancy.

- **Right of survivorship:** A and B own fractional, undivided interest; but if A dies, B takes over A's interest.
- **If interest is conveyed away,** the joint tenancy is severed, and the right of survivorship is terminated.
- Two approaches:
  - Traditionally, the presumption was that if the land was conveyed to 2+ persons, a joint tenancy was created.
    - Four unities: time, title, interest, possession. (high courts pg 113)
  - Modernly, if you convey land to 2+ persons, then it is tenancy in common, unless there is clear language that shows intent to create a joint tenancy.
    - Unities are abolished.
- **Jackson v. O’Connell** (337)
  - Where 3+ joint tenants exist, the conveyance by one joint tenant to another joint tenant does not sever the entire joint tenancy.
  - The grantee remains a joint tenant, but becomes a tenant in common w/ the other 2 joint tenants.
  - The remaining 2 joint tenants still have right of survivorship.
- **Matter of Estate of Vadney** (340)
  - Need to have clear and convincing evidence that a joint tenancy is intended.
  - Here, there is evidence that the scribner made a mistake when writing the will.
- **Palmer v. Flint** (342)
  - Deed says “as joint tenants, and not as tenants in common, to them and their assigns and to the survivor, and the heirs and assigns of the survivor forever.”
  - Court holds that this language conveys a **joint tenancy**, and not a joint life estate to the grantees w/ a contingent remainder in fee to the survivor.
- **Jones v. Green** (349)
  - Deed says “as joint tenants with full rights of survivorship and not as tenants in common.”
  - Court (in thisjsx) holds that a joint life estate followed by a contingent remainder in fee to the survivor is created, and not a joint tenancy.
  - The distinction is that indestructibility does not apply in a joint life estate; joint life estate cannot be severed unless both agree.
- **Mann v. Bradley** (361)
  - “joint” language is not enough to say that there is a joint tenancy
  - Intention is to sever the joint tenancy
  - Court finds that the divorce agreement severed the joint tenancy
  - Son has contingent remainder, upon turning 21
  - Intention to divide the property is enough to sever the joint tenancy and turn it to tenancy in common

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**MORTGAGES for joint tenancy**

- Whether a joint tenancy can be severed by a mortgage depends on the jurisdiction:
  - mortgage-title states → in some, mortgage is a severance; bank holds title until fully paid off
  - mortgage-lien states → in others (CA), mortgage is not a severance; mortgage is a lien; mortgage does not survive the death of the mortgagor
    - **People v. Nogarr** (352)
      - is mortgage a severance of the joint tenancy? → no (if it was severance, it would become tenancy in common); in this case, it was a mortgage-lien
- **Slayer Statute.**
  - When there is a murder, joint tenancy is separated and terminated; becomes tenancy in common
  - **Duncan v. Vassaur** (364) → wife kills husband; she does not get right of survivorship
C. Tenancy by the Entirety

**A tenancy by the entirety** is a concurrent ownership that can only be created by a married couple, which cannot be severed be either party individually.

- Concurrent ownership that can only be created by a married couple.
- Neither party can sever or partition the property.
- Can be terminated when:
  - Mutual agreement to terminate
  - One spouse dies
  - Judgment is executed against husband and wife by joint creditor of both
  - Divorce (sometimes makes it a tenancy in common)

D. Condominiums and Time-Share

**Condominiums** are a more recent kind of concurrent ownership with the idea that people can have **individual titles** to units in a building, but have **common ownership** to common elements. The individuals share both rights and responsibilities to the complex as a whole.

- **Condominiums are not considered to be unique, since they are virtually identical units**
  - *Centex Homes Corp v. Boag* (371) → condo selling vendor seeks specific performance for contract by vendee to buy
    - For condos, specific performance is not preferred by courts, b/c condos are not unique property and equitable remedies are not as sufficient
    - Specific performance is not going to be available for condos
- **For common areas, condo owners are liable to the pro rate share**
  - *Dutcher v. Owens* (377) → fire in common area causes damage in condo unit rented to 3rd party
    - Issue of control that owner has
- **Alienation**
  - *Aquarian Foundation Inc. v. Sholom House Inc* (380)
    - Notion of alienability (is it easily conveyable?)

XI. NON-FREEHOLD ESTATES (ch17)

I. LANDLORD-TENANT RELATIONSHIP

a. Creation of leasehold estates
   i. Formation of landlord tenant relationship
      - Created by oral, written, or implied agreement
      - Leases are both contracts (rights and obligations of the land—rights and duties of owners and the possessor) and conveyances (transfer of land—transferring the right to occupy)

b. Access of the rental market
   i. Safe and decent housing by govt
      - **Brown v. Southall Realty Co**: A rental contract is unenforceable when the property rented does not meet govt safety and habitability regulations (housing codes) and the landlord is aware of the violation at the time that the lease is executed
The federal Fair Housing Act (FHA):
  a. Prohibits discrimination in the sale and rental of housing including discrimination based on race, religion, gender, national origin, and familial status
c. Tenant’s rights to possession of the leasehold
   i. Tenant’s right to take physical possession of the premises at the commencement of the rental period
      • Adrian v. Rabinowitz: applies the English Rule: A lessee is entitled to receive both actual and legal possession of the premises at the beginning of the lease period and the lessor has a duty to deliver them both, unless otherwise specified.
        a. Based on the fact that tenant bargains for the possession of the premises
      • American Rule: The landlord has no duty to deliver the actual possession of the land. Courts say that it is the tenant’s duty to expel unwanted holdover tenants, and to place the burden on the landlord would be unfair
        a. Based on the idea that the tenant can as easily eject the wrongful holdover as the landlord in an action of ejectment
   ii. Responsibilities of landlord and tenant—gaining possession in a timely manner

II. LEASE PROVISIONS

A. Duration: classified according to the duration of the lease
  • Different kinds of tenancies:
    o Tenancy at will = Where no duration is specified in a lease agreement, the lease will be considered a tenancy at will; landlord can evict tenant at any time; indeterminate period; can also be terminated by tenant
    o Tenancy at sufferance = when someone holds over after the lease term; One who wrongfully remains in possession of a leasehold after the expiration of the lease.
      ▪ Commonwealth Building Corp v. Hischfield (411) → holdover tenant stayed a few extra hrs
        • Can be held to another term when:
          o Intentions: Either his actions are such that the landlord may rightfully assume that he intents to create a second tenancy
          o Quasi Contract: you can only be charged for the amount that you stay, not for an entire term
    o Tenancy for years = definite beginning and end date; no notice needed for termination of lease or a tenancy that has a definite start date and end date (even if it is for less than a year in duration)
      • Notice is not required, as the parties know when the term expired. Death does not invalidate the lease.
      • In most term of year leases, the LL reserves the right to terminate if the T breaches any of the leasehold covenants. This is call the LL’s right of re-entry. Failure to pay rent!!
    o Periodic tenancy = most common, tenancy for specific period (month-to-month, year-to-year); a tenancy which continues from specified period (week, month, year) to another until either party gives notice of intent to terminate the lease
      • All conditions and terms are carried over and apply to each subsequent period unless provided otherwise. Death does not terminate lease. (I.e., month to month lease) Modernly Jx’s require 30-day notice.

B. Condition of Premises
  • A condition of the premises can be part of the contract.
  • Constructive eviction: conditions were so bad that one felt that they had to move out, so from a property point of view, he would argue that he shouldn’t have to pay since he is no longer on the property
Richard Barton Enterprises Inc v. Tsern (423) \(\rightarrow\) elevator in commercial building was not working
- P (tenant) sues D (landlord) for not maintaining the premises
- Commercial lease
- Distinction b/w commercial and residential

C. Rent
- Most leases provide for a set amount of rent for a set amount of time
- Common law approach is that landowners can set their rent prices
- Rent control sometimes comes in as social control
  - Town of Telluride v. Lot 34 Venture LLC (436)
    - Intention of the town ordinance was for economic efficiency, to make available housing affordable
    - When talking about rent, are the parties free to fix any rent they want? \(\rightarrow\) this court says no, and affirms the common law approach
    - The policy implication of the ordinance was to make housing available
    - However, this goes against the rights of the landowner / builder

D. Use of the Premises
- (1) Duty of Continuous Operations
  - When there is a substantial base rent, there is no duty for continuous operation.
    - Majority: looks at the contract as a whole and decides whether there was duty; there would be duty to continue if there is a substantial base rent
      - Policy = having a required obligation to continue operations would discourage potential tenants from entering into lease
    - Dissenting: When there is a percentage-rate, you are expressly agreeing / promising to continuous use
      - Policy = Tenant that will seek profits more aggressively
  - When analyzing during exam:
    - If substantial base rent, then no duty
    - If no substantial base rent, use dissenting opinion
  - Factors to consider if lease contains issue of duty of continuous operations
    - Whether the lease contains an inconsistent express term or provision for a substantial fixed base rent
    - Whether the lease contains a provision giving the tenant free assignability of the lease
    - Whether the lease was actively negotiated by all parties involved
    - Whether the lease contains a noncompetitive provision
    - Whether the lessee is an “anchor tenant” whose presence operates as magnet to draw customers
  - Piggly Wiggly Southern inc. v. Heard (442)
    - Total rent is sum of the base rent and percentage of gross income
    - When Piggly Wiggly vacates the land (but still continues to pay rent), Heard sues for breach of contract
    - Piggly Wiggly argues that the lease agreement protects them
    - Court decides that the lease shows that they agreed to a substantial base rent, which is enough for a landlord to be getting some income, indicating that he doesn’t rely on the percentage-based rent
  - Another factor to consider: Anchor tenants have the duty of continuous operation

- (2) Physical Alterations
  - Traditional: any personal property attached to property becomes part of the property
  - Modern: any personal property attached to the property is removable if:
    - (1) It is a trade fixture (used for business) AND
    - (2) Will cause no material damage
For modern approach, it is unlikely that tenant can remove if it will cause material damage, even if they are willing to pay to fix damages, b/c it would require policing of the repairs to make sure everything is done correctly

Policy = modern approach promotes economic efficiency and encourages business

**Handler v. Horns** (446)

Restrictions that apply to the tenant's use of the property
- Avoiding and paying for injuries caused to person and property on the rental premises

- **Walls v. Oxford Management Co**: Where a landlord has made no affirmative attempt to provide security for her tenants and is not responsible for any physical defense that enhances the risk that a crime may be committed, she cannot be held liable for a criminal attack perpetrated upon a tenant on the leased premises
  - Remedies available to the landlord for breach of lease agreement
  - Landlord seeking termination of the lease
  - Landlord seeking eviction of the tenant
  - Landlord seeking payment of damages
  - Transfer of respective interests in the leasehold to other parties
  - Responsibilities that do and do not continue after the transfer

### III. LIABILITY FOR INJURIES TO PERSONS and PROPERTY

1. **No duty to protect (Majority)**
   a. **Walls v. Oxford Management Co** (451)
      i. The landlord has no duty to protect against criminal acts unless:
         1. There is a known physical defect that has foreseeably enhanced the risk of a criminal attack
         2. Landlord has created or is responsible for known defective condition and has made an affirmative attempt to provide security from that defect
      ii. The issue of **warranty of habitability** (structural defects, running water, etc) does not apply in this case
   b. Note: this is not a housing violation issue b/c it doesn’t deal w/ structural defect

2. **Failure to protect is breach of duty (Minority)**

### IV. LESSOR’S REMEDIES AGAINST DEFAULTING TENANT

- **Termination of Lease**
  o Lessor can terminate the lease for non-payment
  o **Majority Rule**
    - **Foundation Dev’t Corp v. Loehmann’s Inc** (458)
      - In property, there are many opportunities for breaching a contract.
      - It is more favorable to look at it as a property matter than as a contractual matter
      - Even though there is an express clause, there was good faith to make the payment
      - Pro-business / pro-transaction policy
  o **Minority Rule**
    - Note 1, Pg 463
      - If there is an express clause, it must be followed
  o **Commercial v. Residential Lease** might be looked differently
• **Eviction**
  - Lessor does not have to give a reason for evicting the lessee.
  - But, there is a ban for evicting people for bad reasons.
  - Therefore, the evicted person would have the burden of showing that there was a bad reason.
  - **Edwards v. Habib (464)**
    - Facts: Lessee was evicted for reporting violation of housing codes.
    - When there is a bad reason (such as retaliation), the contract will not be enforced, and lessor cannot evict.
    - There is nothing in the code, but the fact that there is a code indicates that you cannot evict someone just for reporting the violation.
  - If tenant is doing something that tenant has control over, it is more likely that tenant will be evicted.
  - **Note 1, Pg 467**
    - You can’t even be evicted for asserting a retaliatory eviction
    - If you assert the defense of retaliatory eviction and win, and then the landowner tries to evict again, you can use the defense again (sort of like an extension to the defense)
  - **Bar on retaliatory eviction is for social public policy, to protect people from bad conditions**
  - If you want to get rid of someone and evict them, you should probably bring the building up to standard with the housing code, so that they can’t use violation of the housing code as reason for retaliatory eviction

• **Damages**
    - Is the court treating the arrangement as a matter of contract or prop law? → contract
    - Traditional
      - If treated as property, and considered conveyance of land, since the person is not on the property and not benefiting from the property, then the person should not have to pay
    - Modernly
      - This is treated like a contract, which was an agreement to facilitate the use of the land
      - Abandonment by tenant, is not surrender to leasehold
      - Want to avoid economic burden on the landlord