Outline Property
Topics and question: with issues/ rules

1. Property _NO_
   What is Property?
   Issues
   I. What is the utilitarian view of property?
   II. What are its effects?
   III. What is alienability and why is it important?
   IV. What is common property?
   V. What is capture?

Rules

2. Leases
   How are leaseholds different from freeholds?
   Issues
   I. What makes is a leasehold?
   II. What is the dual nature of a leasehold?
   III. What are the requirements of a written lease?
   IV. What are the 4 types of leaseholds?
   V. What is a freehold?
   VI. What is a term of years?
   VII. What is a periodic tenancy?
   VIII. What if a tenant dies?
   IX. What is a tenancy at will?
   X. What if there is no fixed period for tenancy?
   XI. What is Livery of Seisin?
   XII. What is a life tenancy?
   XIII. How can a life tenancy be terminated?
   XIV. Can a tenant have the exclusive right to terminate a tenancy?
   XV. What is the numerus clausus principle?
   XVI. What is a lease for life? Why doesn’t it exist?
   XVII. What is a life estate?
   XVIII. Who has the ability to terminate an ambiguous lease?

Rules:
I. A lease gives the leaseholder the right of exclusive possession of the property, as long as he fulfills he lease obligations. CB
II. A leaseholder has all the legal rights of a possessor > can sue for invasion of possessory interest. CB
III. A leasehold is an evolving hybrid of estate (traditionally property law) and contract law (modern view). It is a conveyance of a possessory estate in land and a contract. And the 4 types are: (CB)
a. Term of years
b. Periodic tenancy
c. Tenancy at will
d. Tenancy at sufferance

IV. According to the statute of frauds (1677) any lease over 3 years must be in writing.
   Now, one year or more must be in writing, otherwise void. If tenant takes possession > a tenancy at will, and if rent is paid and accepted > periodic tenancy. CB

V. Freehold is a property right is title to land. CB

VI. A term of years is a lease for a single fixed term of any length. CB
   a. CL > any length
   b. Statutes now restrict

VII. A periodic tenancy is a leasehold for a recurring period of time. It continues until either party gives advance notice to the other party of termination. It is created by the parties intention or by operation of law. CB

VIII. Advance notice at CL was a max of 6 months, or the length of the period. CB

IX. At CL the death of the tenant did nothing, but now in residential leases > terminates it, b/c its personal. CB

X. A tenancy at will is a leasehold for no fixed period that may be terminated by either party. Under CL it can be terminated w/o notice (statutes > 1 month) and also terminates if either party dies, tenant tries to assign tenancy, or landlord sells. CB

XI. If there is no fixed period > periodic tenancy as an operation of law > 3 different calculations for term: (CB)
   a. Year to year
   b. Period measured by the way rent is calculated in the void lease
   c. Period measured by the way rent is actually paid

XII. A unilaterally terminable leasehold is a determinable tenancy. GARNER

XIII. A life estate is an interest in property that exists in a party till they die, it is assignable. CB

XIV. A tenant can have a determinable leasehold life estate (leasehold life estate did not exist at CL and is a modern invention). GARNER

XV. At CL a lease for life didn’t exist b/c it didn’t fit into the 4 types

XVI. The numerous clausus doctrine prohibits the creation of all new types of property interests. CB

XVII. A lease with an ambiguous termination clause can be terminated by either party. CB

3. Holdovers
   What is a holdover?
   Issues
   I. What is a tenancy at sufferance (holdover)?
   II. What options does a land in this situation have?
   III. What is a trespasser?
   IV. How does a landlord go about evicting a holdover?
   V. How does a landlord go about extending tenancy of holdover?
   VI. What is the maximum period a landlord can install for a holdover lease?
   VII. By how much can a landlord raise rents for a holdover tenant?
   VIII. What if items are left behind by a tenant?
Rules:
I. When a tenant remains in possession after their right to do so has expired (must be voluntary) > tenancy at sufferance. CB
II. A tenancy at sufferance gives the landlord 2 options, he must exercise 1 within a reasonable time. CB
   a. Eviction and recovery of damages for lost possession
   b. Implied or express consent (election) > a new term
III. A trespasser is one who enters another’s property without the right to do so.  CB
IV. A landlord can evict a holdover (using summary procedure or reasonable self help) and recover damages for wrongful occupancy = fair market value plus injury to premises. CRECHALE
V. A landlord can bind the holdover to a new term which will be a periodic tenancy for the rent stated and the original provisions and term (not to exceed 1 year). CRECHALE
VI. The new term can either be expressly told, or implied by the landlord accepting a rent check after the tenancy at sufferance has started. CRECHALE
VII. Some jurisdictions allow for the landlord to demand double rents from the holdover. CB
VIII. If items left behind by a tenant do not interfere with a landlords use of the premises > not a holdover. CB

3b. Lease
Is a lease a contract or property?
Issues
I. Why does it matter if a lease is made?
II. What differentiates a lease, a license, a life estate, and a loan?
III. Is a lease a conveyance or a contract?
IV. What type of interest is a lease?
V. Check qu’s on top of 375
VI. What is the statute of frauds affect?
VII. Does the standard lease form act as a contract of adhesion?
VIII. How do standard lease forms affect bargaining power?

Rules:
I. Qualification as a lease is important because it gives rise to the landlord tenant relationship, which carries certain rights, duties, liabilities and remedies that other interests don’t. CB
II. A lease is both a conveyance (transfers a possessory interest in land) and a contract (contains a number of promises). CB
III. Leases are classified as personal property (like contract interests). CB
IV. Today courts often rely on contract principles to reshape the law of leases. CB
V. Statute of frauds (enacted by states) usually > leases of a year or more must be in writing. Most jurisdictions allow oral leases for less than 1 year, otherwise > oral lease + rent > periodic tenancy. CB
VI. Standard lease forms can cut down on bargaining power of tenants, but this is more of a problem of shortage of rental properties available > renters have power. CB
4. Tenant Selection (unlawful discrimination) NO

Can a landlord refuse to lease to a “qualified” tenant?

Issues:

I. What is the Fair Housing Act?
II. Who does the FHA affect?
III. What type of dwellings does the FHA apply to?
IV. What types of actions does the FHA regulate?
V. What classes of people does the FHA protect?
VI. What types of relief/legal action are available under the FHA?
VII. What motive needs to be shown to fall under FHA?
VIII. What does the P need to show to make a prima facie case under the FHA?
IX. What does handicap mean?
X. What effect do state and local legislation have on the FHA?
XI. What damages are available under the FHA?

Rules
Study guide 150

5. Delivery of Possession

Is delivery of possession implied in a lease?

Issues

I. Who is responsible for a holdover tenant?
II. What remedies are available to a new tenant if a holdover exists?
III. Who has the right of possession?
IV. What is the legal duty of a landlord to the new tenant?
V. What is the legal duty of a holdover tenant to the new tenant?
VI. What is the English rule?
VII. What is the American rule?
VIII. Who is responsible for putting the new tenant in possession?
IX. What does the restatement say?
X. What does the Uniform residential landlord tenant act (URLTA) say?
XI. What damages are available under the English rule?
XII. What damages are available under the American rule?

Rules

I. The responsibility of the holdover tenant depends on the jurisdiction and whether the actual right to possession and the legal right of possession are transferred to the tenant. HANNAN
II. All landlords have the duty to deliver the legal right to possession. HANNAN
III. The English rule (which is the majority in US) > landlord has an implied in law obligation to deliver actual possession on the first day of the term. HANNAN
   a. If not delivered the tenant can either
      i. Terminate the lease and recover damages from either landlord or holdover
      ii. Adhere to the lease, withhold rent and recover damages related to lost possession
   b. If tenant only gets partial possession > can prorate rent
   c. Some jurisdictions > tenant can waive obligation to real possession.

IV. The American rule > landlord only has to deliver legal possession, actual possession is the tenants problem. HANNAN
   a. If holdover > tenant has same remedies as a landlord, but landlord has no remedies
   b. Parties can modify agreement to include a real possession clause

V. The restatement and the URLTA both adopt the English rule. CB

6. Sublease and Assignment
   How does a sublease differ from an assignment?
   Issues
   I. What is a sublease?
   II. What is an assignment?
   III. Who has the power to assign?
   IV. What limits can be put on subleases?
   V. What limits can be put on assignments?
   VI. What recovery is available by landlord?
   VII. What recovery is available by the tenant?
   VIII. What is the tenants duty?
   IX. What is the CL distinction between a sublease and an assignment?
   X. What is the modern rule?
   XI. What is the formalistic approach?
   XII. What is the intention approach?
   XIII. How do the rules of alienability affect commercial vs. residential leases?
   XIV. What is the free alienability of property?
   XV. How can a landlord restrict the assignability of a lease?
   XVI. What effect does contract law have on the assignability of a lease?
   XVII. What is the minority rule and what is its justification?
   XVIII. What is the majority rule and what is its justification?
   XIX. What is the validity of a clause that absolutely prohibits assignment, or gives absolute discretion over assignment to the lessor? (If the clause if freely negotiated > would be valid. Restatement)

Rules
I. A sublease occurs when a tenant transfers anything less than his entire interest in the leasehold to a third party and retains a reversion. ERNST
   a. A tenant is fee to sublease as long as there is not a clause prohibiting it. KENDALL
   b. The subtenant does not have privity of estate or contract with the landlord > subtenant has not claim against a landlord, only the tenant. ERNST
c. If the tenant defaults > lease canceled and subtenant is SOL. ERNST

II. An assignment is the transfer of a party’s entire interest under the lease. ERNST
   a. In an assignment the assignee and the landlord, as well as the assignee and the tenant have privity of estate (relationship of landlord-tenant). ERNST
   b. In an assignment the privity of contract between the landlord and tenant is not destroyed. ERNST
   c. For a promise to run with the leasehold the following elements must be present:
      i. Intent
      ii. Privity of estate or contract
      iii. Touch and concern the land
   d. The tenant can get out of the equation if the landlord releases him and the assignee assumes performance. ERNST
   e. If an assignee breaches > landlord can sue both tenant and assignee, if landlord sues tenant > tenant is subrogated to landlords claim and can sue assignee. ERNST

III. There are 2 methods to determine if a transfer is an assignment or a sublease: ERNST
   a. Examining the parties intentions (modern rule)
      i. The parties must appreciate the legal significance between the 2 types of transfers, if they do > intent will be used. ERNST
   b. Examining the substance of the transfer to see if tenant has transferred all of his interests (CL rule)
      i. At CL transfer was an assignment unless tenant retained a reversion. ERNST
      ii. A right to reentry (right to retake possession upon default) retained by a tenant is not enough to create a sublease. ERNST
      iii. The restatement: if tenant retains a right of reentry with a transfer of the remainder of the term > sublease. ERNST

IV. If a tenant assigns his who term to a assignee > privity of estate between assignee and landlord > tenant cannot charge different rent to assignee b/c of merger. CB

V. A lease must expressly limit or prohibit assignments or subleases for it to be enforceable. KENDALL

VI. At CL a landlord could deny consent to a transfer for any reason. KENDALL

VII. Antidiscrimination statutes limit landlords ability to reject prospective tenants. CB

VIII. Most jurisdictions and restatement > landlord has to act reasonably (commercially reasonable objection) when denying consent to a transfer of a commercial lease only. KENDALL
   a. This is based on the contractual nature of a lease > must be in fair dealing. KENDALL

IX. In most jurisdictions and restatement, commercial parties can chose to include lease provisions, if freely negotiated, that ban transfers or that give landlord to arbitrarily deny transfers. KENDALL

7. Tenant Defaults
   What can a landlord do if a tenant defaults on a lease?
   Issues
   I. What is self help repossession?
   II. What is the CL rule of using self help?
   III. What is the modern rule for using self help?
IV. What is wrongful eviction?

V. What are the remedies available for wrongful eviction?

VI. What is summary procedure?

VII. What is the goal of summary proceedings?

VIII. What types of liability does landlord have for using self help under common law?

IX. What types of leases do these rules apply to (commercial vs. residential)?

Rules

I. The landlord has 3 statutory/CL options for eviction of a tenant that defaults on any lease obligation, but first if the landlord has the right of reentry (may terminate lease) > landlord must notify tenant of default and permit reasonable time to cure the default.

a. Summary Proceedings
   i. By statute (all states have), a landlord can file unlawful detainer. CB
   ii. Landlord gives notice to quit to tenant, who has 3 days to fix default. CB
   iii. The unlawful detainer suits are rushed to the courts > they can only discuss entitlement to possession > landlord must prove that lease has been validly terminated and he is entitled to possession. BERG

b. Ejectment
   i. Ejectment was a CL remedy that is still available, but rarely used, b/c it is not rushed to the court and the tenant can provide affirmative defenses. CB

c. Self help
   i. At CL a landlord was entitled to use reasonable force to remove tenant. BERG
   ii. At CL, many jurisdictions, > limits self help to peaceful removal > many jurisdictions define force so broadly that self help is essentially forbidden. BERG
   iii. Minority of jurisdictions statutorily forbid self help. BERG
   iv. Other jurisdictions > reasonably forceful self help. BERG
   v. Jurisdictions differ on application between residential and commercial. CB
   vi. Landlord that uses self help, where permitted, > at CL did not have civil liability, as long as force was reasonable, but did have criminal liability for forcible entry. CB

8. Tenant Abandons

   What can a landlord do if a tenant abandons the premises?

Issues

I. What is the duty to mitigate?

II. What duty does a landlord have to mitigate?

III. What effort does a landlord have to exhibit to fulfill mitigation?

IV. Who has the burden of proof of sufficiency of mitigation efforts?

V. What are the consequences of the failure to mitigate?

VI. What does it mean to abandon?

VII. What remedies are available to a landlord if he mitigates?

VIII. What is the majority rule?

IX. What is the new rule?
X. What does the restatement say about mitigation?
XI. What is a surrender, how does it work, and what is its affect?
XII. What is the intent test?
XIII. What is the CL rule about mitigation?
XIV. What must landlord do to recover possession?
XV. What is anticipatory breach/ is it available?
XVI. What is a security device?
XVII. What security devices can a landlord use?
XVIII. Does a commercial landlord have a duty to mitigate?

Rules
I. Abandon (restatement): when a tenant vacates a leased property w/o justification, w/o any present intention to return and defaults on payment of rents. CB

II. If a tenant abandons during a valid lease > tenant has offered surrender > landlord has 3 options at CL (landlord could not terminate lease just b/c of failure to pay, he could only sue for rent due):
   a. Accept surrender and terminate the lease
      i. The tenants obligations and lease cease at the moment landlord terminates
      ii. Damages: transactional costs of finding a new tenant + any unpaid rent before termination. CB
   b. Reject the surrender and leave the premises untouched > collect rent from tenant
      i. At CL > tenant was free to abandon, but was still liable for rent
      ii. This is the minority view now, as it rejects mitigation. RIVERVIEW
   c. Retake possession and relet the premises > hold tenant liable for any loss that occurs
      i. This retaking can be voluntary or due to the duty to mitigate
      ii. If voluntarily retaking, the landlord must be careful to avoid accepting surrender (jurisdictions differ on how to do this). CB
      iii. If new rent is for longer than the orig. term > surrender accepted. CB

III. Most jurisdictions and restatement > no duty to mitigate, b/c equate a lease with a transfer of a property interest. RIVERVIEW
   a. Some jurisdictions > landlord is held to the duty to reasonably mitigate damages caused by the tenant’s abandonment. RIVERVIEW
   b. Most jurisdictions > only apply to residential leases
   c. At CL landlord had no duty to mitigate. RIVERVIEW

IV. Majority > tenant has the responsibility to prove lack of mitigation. AUSTIN HILL

V. If mitigation is required > landlord must act use reasonable effort (ie. act as if it’s vacant), if he can’t > abandoning tenant not liable for unreasonably lost rents. RIVERVIEW

VI. If a landlord reasonably mitigates > he is entitled to lost rents, cost of finding replacement and other incidental costs. RIVERVIEW

VII. Anticipatory breach is based on contract doctrine (is only allowed by statute) > permits landlord to recover damages when tenant has made it clear that he is abandoning and also denying further lease obligation > landlord can recover damages for a period that can be reasonably forecast. CB
VIII.  At CL, if a tenant failed to pay rent > landlord could seize personal property and hold until tenant fixed default under the action of distress. CB  
   a.  Most jurisdictions have either abolished or severely limited distress. CB  
   b.  However, a landlord can get a lien on personal property. CB  
IX.  Landlords often use the following security devices (from the lease or statutory): CB  
   a.  Security deposits  
   b.  Advance rent  
   c.  Liquidated damages (rarely allowed, due to contract reasons)  
   d.  Rent acceleration  

9. Landlord’s Duties; Illegal Lease  
   What are a landlord’s duties to a tenant?  
   What is an illegal lease?  
   Issues  
   I.  What were the Landlords duties at CL?  
   II.  What are the 2 reasons for landlord duty complaints arising?  
   III.  What are the lessee’s options if landlord doesn’t remedy problem?  
   IV.  What is quiet enjoyment, when does it exist?  
   V.  What is constructive eviction?  
   VI.  When can a tenant vacate premises based on constructive eviction?  
   VII.  What is an independent covenant?  
   VIII.  What is a mutually dependant covenant?  
   IX.  What is material failure of consideration?  
   X.  What is the scope of the covenant of quiet enjoyment?  
   XI.  What is actual partial eviction?  
   XII.  What is constructive partial eviction?  
   XIII.  What are the tenant’s remedies in an eviction?  
   XIV.  What is an illegal lease?  
   XV.  What are a tenants options in an illegal lease?  

Rules  
   I.  At CL the tenant took the property “as is”. CB  
   II.  Complaints regarding landlords duties arise when:  
      a.  The tenant wants to vacate or say but pay less/no rent. CB  
      b.  The tenant or an invitee is injured by an alleged defect in the premise and claims tort damages against the landlord. CB  
   III.  Implied in law, all tenants have a right to quiet enjoyment of their lease  
      a.  At CL tenants duty to pay rent is conditional upon quiet enjoyment. RESTE  
   IV.  Quiet enjoyment encompasses the landlord’s duty to provide tenant w/the legal right to possession (quiet title) and the duty to refrain from wrongful actual or constructive eviction. RESTE  
      a.  Also includes duty to disclose latent defects and to maintain furniture in furnished apartments. CB  
   V.  Actual total eviction occurs when tenant is totally ousted from physical possession by landlord or another who has better little than the landlord > tenant not have to pay rent and can terminate lease. CB
VI. Actual partial eviction occurs when the tenant is physically ousted from any part of the property > at common law tenant not have to pay any rent until fixed, however, modern trend > partial abatement of rent. CB
   a. If tenant knew or should have known of 3rd party that had better title > tenant only gets partial abatement of rent. CB

VII. There are 3 elements to constructive eviction:
   a. Wrongful act or failure to act of the landlord (not 3rd party). RESTE
   b. Substantial and material deprivation of the tenants beneficial use and enjoyment of the premises. RESTE
      i. The tenant must be so essentially deprived of the beneficial enjoyment of the leased premises that they are rendered unsuitable for the purpose for which they are leased. RESTE
      ii. Court looks at the duration and severity of the interference, its foreseeability and the ease or difficulty of fixing the problem. RESTE
   c. Complete vacation of the premises by the tenant within a reasonable time. RESTE
      i. But, if tenant moves out and later loses constructive eviction in court > tenant liable for unpaid rent and damages.
      ii. To avoid this tenant can get a declaratory judgment. RESTE
      iii. Upon justified vacation of premises > tenant not have to pay rent and is entitled to damages as a result of eviction. RESTE

VIII. If partial constructive eviction occurs > tenant must still pay rent. CB

IX. If a lease is made in violation of statutory provisions > it is an illegal lease > tenant can withhold rent and not get evicted.
   a. Statute must have been in place at time of the lease and landlord must have either actual or constructive notice of the violation

10. Implied Warranty of Habitability
    When does the implied warranty of habitability apply, what result?
    Issues
    I. What is the implied warranty of habitability?
    II. When does the implied warranty of habitability apply?
    III. How is the implied warranty of habitability breached?
    IV. What are the remedies available under the implied warranty of habitability?
    V. What warranties did the CL imply?
    VI. Why does the implied warranty of habitability exist?
    VII. What is the landlord responsible for under the implied warranty of habitability?
    VIII. What is the tenant responsible for under the implied warranty of habitability?
    IX. Who has the burden of proof/what must be shown for the implied warranty of habitability?
    X. What restrictions on eviction were allowed under CL?
    XI. What restrictions on eviction are allowed today?
    XII. What is retaliatory eviction?
    XIII. When is a landlord liable for torts under CL?
    XIV. When is a landlord liable for torts not?
I. At CL, the rule of caveat emptor applied > no implied obligation, only an obligation if there was an express covenant to repair in the lease. HILDER

II. Implied warranty of habitability is changing >
   a. Habitability: breach occurs when the leased premises are uninhabitable to a reasonable person. CB
   b. Majority view (but fading) > there is not an implied warranty in housing codes and that legislature should create rules > also doesn’t apply to all types of residential leases. Also usually doesn’t apply to commercial leases. CB
   c. Emerging rule and restatement > imply into every residential lease a warranty of habitability. HILDER
      i. Restatement > 2 separate obligations
         1. warranty implied at the inception of the lease
         2. and implied continuing duty of repair CB
      ii. Rationale: HILDER
         1. implied warranties are a common feature of contract law
         2. urban tenants lack the skills to fix uninhabitable premises
         3. needed to fix unequal levels of bargaining power between poor tenants and landlords
         4. implying a warranty will encourage compliance with local housing codes
      iii. criticism: HILDER
         1. mostly on economic grounds, that it actually ends up putting a greater burden on the poor
      iv. Scope: HILDER
         1. Generally, only residential and possibly small commercial leases
         2. sometimes excludes single family houses
         3. Minor violations of the housing code do not breach the warranty
         4. landlord is not in breach until he has been notified of the uninhabitable condition and given reasonable opportunity to correct it. HILDER
      v. The tenant must show that: HILDER
         1. the landlord had notice of the defect and failed to repair it in a reasonable time
         2. and the defect existed at the time for which rent was withheld
      vi. After tenant has shown proof they can suspend rent and have these remedies:
         1. terminate and leave: recover relocation and dislocation expenses
         2. stay and withhold rent: tenant must notify landlord of employing this remedy and then place rent in an escrow account
         3. stay and repair > repair and deduct
         4. stay and recover damages: rent abatement + discomfort and annoyance
            a. value as warranted (majority view): difference between value if habitable and value as is. HILDER
            b. value as is: difference between rent and market value
            c. proportionate reduction (restatement view):
         5. stay and defend: only a defense to stay on premises when landlord attempts to evict for nonpayment of rent
         6. punitive damages: in circumstances involving will, wonton or fraudulent conduct by the landlord. HILDER
III. Retaliatory eviction doctrine: CB  
  a. CL > if landlord is entitled to possession his motivation was irrelevant  
  b. Modern rule > landlord cannot evict a tenant, even if he is otherwise allowed to, if he seeks to do so in retaliation for the tenants reporting a housing code violation.  
  c. Tenant has the burden of proof.  
  d. ULTRA and the restatement extend this to the implied warranty of habitability  
  e. Usually a period of 90-180 days that a landlord cannot reduce services within.  
  f. Only a tenant that is not in default (invoking implied warranty of habitability is not in default) can invoke the retaliatory eviction doctrine.  

IV. Landlord’s torts: CB  
  a. CL > landlords only liable for tenant or invitee injuries when landlord negligently breached their duty  
  b. Minority (but emerging) > due to implied warranty there should be a general standard of care > a negligence standard for all landlords  

11. Tenant’s Duties  
   What are a tenant’s duties to a landlord?  
   Issues  
   I. What is the law of waste?  
   II. What effect does the law of waste have on a tenant’s duties?  
   III. What is permissive waste?  
   IV. What is the CL view of duty to repair?  
   V. What is the modern view of duty to repair?  
   VI. What are exceptions to the duty to repair?  
   VII. How does the duty to repair affect commercial leases?  
   VIII. What is the tenant’s duty to pay rent under CL if a property has been destroyed?  
   IX. What is the modern view of a duty to pay rent if the property has been destroyed?  
   X. What is a fixture?  
   XI. Why does it matter if an item is a fixture?  

Rules  
   I. The lease can impose almost any duty, as long as it is not illegal, unconscionable or in violation of public policy. CB  
   II. Tenant has a duty to avoid waste, of which there are 2 types: CB  
      a. Permissive/involuntary waste  
         i. When a tenant fails to act reasonably to protect deterioration of the property  
            ii. At CL the tenant was required to keep premises in good repair, ordinary wear and tear was ok.  
            iii. Many states have imposed a duty to repair on the landlord, either by statute or implied in the warranty of habitability  
      b. Affirmative or voluntary waste  
         i. When a tenant acts affirmatively to damage property permanently  
            ii. To constitute waste the damage must change the appearance, function or utility of the property and be extraordinary in scope and effect.  
   III. In commercial leases > the terms of the lease are key to determining what the parties duties are
IV. At common law, if a building had been destroyed > the tenant still had to pay rent
V. Modern trend > damages by fire or other casualty > tenant is relieved of liability even if their negligence caused the problem
VI. Fixtures belong to the landlord
   a. At CL a fixture was any chattel permanently attached to the leased property
   b. Modern view of a fixture focuses on the tenants intent, via objective measures and if the removal damage is not big > not usually a fixture

11b. (Un)affordable Housing
   What are the problems of affordable housing?
   Issues
   I. How are affordable housing laws enacted?
   II. What control does the judiciary have over affordable housing laws?
   III. What are the policy reasons for affordable housing?
   IV. What is rent control?
   V. When does rent control make sense?
   VI. What is the usual effect of rent controls?
   VII. What is the benefit of rent controls?
   VIII. What are the short term effects of rent control?
   IX. What are the long term effects of rent control?
   X. What are the policy arguments for/against the implied warranty of habitability?

Rules
I. Affordable housing laws are usually created to depress rent prices through fixed mechanisms. Chicago Board of Realtors
II. However they are actually sponsored by the rich people, because they can make them $$ in the long run
III. Rent control sets a max increase on rents
IV. Rent control is supposed to keep housing affordable
V. Economists agree that rent control actually decreases the amount and quality of places available to the poor, by driving up costs on landlords
   a. Short term is positive, but long run is negative
   b. They lead to economic inefficiency
VI. The arguments against rent control are often given against the implied warranty of habitability as well
VII. Rent control only makes sense when the demand for units rises quickly and the new construction of units has been legally restricted (ie. wartime)

12. Find NO
   Does a finder own lost, abandoned, or mislaid property?
   Issues
   I. What title does a finder have?
   II. What title does the true owner have after a finder has it?
   III. What is trover?
   IV. What is replevin?
V. What if the bailee has recovered from a present possessor, what options does a true owner have against the present possessor?

VI. What is ejectment?

VII. What is trespass?

VIII. What if the property that is found is buried (part of the earth)?

IX. What if the finder is a trespasser?

X. Who has the title to mislaid property?

XI. Who has the title to abandoned property?

XII. What elements matter as to determining the title holder of mislaid property?

XIII. What if the finder is an employee?

XIV. What if the finder is a police officer?

XV. What happened to found treasure under CL?

XVI. What happens to found treasure under American law?

XVII. What statutory solutions to the question of finder have been enacted?

Rules

I. Trover is the CL action for money damages resulting from D’s conversion of chattel (personal property that is owned or possessed by P. CB)

II. Replevin is the CL action for the return of converted chattel (personal property (no $$)

III. If a bailee has recovered from a present possessor, then the true owner cannot also recover from the present possessor (he won’t be punished twice), he would have to recover from the bailee. ARMORY

IV. Ejectment is the action for possession of real property

V. Trespass is the action for damages of real property

VI. There is no CL right to a reward, but some have been made statutorily

VII. Property that is lost or mislaid

a. Generally, a finders title is good against the whole world except the true owner, prior finders and sometimes the owner of the land where the object was found. ARMORY

b. Prior finders prevail over later finders. CB

c. Trespassing finders lose to landowners. CB

d. If an employee has a contractual duty to report finds or in their job they often find lost/mislaid property > they must return it to their employer. CB

e. An invitee (ie. worker/pool cleaner) that finds property while doing what they were invited to do > must give property to the landowner. HANNAH

f. When object is in the land > it is awarded to the landowner. HANNAH

g. Homeowners get objects found in their houses, unless they are an absentee owner and they are not in constructive possession of their home (more than briefly away from home) or never moved in > was given to finder (but would have been more fair to split it). HANNAH

h. Lost property found in public places > finder. MCAVOY

   i. Odds of restoring lost property are slim, (ie. wallet on ground)

i. Mislaid property found in public places > landowner. MCAVOY

   i. True owner of mislaid property has a good chance of returning (ie. wallet on counter)

j. Treasure Trove
i. In England > treasures hidden with the intention of returning to claim them > to the king, but those treasures that were abandoned > finder

ii. In US > tendency is to treat it like any other found property

k. Shipwrecks > law of finders applied to territorial water, unless wreck is embedded in land owned or possessed by another

VIII. If property is abandoned (which technically can’t happen unless someone else claims it) > usually the finder of the property acquires title. HANNAH

a. There must have been an intention to abandon

b. Statutes sometimes change this

c. If the finder is a trespasser > usually will not be rewarded for his wrongful actions, unless the trespass is trivial

IX. Statutes in many jurisdictions cover lost, mislaid and abandoned property

12b. Adverse possession (theory/elements) NO

Issues

I. What is adverse possession?

II. When did adverse possession begin to be recognized?

III. When did adverse possession become tied to a fixed period of time?

IV. What is the rationale for adverse possession?

Rules

I. began in 1275 and was done by naming past events that “no one could remember before” > quiet title

II. in 1540 > adverse possession was tied to a term of years

III. Adverse possession functions as a way of transferring interest in land without consent of the prior owner and in spite of his dissent

IV. The policy is to reward those using the land in a way beneficial to the community

13. Bailment NO

What is a bailment and does it ever transfer title to property?

Issues

I. What is bailment?

II. What are the 3 essential elements of bailment?

III. How is a bailment created?

IV. What are the 3 rights/duties of the bailee?

V. Can a bailee sell to a bona fide purchaser?

Rules

14. Adverse Possession of chattels NO

Can an adverse possessor acquire property; what is the role the statute of limitations?

Issues

I. What is a voidable title?
II. What is the discovery rule?
III. Who has the burden of proof with the discovery rule?
IV. Who has the burden of proof with adverse possession?
V. What is a bona fide purchaser?
VI. How does a bona fide purchaser get full title?
VII. What effect does the UCC have on bona fide purchasers?
VIII. What elements does the UCC have on bona fide purchasers?
IX. What must/can true owner do to avoid/limit adverse possession?
X. When does the statute of limitations start to run on adverse possession?
XI. What is tacking/ how does it work?
XII. What are the pro’s of the discovery rule (where does it exist)?
XIII. What are the con’s of the discovery rule (where has it been ignored)?

Rules

15. Gift NO
What is a gift, what is required to make one, and compare to an oral trust?
Issues
I. What must a donor do to gift a personal property (3 elements)?
II. What is constructive delivery?
III. What is symbolic delivery?
IV. What is the traditional rule giving gift vs. modern trend?
V. What is a gift causa mortis?
VI. What is the traditional view of gifts causa mortis?
VII. What is the modern trend regarding gifts causa mortis?
VIII. What if a donor gives a gift causa mortis, but lives?
IX. What are the arguments against gifts causa mortis?
X. What is needed for a valid inter vivos gift (2 elements)?
XI. What is a gift reserving a life estate?
XII. What does donee have to do to accept gift?

Rules

16. Bona Fide Purchaser NO
Who is a bona fide purchaser and can she have better title than the true owner?
Issues
I. What title can a thief pass?
II. How can a bona fide purchaser get “good” title?
III. What is a bona fide purchaser?
IV. What title can a merchant pass and in what situations?
V. See bottom of page 148 for rules
17. People as Property

- NO

Can people be property?
Historically yes, now due to constitutional amendment > no

18. Property in One’s Person

- NO

Do you have a property interest in your body parts?

Issues
I. What is dominion of property?
II. What are the policy reasons against interest in your own body parts?
III. What are the policy reasons for interest in your own body parts?
IV. What is the breach of Fiduciary duty?
V. What is lack of informed consent?
VI. What is wrongful publicity?
VII. What statutory limitations are placed on one’s own body parts?
VIII. What are the policy reasons for not extending conversion liability?
IX. What is property as a bundle of rights?
X. What are the policy reasons for extending conversion liability?
XI. What is the problem with nondisclosure recovery?
XII. What is market-inalienable?
XIII. What does the federal statute say on property rights and ability to sell body parts?

Rules

19. Right to Include, Exclude, and Destroy

- NO

Does the right to property always include the rights to include, exclude, and destroy?

Issues
I. What are the necessary and sufficient conditions to be able to transfer property rights?
II. What is the right to exclude?
III. What is the right to include?
IV. What types of legal actions protect the right to exclude?
V. What damages can be awarded for trespass, what is their purpose?
VI. What is a landowner’s right to exclude?
VII. What are limitations/restrictions/exceptions to the right to exclude?
VIII. Where do these limitation come from?
IX. What right does title over land give owner to guests/invitees?
X. What is the reliance interest in property?
XI. What are the arguments for and against the absolute right to exclude?
20. Procedural Protections
   What procedures or causes of action protect property rights?
   Not sure what handout is?

21. Discovery NO
   Can real property be acquired by discovery?
   Issues
   I. What is the natural law?
   II. What is positive law?
   III. What is discovery?
   IV. What title do you get from discovery?
   V. Who can discover?
   VI. What rights to preexisting inhabitants have and how does this affect discoverers rights?
   VII. What is the English theory of discovery?
   VIII. What parties have the rights to receive rights from Indians?
   IX. What power does the Govt. have over rights that Indians possess?
   X. What responsibility do the discover’s have to the conquered?
   XI. What is conquest?
   XII. What is the occupancy theory?
   XIII. What is the principle of first in time?
   XIV. What is the modern view of conquest?
   XV. What is the law of accession?
   XVI. What is Locke’s labor theory?
   XVII. What power does property rights give to owners?

Rules

22. Feudalism and Estates
   How does feudalism influence the modern concept of an estate?
   Issues
   I. When did the feudal system begin?
   II. What is land tenure?
   III. Where did all property titles derive from?
   IV. What is subinfeudation?
   V. What is seisin?
   VI. What types are the 3 types of free tenures?
   VII. What are the types of unfree tenures?
   VIII. What is an incident?
   IX. What is copyhold and when was it gotten rid of?
   X. What are the 4 types of feudal incidents?
   XI. What are the 3 types of liabilities at the death of a tenant?
XII. What is ravishment?
XIII. What was the purpose of the royal courts?
XIV. What were methods to avoid feudal incidents?
XV. What was the statute of Quia Emptores and what did it do?
XVI. What is the difference between substitution and subinfeudation?

Rules all CB
I. a feudal incident > lord acquires the tenants rights whenever the incidents came due
   a. Lord could then subinfeudate (transfer) those tenants rights to another party
II. There were 4 types of feudal incidents
   a. Homage and Fealty
      i. Pledge of military support to your lord, required by all military tenants
   b. Aids
      i. Ability of lord to demand help from his tenants in case of financial emergencies
         1. ie. ransom, knitting of eldest son, and marriage of eldest daughter
   c. Forfeiture
      i. If tenant in possession committed treason against the king > goes to lord
   d. And 3 liabilities at the death of a tenant that were a cluster of incidents
      i. Escheat
         1. If tenant in possession died w/o heirs > his tenure ended and possession returned to the lord
      ii. Relief
         1. the heir had to pay the lord a sum (a years rent) to come into his inheritance
      iii. Wardship and marriage
         1. If tenant in possession died with an heir that was still a minor > lord was entitled to profits from land until heir became an adult
III. Tenants avoided incidents (taxes) by adding substitute tenants (looks like sublease) through process of subinfeudation
IV. Subinfeudation was banned in 1290 with the enactment of the Statute Qui Emptores
V. The Statute Qui Emptores had 2 historical consequences:
   a. It established the principle of free alienability of land
   b. Over time escheat and forfeiture caused most of the land to be held by the crown
VI. The relationship of substitution and subinfeudation is the same as assignment and sublease

23. Fee Simple, Inheritance, and Fee Tail
What is fee simple, fee tail and how created?
What is intestate succession?
Issues
I. What is a fee simple?
II. How is the fee simple treated by inheritance?
III. When was a fee made alienable?
IV. When does a fee escheat?
V. What are interests in personal property?
VI. What is the modern view of an estate?
VII. What characteristics is a fee simple given?
VIII. What did it take under CL to create a fee simple?
IX. What does it take now to create a fee simple?
X. What was the rule of primogeniture?
XI. What can bastard children inherit?
XII. What is to die “intestate”?
XIII. What is the hierarchy of inheritance (if not specified by a will)?
XIV. What limits can a fee simple have on its inheritability?
XV. What is numerous clausus?
XVI. What was the purpose of numerous clausus?
XVII. What is a fee simple conditional?
XVIII. What is a fee tail?
XIX. What is the path of a fee tail?
XX. What are the 3 types of fee tail?
XXI. What extent could a tenant in fee tail alienate his possessory interest?
XXII. What was developed to end a fee tail?
XXIII. What was done with the fee tail in America?
XXIV. What was fee tail replaced by?
XXV. What are the 2 options when one’s will attempts to create a fee tail?

Rules all CB
I. There are 2 types of fees simple
   a. Fee simple absolute
   b. Defeasible fees
II. A fee simple absolute is ownership in a land whose duration is perpetual
III. Fee simple absolute is created by
   a. Under CL by a grant “to A and his heirs”
      i. “to A” are words of purchase
      ii. “and his heirs” are words of limitation
   b. Under modern law > a grantor coveys his entire estate unless the grant is to the contrary
IV. Inheritance of a fee has been a matter of right since the 1200’s, but payment of relief was still required
V. Quia Emptores made the fee simple alienable which is a freehold estate that is not terminable at the will of the lord
VI. Fee simple was given the qualities and characteristics of a thing
VII. Modern view is that an estate is a bundle of rights = legal relations between persons with respect to a thing
VIII. If a person dies intestate the real property goes to his heirs, in the following order:
   a. Issue
      i. If one of the children dies before the decedent > child’s heirs get his share
   b. Ancestors
   c. Collaterals
   d. Escheat
IX. The standardization of estates led to:
a. The fee simple cannot have any limits put on its inheritability
b. The numeros clausus principle prohibits new or customized property interests
   i. Rationale: to limit the fragmentation of ownership and promote the easy transferability of property rights
X. A fee simple conditional upon having issue was a predecessor to the fee tail, it was created by the same language but it existed before the Statute de Donis Conditionalibus which replaced the fee simple conditional with the fee tail
XI. The fee tail was created by a conveyance of “to A and the heirs of his body”
   a. The fee tail descends to A’s issue generation after generation
   b. The fee tail expires when the original tenant in fee tail and all of his descendants are dead.
   c. When the fee tail expires it reverts to the grantor’s estate by reversion
   d. Every fee tail has a reversion or a remainder after it
   e. The tenant in fee tail could alienate his possessory interest for his lifetime
XII. In 1472 the court developed the suit of common recovery, by which the fee tail tenant could get a court order awarding him fee simple
   a. In 1800’s common recovery was abolished and fee tail tenant was given the power to disentail by conveying a fee simple by deed to another
XIII. In US, fee tail is only allowed in 4 states and has been replaced by the life estate
XIV. If you try to create a fee tail one of the following will happen:
   a. Will create a fee simple in A and any gift over on A’s death without issue is void
   b. If A dies without surviving issue > B will take fee simple

24. Life Estate
   What is a life estate?
   Issues
I. What is a life estate?
II. How is a life estate made?
III. What are the 2 consequences of judicially recognizing life estates?
IV. What follows a life estate?
V. What does Tennessee statute presume a will conveys if not explicitly stated?
VI. What are the 4 objections to restraints on alienability?
VII. What are the 3 types of restraints on alienability?
VIII. What is the restatement view of restraints on alienability?
IX. How do you determine a present value of a life estate?
X. How do you determine a present value of a remainder?
XI. What limits does a life tenant have on alienability (due to the remainders interest)?
XII. What course of action can life tenant take to try to sell property?
XIII. What happens if the court orders the sale of land, in spite of future interests?
XIV. What factors does the court weigh when deciding if it should order the sale of land that is subject to a life estate?
XV. What is waste?
XVI. What is the goal of waste doctrine?
XVII. What limits does the waste doctrine place on the life tenant?
XVIII. What is affirmative waste?
XIX. What is permissive waste?
XX. What is the open mines doctrine?
XXI. What duty to insure does the life tenant have?
XXII. What protects personal property?
XXIII. What is a trust?
XXIV. What the benefits of a trust?
XXV. What is seisin?
XXVI. What is a leasehold estate?

Rules
I. A life estate is a possessory estate that terminates upon the death of the holder. WHITE
II. A life estate is made by a conveyance “to A for life” and is followed either by a
    reversion in the transferor or a remainder in the transferee. WHITE
III. If the grantee of a life estate transfers his interest to B > B has a life estate pur autre vie
IV. Recognizing life estates allowed the grantor to control who takes property after a life
    tenants death (takes place of the fee tail) and allowed for the development of trust
    management for the life tenant
V. If it is not specifically stated, or ambiguous, > a will transfers a parties whole interest.
    WHITE
VI. There are 4 objections to restraints on alienability CB
    a. Makes property unmarketable
    b. Perpetuates concentration of wealth
    c. Discourages improvements on land
    d. Stops creditors from reaching property
VII. There are 3 types of restraint on alienation: CB
    a. Disabling restraint: withholds the power of transferring his interest from the grantee
    b. Forfeiture restraint: if transfer is attempted > interest is forfeited to a third party
    c. Pormissory restraint: (only in landlord tenant) grantee promises (contract law) not to
       transfer his interest
VIII. The restatement says: CB
    a. Absolute restraint on a fee simple is void
    b. Partial restraint on a fee simple is valid if its reasonable
    c. Life estate > absolute disabling restraint is void, but forfeiture is ok
IX. The present value of a life estate is based the annual value of possession multiplied by
    the lie expectancy of the life tenant minus the % of interest. The present value of the
    remainder is the total value of the estate minus the life tenants portion. BAKER
X. An equitable life estate is a common estate, that give the life tenant property interests in
    the assets of a trust. CB
XI. A legal life estate is an estate for life in the assets themselves, it is rarely used. BAKER
XII. There are 3 judicial responses to the inflexibility of legal life estate: BAKER
    a. Construction: courts try to use grantors intent unless it is too ambiguous > can make
       it a more alienable estate. BAKER
    b. Judicial sale due to equitable necessity: if it can be proved that a sale is in the best
       interests of all the parties. BAKER
    c. Judicial sale due to waste avoidance: when court determines it is necessary to avoid
       waste > can force sale. BAKER
XIII. Waste is actions of the life tenant that permanently impair the property’s value or that unreasonably interferes with the expectations of the future interest holders. There are 2 types: CB
   a. Affirmative waste: when a life tenant acts to damage land (voluntary waste). CB
   b. Permissive waste: when a life tenant fails to act reasonably to protect deterioration of the land (involuntary waste) CB

XIV. The life tenant is under no duty to insure buildings on the land, but if he does so, he will collect all of the insurance money. CB

XV. Waste doctrine does not protect personal property, statutes are need for that. CB

XVI. A trustee holds the legal fee simple and gives him total power over the estate. CB

XVII. At CL the freeholder had seisin (possession)

XVIII. In leaseholds, the landlord has seisen but the tenant has merely has possession. CB

24b. Defeasible Estates

What types of defeasible estates are there?

Issues

I. What is a fee simple absolute?
II. What is a fee simple defeasible?
III. What are the 2 types of fee simple defeasible?
IV. What is a fee simple determinable?
V. What is the possibility of reverter?
VI. How is a fee simple determinable created?
VII. What is a fee simple subject to a condition subsequent?
VIII. What is a “right of entry” (power of termination)?
IX. How is a fee simple subject to a condition subsequent created?
X. What is the difference in language between the 2 types of defeasible fee simple’s?
XI. What were the restrictions on transferability of defeasible fees under CL?
XII. What is the modern trend on transferability of defeasible fees?
XIII. How does adverse possession and the statute of limitations affect defeasible fee simples?

XIV. What is the difference between a condition imposed in a defeasible fee vs. a covenant?
XV. What is the effect of a condition that puts restraint on alienability?
XVI. What does severing mean and how/when does the court do this?
XVII. What affect does RAP have on defeasible fees?
XVIII. How are wills that attempt to control the use of property viewed?
XIX. What party gets money if a land subject to a defeasible fee is condemned?
   a. Modern trend?
   b. Restatement?
XX. What happens if the condemning party also has the possessory interest?
XXI. What is a life estate defeasible upon marriage, and why is it not used now?

Rules

I. A fee simple absolute is total ownership of property that is perpetual in duration. CB
II. A fee simple defeasible may come to an end if a certain event occurs. CB
III. There are 2 types of fee simple defeasible’s: CB
   a. Fee simple determinable: will end automatically when a stated even occurs. CB
i. The future interest is a possibility of reverter. CB
ii. “so long as, until, during, while, etc”
b. Fee simple subject to a condition subsequent: may be cut short or divested, at the choice of the transferor, when a stated condition occurs. CB
i. The future interest is a right of entry
ii. “but if, provided, however, on condition that, etc”

IV. CL > Right of entry and possibility of reverter may only be retained by the transferor or his heirs and could not be transferred by will or conveyance. MAHRENHOLZ

V. Modern trend > right of entry and possibility of reverter are transferable intervivos. CB

VI. If can’t tell which type of condition has been created > courts prefer to find a fee simple subject to a condition subsequent. CB

VII. For adverse possession, the clock starts running as soon as the triggering event occurs. CB
a. Theoretically, for the right of entry > would not start running until grantor attempts to exercise right, but most state statutes > at time of triggering event. CB

VIII. A covenant is a promise > contract remedies > liable for damages if grantee breaks covenant, whereas breaking condition > land may be forfeited to holder of future interest. CB

IX. A defeasible fee is an invalid restraint on alienation when the use restriction materially affects marketability adversely. MOUNTAIN BROW LODGE

X. Courts can sever parts of granting language that are invalid if it doesn’t materially effect the purpose of the grant > invalid grant can be made valid. MOUNTAIN BROW

XI. RAP doesn’t apply to defeasible fees b/c are inherently vested by nature. CB

XII. Wills that attempt to control the use of property > enforced if reasonable. CB

XIII. If property is condemned > holder of fee takes the whole award and the holder of the reversionary interest gets nothing, b/c the defeasible fee is too remote. CB
a. Restatement: if end of the defeasible fee was not imminent > fee holder gets award. CB
b. If condemning party is the holder of the fee > act of condemnation > violation of fee being imminent. PALM SPRINGS

XIV. Defeasible life estates were used in marriages to support widows, not used now because of common law rule against restraints on marriage. CB

25. Future Interests all CB
What are future interests, types, and in whose interest?

Issues
I. What are the 3 interests retained by the transferor?
II. What are the 3 interests created in a transferee?
III. What is a future interests legal status?
IV. What is reversion?
V. What is possibility of reverter?
VI. What is right of entry?
VII. In whom can future interests in transferees created?
VIII. What is a vested remainder?
IX. What is a contingent remainder?
X. What is a remainder?
XI. What is an executory interest?
XII. What are the types of vested remainders?
XIII. What are the types of contingent remainders?
XIV. What is a remainder vested subject to divestment?
XV. What is the order/method to classifying interests?
XVI. What are the 4 historical differences between vested and contingent remainders?

Rules

I. A transferor can retain the following 3 future interests:
   a. Reversion
      i. A retained interest which is vested in the transferor.
      ii. Created by transferring a lesser estate than transferor originally owned.
      iii. Not all reversions are certain to become possessory.
      iv. A reversion is transferable during life and descendible and divisable at death.
      v. A reversion is always vested.
   vi.
   b. Possibility of reverter
      i. Future interest remaining in the transferor when a fee simple determinable is created.
   c. Right of reentry
      i. Interest created when a fee simple to a condition subsequent is made.

II. A transferor can create the following 3 future interests in a transferee:
   a. Vested remainder
      i. A remainder is vested if it is created in an ascertainment person and is ready to become possessory whenever all preceding estates expire.
      ii. Indefeasibly vested:
         1. the remainder is certain of becoming possessory in the future and cannot be divested
      iii. Vested subject to open:
         1. a remainder created in a class of persons is vested if one member of the class is ascertained (more can come, ie. kids) and not subject ot any condition precedent
      iv. Vested remainders subject to complete divestment:
         1. created in a know person and not subject to any condition precedent, but is subject to a condition subsequent that if it occurs will completely divest the remainderman of his interest
   b. Contingent remainder
      i. Remainder is contingent if:
         1. it is given to an unascertained person
         2. or it is made contingent upon some event occurring, other than the natural termination of the preceding estates.
      ii. Alternative contingent remainders
         1. depending on a certain condition (ie. one person outliving another) the remainder can vest in different parties, depending on outcome of contingency
      iii. Remainder vested subject to divestment
1. a party has a vested remainder subject to a divestment (if a condition occurs) by a 3rd party
   c. Executory interest
      i. See below

III. A future interest is a presently existing property interest that give the future right to possession. CB
IV. Divest: to cut off another future interest
V. A remainder looks like a reversion but it is created in a transferee
   a. **A remainder is a future interest that is capable of becoming possessory at the termination of the prior estate**

VI. When writing a grant > must classify interests in sequence
   a. If the conditional element is incorporated into the description of the remaindeman > remainder is contingent
   b. But, if a vested interest is given and then a clause is added that divests it (with the same condition as above) then the remainder is vested subject to divestment.

VII. The law prefers vested remainders
VIII. There are 4 historical differences between vested and contingent remainders:
   a. Vested becomes possessory when the previous estate ends, but a contingent remainder cannot be possessory until its not contingent
   b. Historically, contingent remainders weren’t assignable, but now they are. Vested remainders always transferable.
   c. CL > contingent remainders were destroyed if they didn’t best upon termination of the preceding estate, but vested remainder wasn’t
   d. Contingent remainders are subject to RAP, vested remainders aren’t

26. Executory Interests, Trusts all CB
    What are equitable interests in land?
    What is a use?
    What is a trust?
Issues
I. What must happen for an executory interest to become possessory?
II. How was the Chancellor able to enforce rights under CL?
III. What was the rule of no shifting interests?
IV. What was the rule of no springing interests?
V. What was a use, why was it created and who enforced it?
VI. What was the statute of uses?
VII. What is a shifting executory interest?
VIII. What is a springing executory interest?
IX. What is a fee simple subject to an executory limitation?
X. What were the differences between the label of executory interest vs. remainder at CL and now under modern law?
XI. What is a trust?
XII. How does a trust avoid the statute of uses?
XIII. How is a trust made?
XIV. What are the benefits of a trust?
Rules
I. Executory interest arose because the Chancellor did what was morally right by enforcing personal duties (since courts wouldn’t). The Chancellor couldn’t declare rights, but he could punish those who insisted on enforcing their rights.

II. An executory interest is a future interest in a transferee that in order to become possessory must (there is no difference in legal consequences between the 2):
   a. **Divest (cut short) some interest in another transferee (shifting executory interest)**
   b. **Or, divest the transferor in the future (springing executory interest)**

III. Prior to the statute of uses (1536) CL > there could be no shifting or springing interests
   a. Shifting interests was because grantor couldn’t create a right of entry in a stranger, which is what a shifting interest was doing
   b. Springing interests violated the livery of seisen procedure

IV. A “use” was an interest in equity that the chancellor would enforce (even though courts of law would not) regardless of the legal rights of the parties
   a. This was done through coercion and threats of imprisonment
   b. Cestui que use: “the one for whose benefit the feoffment was made”
   c. Use worked as a practical will
   d. Use avoided feudal incidents which made it very popular

V. The statute of Uses was enacted in 1536 and led to:
   a. Converted the use into a legally recognized interest
   b. > recognition of shifting and springing exectory interests

VI. Modern Exectory interests
   a. Fee simple subject to an executory limitation
      i. A fee simple that upon the happening of a certain event automatically divested by an executory interest in a transferee
         1. is very similar to a possibility of reverter, except the resulting fee simple is vested in a transferee (not transferor)
         2. another way of saying this is: “subject to divestment by (transferee’s) executory interest”
   b. executory interests are usually treated as contingent interests
   c. modern statutes > executory interest and remainders are the same
      i. historically different b/c Shelley’s case and gaps in seisin

VII. The Statute of uses doesn’t apply if the trustee has active duties
   a. The beneficiaries of a trust hold equitable interests
   b. The trustee is a fiduciary and must act for the exclusive benefit of the beneficiaries and cannot benefit personally
      i. Spendthrift trusts: make beneficiaries interests inalienable
      ii. Creditors cannot touch trusts
      iii. Perpetual/dynasty trusts: statutes have altered RAP to make these valid

27. Marketability Rules- Shelley’s Case, Worthier Title all CB
What are special rules relating to conveyancing to heirs, the Rule in Shelley’s Case, the Doctrine of Worthier Title?
Issues
I. What is the rule of destructibility of contingent remainders?
II. What is the doctrine of merger?

III. What did the doctrine of destructibility apply to?

IV. What are the exceptions to merger?

V. What is the rule in Shelley’s case?

VI. What is merger’s effect on Shelley’s case?

VII. What is the doctrine of worthier title?

Rules

I. CL judges made these 3 rules to increase the marketability of land by eliminating uncertainties of title that inhibited alienability. RAP has taken their place.

II. Destructibility of contingent remainders
   a. Destructibility doctrine: A remainder in land is destroyed if it doesn’t vest at or before the termination of the preceding freehold estate
      i. Did not apply to executory interests or trusts
   b. If the remainder is still subject to a condition precedent when the preceding estate terminates > remainder is wiped out
   c. Life tenant could destroy the contingent remainders at any time by either forfeiture or merger > his interest goes back to the grantor and merges
      i. Merger (still in effect):
         1. If the life estate and the next vested estate in fee simple come into the hands of one party > the lesser estate is merged into the larger
         2. exception:
            a. if life estate and the next vested remainder are created simultaneously in the same person > they do not merge at that time, due to grantors intent

III. The rule in Shelley’s Case
   a. This is what it does:
      i. One instrument
      ii. Creates a life estate in land in A
      iii. And, purports to create a remainder in a person described in A’s heirs
      iv. And the life estate and remainder are both legal or both equitable
      v. > the remainder becomes a remainder in fee simple (of fee tail) in A
   b. Merger can also come into play, but it is separate (can have same result)
   c. It is an intent overriding rule
   d. Only applies to remainders

IV. The doctrine of worthier title
   a. If an inter vivos conveyance creates any future interest in the heirs of the grantor > future interest is void, instead the grantor retains a reversion.
   b. Applies to both real and personal property and any kind of future interest.
   c. Rationale:
      i. Increased alienability
      ii. Prevented feudal tax evasion
   d. still exists in some states

28. The Rule Against Perpetuities
   What is the Rule Against Perpetuities, how does it operate, what is its purpose?
Issues
I. What is RAP?
II. What types of interests does RAP apply to?
III. What are the limitations of RAP?
IV. What is the effect of RAP?
V. What are the exceptions to RAP?
VI. What are the mechanics of the rule?
VII. What is a class gift?
VIII. What were the early reforms to RAP?
IX. What is the Uniform statutory RAP?
X. What was the qualified abolition of the rule?
XI. What is a perpetual trust?

And Crusto’s 8 secrets
I. What is the RAP?
II. What is the RAP’s rationale?
III. Which property interests are outside the RAP (interests where it does not apply)?
IV. Which property interests are subject to the RAP?
V. When is a subjected property interest tested for the RAP?
VI. When does a subjected property interest violate the RAP?
VII. What is the outcome on when a subjected property interest violates the RAP?
VIII. What are the major statutory modifications of the RAP today?

Rules
I. RAP is: no interest is good unless it **must** vest not later than 21 years after some life in being at the creation of the interest
   a. Only applies to:
      i. Contingent remainder
      ii. Executory interests
      iii. Commercial and residential option to repurchase
      iv. Class gifts
   b. It applies if:
      i. at the time of its creation (at time of death for will or at time of irrevocability for gift) it cannot vest (become possessory) within the perpetuities period
         1. perpetuities period = life time of anyone alive who is connected with the interest at the time of the creation of the interest plus 21 years > 120 years
   c. If it applies > this interest/transfer is void and shall be destroyed and unenforceable
II. RAP’s rationale is:
   a. A compromise between wealthy landowners who want to control their estates for long periods of time
   b. Vs. their children who wanted the power to control the land w/o limitations
   c. It acts to limit the restrictions on marketability and to get rid of economic inefficiencies
   d. Trusts > RAP not apply
III. Property interests that RAP doesn’t apply to, because they are all vested or possessory interests:
a. Vested remainders  
b. Future interests that are retained by the grantor  
   i. Ie. reversions, possibilities of reverters, rights of reentry, etc  
c. Exception:  
   i. UK and some states > apply RAP to possibility of reverters and right of  
      reentry b/c they negatively effect marketability  
      1. > have statutorily limited these to a set time period (30 years)  

IV. Which property interests are subject to RAP  
a. Executory interests following either a determinable fee simple or a fee simple  
subject to an executory limitation > always violates RAP  
b. Conditions that don’t have a time limitation > always violates RAP  
c. Option to purchase land (commercial and residential and often rights of first  
refusal to purchase land) SPACE  
   i. If they might last beyond the perpetuities period at the time of creation of the  
      interest > violates RAP  
d. Contingent remainders (3rd party grantee is unascertained or follows a  
condition)  
   i. If at the time of creation they may vest or become possessory sometime after  
      the perpetuities period > violates RAP  
e. Class gift  
   i. For RAP > a class that is not considered vested until it is closed  
   ii. If any member of a class to which an interest has been transferred as a class  
      gift cannot be ascertained at the time of the creation of the interest (class is  
      not closed > not vested) > violates RAP  
      1. all conditions precedent for each member of the class must also be  
         satisfied  
   iii. to satisfy RAP all members of a class must be ascertained and able to  
      satisfy all conditions precedent to each member within the perpetuities  
      period.  
f. Remainder interests following a life estate in an unascertained person > can violate  
RAP  

V. A subjected conveyance is tested for RAP  
a. When the interest is actually created  
   i. For a will, this is at the moment the grantor dies  
b. If it is an intervivos gift > when the gift becomes irrevocable  
c. However, issues regarding RAP don’t usually come up until long after the  
conveyance of the interest in question  

VI. A subjected property interest violates RAP, if there is any possibility at the creation of  
the interest that the interest could become vested or possessory at a time outside the  
perpetuities period  

VII. When a subjected property interest violates RAP > it is void, invalid and unenforceable  
> the conveyance is read as if the invalid interest were deleted (blue pencil rule)  

VIII. Some states have modified/updated RAP in the following ways  
a. 4 major sources of criticism
i. Time of evaluation should be changed from the time of creation of the interest based on a potential violation to being based on the actual outcome = a wait and see basis for assessing if interest violates RAP
ii. Should fix perpetuity period to a set # of years
iii. Rather than deleting the invalid interest, RAP should be applied in a way that comes closest to achieving the grantors intent
iv. Some states > RAP doesn’t apply to trusts when the trustee has the power to sell the land or other assets in the trust

IX. Terms
   a. Lives in being = measured by projected lifetime

29. Co-ownership- Joint Tenants and Tenants in Common
   What is a joint tenancy?
   What is a tenancy in common?

Issues
I. What are the 5 types of concurrent interests?
II. What are tenants in common?
III. What are joint tenants?
IV. What is a tenancy by the entirety?
V. What are the 4 unities to joint tenancy?
VI. What type of concurrent interest was favored in CL?
VII. What type of concurrent interest is favored now?
VIII. What is survivorship and where/why does it matter?
IX. What are the benefits of a joint tenancy?
X. What is the effect of joint tenancy to creditors?
XI. What are the tax implications to joint tenancy?
XII. What weight does the equal shares unity have?
XIII. What are the rights to transfer rights in a joint tenancy?
   a. Under CL?
   b. Under statutory law?

XIV. What is a straw man, what is his use?
XV. What are the ways to terminate a joint tenancy?
XVI. How can a joint tenancy be made indestructible?
XVII. What effect does the execution of a mortgage have on a joint tenancy?
XVIII. What is the title theory of mortgage?
XIX. What is the lien theory of mortgage?
XX. What are the issues that arise with joint tenancy bank accounts?
XXI. Why do banks prefer joint tenant accounts?
XXII. What happens to a joint tenant bank account if one dies?
XXIII. What are the present rights to money in a joint tenant bank account?

Rules
I. There are 5 types of concurrent interests
   a. Coparceny (not covered)
   b. Tenancy in partnership (not covered)
   c. Tenancy in common
i. Separate but undivided interests in the property
ii. Interest of each is descendible and can be conveyed by deed or will
   1. each tenant owns an undivided share of the whole
iii. No survivorship rights
iv. Unity of possession is essential
d. Joint tenancy
   i. Have the right or survivorship (viewed as a single owner)
      1. since they are “per my et tout” they each own the undivided whole >
         when 1 dies nothing passes
   ii. There are 4 unities that are essential to joint tenancy:
      1. Time
         a. Interest must be acquired or vest at the same time
      2. Title
         a. All must acquire title by the same instrument or by joint
            adverse possession, cannot arise by intestate succession or
            other act of law
      3. interest
         a. all must have equal undivided shares and identical interests
            measured by duration
      4. possession
         a. each must have a right to possession of the whole, but one
            joint tenant can voluntarily give exclusive possession to the
            other joint tenant
   iii. if the 4 unities don’t exist a tenancy in common is created (either at time of
      creation or later)
   iv. disputes in joint tenancy are solved by judicial partition
e. Tenancy by the entirety
   i. Only by a husband and wife and must have the 4 unities and a 5th, the unity
      of marriage
   ii. Neither husband nor wife can defeat the right of survivorship alone
   iii. Divorce terminates the tenancy by entirety
II. CL > favored joint tenancy (disliked division of land), but now most states prefer
    tenancy in common when ambiguous
III. Implications of joint tenancy
    a. Could avoid probate because no interest passes
    b. A creditor can act during a joint tenants life and seize his share > joint tenancy
       terminated, but after death > nothing for creditor to seize
    c. Federal taxes still apply to the portion of tenancy that dead tenant had
IV. Now the 3rd unity doesn’t apply > can have unequal shares
V. A straw man was a 3rd party that was used to transfer the title to, so that he would then
   transfer a joint tenancy back to the parties (one of whom already had an interest in the
   property) RIDDLE
   a. At CL > was necessary to fit under the time unity and 2 to transfer rule RIDDLE
VI. Statutes in some states (CA) have allowed the creation of joint tenancy by direct
    transfer (avoids straw man) RIDDLE
VII. A joint tenancy can be made indestructible by creating a joint life estate with a contingent remainder in the survivor. RIDDLE

VIII. A joint tenancy is not destroyed when one party mortgages his part, as long as the 4 unities are not destroyed. HARMS
   i. If the joint tenant with the mortgage dies > his interest is extinguished > mortgage holder has nothing to seize. HARMS
   b. The title theory on mortgages (CL) > mortgage is a conveyance of an estate that vests the title in the mortgagor > joint tenancy would be terminated due to title unity. HARMS
   c. The lien theory on mortgages (modern view) > mortgage places a lien on the mortgagor’s interest in property > joint tenancy intact. HARMS

IX. Joint tenancy bank accounts CB
   a. Banks prefer JT accounts because they can pay either party. CB
   b. Majority: If a JT dies > survivor takes all money and burden of proof otherwise is on those disputing. CB
      i. If a joint account is terminated while both are alive > % of contribution. CB

30. Relations Among Co-Owners (apply to all types of concurrent owners)
   What are the rights/duties between co-owners?

   Issues
   I. What is partition?
   II. What is an ouster?
   III. What is accounting?
   IV. When are the 2 times cotenants are treated as fiduciaries?
   V. What are the cotenants responsibilities for rents or profits received?
   VI. What are the cotenants rights/responsibilities for taxes, mortgage payments, etc?
   VII. What is a cotenants responsibility for necessary repairs?
   VIII. What is a cotenants responsibility for improvements?
   IX. Need more (haven’t read chapter … look at Crusto’s notes)

   Rules
   I. If the tenants can agree on a division of the property > no problem. DELFINO
   II. A JT or a tenant in common can demand a partition of the property at any time. DELFINO
      a. Partition in Kind (physical division of property) DELFINO
         i. Partition in kind is the preferred method and will be used unless either party can prove
            1. physical partition is impossible or extremely impractical
            2. or, physical partition is not in the best interests of all parties.
      b. Partition by sale DELFINO
         i. This is the most common method because of impossibility or impracticability of physically dividing real property (condo’s etc)
      c. Agreement to not partition are only enforceable if: CB
         i. There is a clear manifestation of the parties intent not to partition
         ii. And duration of agreement is limited to a reasonable period of time
III. Usually agreements between concurrent owners have stated terms deciding what the parties are responsible for > contract remedies, but if not > property rules determine how the benefits and burdens will be shared. CB
   a. When a cotenant has exclusive possession > he doesn’t have to pay a proportionate amount of rent to the tenants out of possession, unless there has been an ouster. SPILLER
      i. Ouster occurs if a the tenant in exclusive possession either: SPILLER
         1. Actually prevents or bars physical entry by the cotenant. SPILLER
         2. Or, denies the cotenants claim to title. SPILLER
   b. Rents received and profits (resources from land/legal profit) CB
      i. Must divide rents and profits received from 3rd parties evenly. CB
      ii. Must divided permanently removed profits between parties, timber > can take your % of the woods. CB

IV. There are 2 cases where a cotenant has a fiduciary duty imposed:
   a. If a cotenant buys a concurrently owned property at a mortgage foreclosure > buyer must hold the title for the benefit of all cotenant, as long as they reimburse him. CB
   b. If cotenants are blood relatives and the cotenant in exclusive possession claims adverse possession, it can be done but very hard. CB

V. What are a cotenants remedies SWARTZBAUGH
   a. Partition
   b. Ouster
   c. Accounting
      i. Sue other cotenant for rents received
   d. Wait for cotenant to die

VI. Costs of ownership CB
   a. Taxes, mortgage payments, etc CB
      i. Each cotenant should pay their share (based on ownership) and if one tenant pays more they can get excess payment in a partition or accounting action.
      ii. Unless the tenant who pays more has exclusive possession > won’t get more back
   b. Repairs CB
      i. If there isn’t an express agreement > cotenants don’t have an affirmative right of contribution from other tenants but can recover through remedies.
   c. Improvements CB
      i. No cotenant has a duty to improve property
      ii. If a cotenant does improve property > if partition happens can recover the value added by the improvement (not its cost)

31. Servitudes
   What non-possessory rights are incidental to ownership of land?
   Issues
   I. What is a servitude?
   II. What are the 4 types of servitudes?
   III. What is an easement?
   IV. What is a real covenant?
   V. What is an equitable servitude?
VI. What is a profit?
VII. What is a license?
VIII. What is incorporeal hereditaments?

Rules
I. A servitude is an agreement that creates an interest in land. CB
II. There are 4 types of servitudes (3 we cover were products of the late 1800’s) CB
   a. Profits
      i. Rights to take off the land things that were part of the land
   b. Licenses
      i. Permission to enter the licensor’s land but is revocable at any time. CB
      ii. A licenses use of land is similar to an easement except it is revocable. CB
      iii. 2 exceptions to revocability of a license: CB
         1. A license coupled with an interest cannot be revoked
         2. A license that becomes irrevocable due to estoppel.
   iv. Restatement: an irrevocable license is treated as an easement. CB
   c. Easements
      i. Since an easement is an interest in land > it falls under the statute of frauds > requires a written instrument signed by the party to be bound
      ii. Most easements are affirmative easements > they allow the grantee to do something on the grantors land
      iii. Negative easements forbid a party from doing something on his own land.
      iv. Easement appurtenant (courts prefer):
         1. gives a parcel of land an easement and it stays with that land.
         2. have a dominant and servient tenement
         3. are transferable, unless stated otherwise
      v. Easement in gross (England not recognize):
         1. is given to a certain person and stays with them, not the land
         2. have only a servient estate
         3. sometimes are alienable, depends on language, intent and burden
   d. Covenants
      i. Real covenants (enforceable at law)
      ii. Equitable servitudes (enforceable in equity)

III. Incorporeal hereditaments were an ancient way of denoting intangible rights that were inherited by the eldest son (included easements, profits, titles, etc). CB

32. Easements
What are easements and licenses?
How are they created, transferred, and terminated?
Issues
I. What is an affirmative easement?
II. What is a negative easement?
III. What is an easement appurtenant?
IV. What is an easement in gross?
V. What are the limits on transferability of easements?
VI. What does it take to create an easement?
VII. What must be done to properly record and easement and make it completely enforceable?

VIII. What is a reservation?

IX. What is an exception?

X. Can you reserve an interest in property to a stranger?
   a. Under CL?
   b. Under modern trend (what are the differences of the modern trends)?

XI. What is the courts goal in evaluating easements?

XII. What does the restatement say about creating and easement in 3rd party?

XIII. What is the regrant theory?

XIV. What are the differences between a license and an easement?

XV. What are the 2 exceptions to a licenses revocability?

Rules
I. Alternative creation of an easement is possible through fraud, part performance, estopel, implication or by prescription. CB

II. A reservation allows a grantor’s whole interest in a property to pass to the grantee but revests (regrants) a new smaller interest (ie. easement) in the grantor. WILLARD
   a. CL > cannot reserve an interest in property to a stranger to title. WILLARD
   b. Now (most states) > can reserve an interest in property in a 3rd party. CB
   c. Restatement: an easement can be created in favor of a 3rd party. CB

III. Main goal of deciding what interest was transferred is the grantors intent. WILLARD

IV. An exception prevents part of the grantor’s interest from passing to the grantee and it cannot vest in a 3rd party. CB

V. CL > originally couldn’t reserve an easement > development of the regrant theory. CB

33. Easements by Necessity/Prescription/Public Trust
   What are easements by necessity, by prescription?
   What is the public trust doctrine?

Issues
I. What is an easement by prescription (how is it created)?

II. What is an easement by estopel (how is it created)?

III. What does court find important when deciding if an easement has been created by estopel?

IV. What is the strict application of the license rules?

V. How does the relationship between 2 parties affect oral licenses?

VI. What remedies can a servient owner of an easement by estopel get?

VII. What does the restatement say about easements by estopel?

VIII. What is a quasi easement?

IX. What is an implied grant?

X. What is an implied reservation?

XI. What does a conveyor have to do to have an implied easement in
   a. England?
   b. US?

XII. What does the restatement say about implied easements or profits?

XIII. What are the 2 main situations that easements are implied in?
XIV. What is the distinction between an easement implied from a prior use and an easement by necessity?

XV. What 3 requirements must be shown for an easement by implied reservation?

XVI. Can you have an easement on lands you own?

XVII. What is the rationale/application for easement by necessity?

XVIII. What is the only case where easement by necessity exists on its own?

XIX. What is the background of prescription?

XX. What is the fiction of the lost grant?

XXI. What must an owner do to stop a prescriptive easement from forming?

XXII. What is the no compensation rule (arg. Pro and con)?

XXIII. How does prescription differ from adverse possession?

XXIV. What is a public prescriptive easement?

XXV. What is beach access?

XXVI. What is public access?

XXVII. What is the doctrine of customary rights?

XXVIII. What is the public’s right to access municipally owned wet/dry sand areas?

XXIX. What has CA done about beach access?

XXX. What does the public trust doctrine cover?

Rules

I. Easement by estoppel (irrevocable license by equitable estoppel)
   a. **If a licensor grants a license and the licensee reasonably relies upon that license to make improvements to property > equity requires that the licensor is estopped from revoking the license.** HOLBROOK
   b. It continues until the reasonable expectations of the parties are satisfied. HOLBROOK
   c. If the parties are close friends > an oral license is as good as a deed. SHEPARD
   d. Minority view > strict application of license rules > license can be revoked at anytime. HENRY
   e. Restatement: servitude can be created by estoppel (investment in improvements. CB
   f. Remedies: in a suit for easement by estoppel > court can give servient owner an injunction, damages or nothing at all. CB

II. Easement by implied prior use
   a. When property has been divided by a common owner and prior to the division one part of the property was used in an easement like fashion for the benefit of another part > implied prior use. VAN S
   b. Necessary elements VAN S
      i. Common owner
         1. 2 two parts of land must have been owned by 1 estate. VAN S
         2. prior use by the owner > quasi easement by implied grant. VAN S
      ii. Reasonable necessity
         1. CL > easement by prior use is created by an implied reservation and required strict necessity. VAN S
         2. Now > easement must be reasonably necessary for the owner of the dominant estate to use and enjoy her property (intended to continue after division). VAN S
a. Easement can only be appurtenant. VAN S

iii. Continuous use and intended continuation
   1. use must have been continuous and intended to continue > courts
      often look to the sales price of the land to see if it was discounted or
      not to determine this. VAN S

iv. Existing use at time of division
   1. the prior use must actually have existed at the time of division. VAN

v. Apparent use
   1. must be able to be detected or inferred from a reasonable inspection
      of the premises. VAN S

c. Easement implied by necessity is an element of prior use. CRUSTO

III. Easement by prescription (adverse use) OTHEN

a. Elements
   i. Prescriptive period OTHEN
      1. statutorily defined and same as adverse, usually 20 years. CB

   ii. Adverse under a claim of right OTHEN
      1. Use of the others land must be adverse and not with permission of
         the owner.
         a. Objective test: whether a neutral observer would think the use
            is under a claim of right and not permissive. CB
         b. Subjective test: user must show their state of mind. CB

iii. Open and notorious use OTHEN
   1. must not be carried out in secret

iv. Continuous use OTHEN

v. Exclusive use OTHEN
   1. Majority > exclusivity is defined very broadly and doesn’t depend on
      the right of others to use it, easement can be used by servient owner.
      CB
   2. Minority > strict exclusivity. OTHEN

b. Fiction of the lost grant (UK) CB
   i. Prescription is based on the idea that rights can be acquired by the passage of
      time. CB
   ii. Since UK didn’t have a good system of deed recordation > judges invented
      the fiction of the lost grant > if use was shown to have existed for more than
      20 years > presumed to be a grant and the grant had been lost
   iii. US rejected lost grant and instead based prescriptive easements on adverse
      possession.

c. To stop a prescriptive easement from being acquired the owner must interrupt or
   stop the adverse use. CB

d. Generally a no compensation rule applies to prescriptive easements. CB

e. 2 types of prescriptive easements that are not permitted:
   i. Negative easements
      1. there is no cause of action that is cut off by the elapse of time. CB
   ii. Easements upon public land

f. For a commercial prescriptive easement > use only needs to be regular and
   systematic. MILLER
IV. Public prescriptive easements
   a. Most jurisdictions can be obtained by long continuous use by the public under a claim of right. CB
   b. Some courts use the theory of implied dedication for public easements, but is based on the same evidence that is used for public prescriptive easements. CB
   c. Most states state holds the beach in public trust > public trust doctrine BAY HEAD
      i. Public access requires both a way of access from inland and a lateral easement up and down the beach. BAY HEAD
      ii. Includes all land covered by the ebb and flow of the tide and all inland lakes and rivers that are navigable. CB
      iii. To exercise rights guaranteed by the public trust doctrine > the public must have reasonable access to municipally owned beach areas. BAY HEAD
         1. reasonable access > cannot restrict horizontal or vertical public access to beach (including private areas where that use was customary and the owner did not provide any services that could justify the privacy of its customers). CB
      iv. A quasi-public association will be treated like a municipality. BAY HEAD
   d. Minority of courts use the doctrine of customary rights, which are uses that have existed for so long no one can remember, for explaining beach access. CB

34. Assignability
   Are easements assignable?
   Issues
   I. What ways can the benefits and burdens of appurtenant easements transfer?
   II. What ways can the benefits easements in gross transfer?
   III. Who has rights over a man made lake?
   IV. What are the commercial requirements for prescription?
   V. Are easements assignable?
   VI. What is divisibility?
   VII. What are the limits of the burden of the servient tenement in an
      a. Easement appurtenant?
      b. Easement in gross?
   VIII. What does the restatement say about restricting assignability?
   IX. What types of easements in gross are not assignable in modern law?
   X. When is an easement in gross divisible?

Rules
   I. Easements appurtenant are transferable since they are part of the title. MILLER
      a. They transfer with the land to any subsequent title holders. MILLER
   II. Courts generally tend to restrict the transfereability
      a. Rationale:
         i. Can be difficult to locate the owner of an easement in gross > places burden on a land that can last much longer than its use. MILLER
      b. Commercial easements in gross are assignable. MILLER
i. Primary purpose is to produce economic benefits > transferability is efficient and reflects probable intention of the parties. MILLER
c. Noncommercial easements in gross are not assignable unless the parties intended to permit assignment. MILLER
   i. Primary purpose is to produce personal pleasure > no need to transfer. MILLER

III. Non-navigable lakes which are on land that is owned by someone > riparian rights not attach to property bordering the water and it is considered the owners property. MILLER

IV. Profits are assignable. MILLER

V. Burdens and divisibility
   a. An easement appurtenant > burden on the servient tenement is limited by the needs of the dominant tenement. CB
      i. Dominant estate can be divided and each part of the divided estate is entitled to the use of the easement as long as the increase in the burden on the servient estate was contemplated by original parties. CB
      1. Courts consider whether division is a normal development, is foreseeable and if the burden is substantially increased. CB
   b. An easement in gross has no constructual limit on the burden it can place. MILLER
      i. Courts have attempted to prevent the burden on the servient tenement from increasing beyond what was intended by the original parties. MILLER
      ii. Restatement: all easements in gross are assignable. CB
      iii. Majority > only easements in gross that are not assignable are recreational easements (hunting, fishing, boating, camping) CB
   c. Easements in gross are divisible the creating instrument says so or when the easement is exclusive. MILLER
      i. Majority/restatement: easements in gross may be divided unless the division is contrary to the intent of the creating parties or unless the division unreasonably increases the burden on the servient estate. CB
      ii. Minority > apply the one stock rule of the law of profits to divisibility of easements in gross. MILLER

34b. Scope of Easements
   What are their scope?
   Issues
   I. What is the rule of extending an easement?
   II. What is the conventional rule regarding non-dominant tenements and easements?
   III. What does the restatement say about subdividing a dominant tenement?
   IV. Who can change the location of an easement?
   V. What is the scope of a prescriptive easement?
   VI. What limitations are there to a private easement of way?

Rules
I. Generally, the party’s intentions will determine the scope of an easement. VOSS
   a. The scope of prescriptive easements is limited to what was done and the purpose of the action to that created the easement. MILLER/OTHEN
II. An easement cannot be used for the benefit of land that is not the dominant estate. VOSS
   a. Easement appurtenant to one parcel cannot be extended by the owner of the dominant estate to other parcels he owns but aren’t appurtenant. VOSS
   b. The remedy for this is an injunction. VOSS

III. The servient estate owner cannot unreasonably interfere with the easement holders use of the easement. VOSS

IV. A private easement of way usually doesn’t permit the easement owner to install utilities, b/c they are not reasonably foreseeable by the parties. CB

V. Moving easement
   a. CL > the location of an easement cannot be changed by the servient owner without permission of the dominant owner. CB
   b. Restatement/modern trend: servient owner has the right to change the location of an easement, at his expense, as long as the change doesn’t “lessen the utility, increase the burdens in its use and enjoyment, or frustrate the purpose for which the easement was created. CB

35. Termination of Easements
   How are easements terminated?

Issues
I. What is a taking?
II. What is a takings effect?
III. What law applies to old easements (law at the time of initiation of the easement)?
IV. What does the court usually find when the deed to a strip of land is given as a “right of way”?
V. What are the 7 ways you can terminate an easement?

Rules
I. A taking is when the government takes the title or use of a property who’s interest is owned by a private party. In this case > govt. must reimburse party for a reasonable value of the property. PRESEault
II. Must look at law that was in place at the time of the grant to determine what is going on. PRESEault
III. If a strip of land that is granted is referred to as a “right of way” > easement. CB
IV. There are 7 ways to terminate an easement: CB/PRESEault
   a. Release
      i. Easement holder may release the easement either unilaterally or as part of an agreement with the servient estate owner, must conform to SF. CB
   b. Expiration
      i. The grant can dictate the terms of expiration. CB
   c. Merger
      i. If the easement holder also acquires title to the servient estate > the easement is extinguished, b/c easement only exists in land of another. BROWN
   d. Estoppel
i. If a servient owner reasonably relies on the representation/statement by the easement owner. CB

e. Abandonment
   i. By acts of the easement holder that clearly and unequivocally establish a present intent to relinquish the easement, abandonment is not enough. PRESAULT

f. Condemnation
   i. If govt. uses eminent domain to claim title to land and the purpose of the govt.’s use is inconsistent with the existence of the easement. PRESAULT

g. Prescription
   i. If the servient owner wrongfully and physically prevents the easement for being used for the prescriptive period. CB

36. Negative Easements/Real Covenants/Equitable Servitudes
   What are negative easements, real covenants, and equitable servitudes?

   Issues
   I. What are the 4 negative easements?
   II. What are the historical reasons for limiting negative easement?
   III. What are the 3 differences between US and UK view of negative easements?
   IV. Why can’t a negative easement be acquired by prescription in the US?
   V. What types of contracts were assignable under common law?
   VI. What is privity of estate?
   VII. When does privity of estate exist?
      a. Under English law?
      b. Under US law?
   VIII. What is a real covenant?
   IX. What is the burden of a covenant?
   X. What is the benefit of a covenant?
   XI. What is horizontal privity?
   XII. What is vertical privity?
   XIII. What type of privity is needed in subdivisions?
   XIV. How does the restatement view the running of privity in
      a. Negative covenants?
      b. Affirmative covenants?
      c. Lessees?
      d. Life tenants?
      e. Adverse possessors?
   XV. What is an equitable servitude?
   XVI. When did equitable servitudes come into existence?
   XVII. What does an equitable servitude require?
   XVIII. What effects do horizontal and vertical privity have on an equitable servitude?
   XIX. What is the property theory of equitable servitudes?
   XX. What is the between real covenants and equitable servitudes?
      a. Traditionally?
      b. Now?
      c. Restatement?
Rules

I. Negative easements CB
   a. In UK they limited the negative easements to the right to stop your neighbor from:
      i. Blocking your windows
      ii. Interfering with air flowing to your land in a defined channel
      iii. Removing the support of your building
      iv. Interfering with the flow of water in an artificial stream
   b. CL > 4 types of affirmative easements
      i. Right of way
      ii. Right to place clothes on line over another’s land
      iii. Right to nail fruit trees to a neighbors yard
      iv. Right to was cattle at a pond
   c. UK courts limited negative easements to keep land titles unencumbered and b/c they held that negative easements could be formed by prescription.
   d. US > negative easements cannot be acquired by prescription b/c prescription doesn’t apply unless servient owner has a cause of action against the user.
   e. There were 3 main differences between US/UK > these differences in views:
      i. US had a recording system that existed to protect subsequent purchasers against unrecorded claims
      ii. Prescription doesn’t apply until the rights of the servient owner are interfered with.
      iii. A right created by promise should be treated the same way as a right by grant

II. Equitable servitude became the equivalent of negative easements, subject to a different set of rules that are based in equity. CB

III. Real covenants
   a. Real covenants are those covenants that are enforceable at law by successors in title to the original promisors and promisees. CB
      i. Can be negative, promise not to act, or affirmative, promise to do an act.
   b. A real covenant is a property interest that benefits and binds successors in title only if:
      i. It is legally enforceable
      ii. The parties intended that it run with the land
      iii. It touches and concerns the land
      iv. And there is privity of estate
   c. US real covenant doesn’t need
   d. In early 1800’s UK > contract rights and duties were not assignable
      i. > only parties that had privity of contract could sue on the promise.
      ii. If the parties had privity of estate the contract could be enforced.
         1. UK > only landlord tenant had horizontal privity > only relationship that could have privity of estate
         2. US > 2 views
            a. Strict view > horizontal privity only satisfied if the covenant was granted when fee title to the land was transferred to the promisor
b. Liberal view > horizontal privity is satisfied if the covenant is
given in exchange for the conveyance of any interest in land
c. Restatement completely eliminates the need for horizontal
privity

iii. Vertical privity is required for the benefit and burden to run:
1. unbroken chain of conveyance must exist from the original
covenantor to the current owner of the burdened land and form the
original covenantee to the current owner of the benefited land

iv. If the benefited land is subdivided and sold > thee owners of the subdivided
land will be entitled to the benefit of the original covenant

v. If the burden is subdivided:
1. Majority > current possessor will not be bound by covenant if he has
   a lesser estate than the original covenantor
2. Minority > current possessor of lesser estate will be bound by
   negative easements restricting the use of land
   a. But not bound by affirmative covenants (subdivision
      maintenance fees)

e. Remedies available were in a court of law > only money damages
f. New Restatement and the running of privity in:
   i. Negative covenants
   ii. Affirmative covenants
   iii. Lessees
   iv. Life tenants
   v. Adverse possessors

IV. Equitable servitudes (negative covenants)
a. Remedies available were equitable > only injunction or specific performance. CB
   i. Courts enforced equitable servitudes because of fairness (specifically, that a
      purchaser could buy an interest in a property and then sell it for more and
      any covenants that restricted his use would not be transferred to the
      subsequent purchaser > seller lost money and intent of his sale and original
      buyer got a windfall). TULK
b. After 1848 (TULK, and the creation of equitable servitudes) and equitable servitude
   had to be: TULK
   i. A negative covenant
   ii. That was created by the original parties with the intent to bind or benefit
      assigns or successors in title
   iii. Need not be privity of estate
   iv. Assigns or subsequent purchasers must be bona fide purchasers (inc.
      creditors)
      1. exception: equitable servitudes are enforceable against successors in
         title that give no consideration for their interests (ie. donee’s/ heirs)
         regardless of notice. CB
   v. Who have notice (either actual or constructive) of the restriction
   vi. The benefit and burden must touch and concern the land
c. Differences between real covenants and equitable servitudes
   i. Remedies available > real covenant > $$$, equitable > injunction
ii. No privity is needed for equitable servitudes
iii. Creation: equitable servitudes can be created by implication

The burden and the benefit of a real covenant run with the estates in land, not the land itself. CB
e. Can only be created by a written instrument (ie. deed signed by grantor)
  i. Real covenants cannot be created by implication or prescription. CB
f. For the elements to run > must have been the intent of the original parties to do so.
g. CL > contract rights and duties (which are the basis for covenants) were not assignable.
h. Exception: where there is privity of estate > contract is enforceable by and against assignees
  i. UK > only horizontal privity of estate between landlord and tenant. CB
  ii. US > didn’t limit privity of estate to a certain situation > American real covenant. CB
    1. promise respecting the use of land that runs with the land at law. CB
    2. To get horizontal privity > covenant must be created in conjunction with the transfer of some other interest in land. CB
       a. Horizontal is required for the burden to run
       b. Horizontal is not required for the benefit to run

iii. vertical privity requirements to run:
    1. for the burden > covenant is only enforceable against someone who has succeeded to the same estate as that of the original promisor. CB
    2. for the benefit > covenant is enforceable by a person who gets the original promissee’s estate or to a lesser interest of that estate. CB

37. Creation of Covenants Running with the Land

What are "covenants running with the land," and how are they created?

Issues
I. What is required to create a real covenant?
II. What is needed to create an equitable servitude?
III. What is a reciprocal negative easement and how is it created?
IV. What is a buyers burden of discovery to find if a reciprocal negative easement exists?
V. What must be done if a structure violates a reciprocal negative easement?
VI. What constitutes a general plan/scheme from which restrictions will be implied by equity?
   a. Majority of jurisdictions?
   b. Other jurisdictions?
   c. Restatement?
VII. What are the requirements for the enforcement of covenants in equity?
   a. Pre 1848?
b. Post 1848 (4 requirements)?

VIII. What is the needed for a covenant to run with the land?
   a. Old general strict rule?
      i. Exceptions?
       
   b. New approach?

IX. A

X. What is an assessment covenant?

XI. What were the 2 problems with enforcing assessment covenants?

XII. What is the rationale for avoiding the vertical privity requirement in Neponsit?

XIII. What legal standing do home owners assoc. have?

XIV. What is the general view of the need for vertical privity?
   a. Exception?

XV. How does the court view touch and concern with regards to negative covenants?

XVI. What are the 4 reasons that courts have been wary to enforce affirmative covenants against successors (based on touch and concern)?

XVII. What is the view on courts view about a covenant touching and concerning, when they involve monetary obligations?

XVIII. What does the new restatement think of touch and concern?

XIX. What is the new restatements general rule on valid servitudes?

XX. What are the differences with defeasible fees vs. servitudes in land use control?

Rules

I. Creation
   a. To create a real covenant it must be done so expressly and in a writing signed by the grantor
   b. Equitable servitudes usually must be created by a signed writing (due to SF)
      i. But, negative equitable servitudes can be created by implication, but not by prescription. SANBORN
      ii. Reciprocal negative easement is one that is implied when developer sells lots in a subdivision on the promise that all of the lots will be burdened with the same use restriction, but fails to attach the promise to all lots. SANBORN
         1. courts will imply that if the negative promise is on any of the lots in the subdivision > is enough notice for the buyer to know, by looking at other lots and looking at other titles. SANBORN
            a. the development must be uniform in character and recognizable as such by purchasers. SANBORN
         2. courts will imply reciprocal covenants only when they are negative (limiting use of property). SANBORN
         3. it is the buyers responsibility to do inquiry of other deeds in the neighborhood. SANBORN
   
II. Subdivisions
   a. By implication a common scheme > same as an implied reciprocal covenant but it uses a common scheme of development to identify the property benefited by covenants that are expressly created. NEOPONSIT
      i. general plan:
         1. Majority > courts imply negative restrictions from a general plan
2. Minority (multiple) > take SF more seriously > not imply
3. to the covenant as owners of land, not the community as a whole

III. Homeowner assoc.
   a. CL > affirmative covenant was a person covenant (focused on form) > does not run with the land. NEOPONSIT
      i. Exception: some covenants to pay that touch and concern the land/benefits. NEOPONSIT
      ii. New approach: look at intent and substantial effect of the covenant rather than form NEOPONSIT
         1. if it touches and concerns land
         2. and effects the legal relations (advantages and burdens) of the parties to the covenant as owners of land, not the community as a whole
   b. historically there were 2 problems with enforcing assessment covenants: CB
      i. courts didn’t like to enforce affirmative covenants against successors to the original covenant. CB
      ii. Home owners assoc. did not succeed to any land owned by either of the original parties and didn’t own any land. NEOPONSIT
         1. got around this by saying that the developer had created the HOA as the agent to represent the property owners whose property was reciprocally benefited and burdened by the covenant. NEOPONSIT
            a. > HOA doesn’t need vertical privity

IV. Difference between using defeasible fees and servitudes as land control devices
   a. Remedy for defeasible fees > forfeiture

38. Scope/Termination of Covenants
   What is the scope of covenants and how are they terminated?
   Issues
   I. What is a single family residence?
   II. What statutory restrictions have been placed on restrictive covenants?
   III. What effect does the FHA have on discriminatory covenants?
   IV. What ways can a covenant be terminated?
   V. What reasons can courts use to terminate a covenant?
   VI. What is the changed conditions doctrine?
   VII. What does the restatement say about termination due to changed circumstances?
   VIII. What does the restatement say about modification and termination of covenants?
   IX. What is termination by condemnation?
   X. Need more from reading and Crusto’s notes

Rules
I. Single family residence is based on a style of house, not its lifestyle. HILL
   a. A group home is residential in nature > residents meet SFR requirement. HILL
II. Equal rights legislation > covenants restricting sales of homes in neighborhoods to only white people which are still in the deed > are not enforceable. SHELLY
   a. FHA has had the same effect with the classes it covers
III. Covenants can be terminated in the same ways as easements.
a. There are also equitable causes for termination/modification like laches (adverse possession) and unclean hands
b. Can be terminated or modified by the parties consent as well.
c. Common interest communities can modify/terminate restrictive covenants with less than unanimous approval.
d. Courts can terminate/modify a restrictive covenant on the basis of changed conditions. WESTERN LAND
   i. The court can modify the servitude to permit the purpose to be accomplished.
      1. In most cases the court will continue to enforce the restrictive covenant by injunctive relief. WESTERN LAND
   ii. If modification is not practical or effective > can terminate
      1. compensation for resulting harm to the beneficiaries may be awarded
   iii. To modify/terminate > the changed neighborhood conditions
      1. must be within the neighborhood borders
      2. and must have substantially diminished the covenants benefit
         a. a change in the restricted parcels zoning classification is not enough change in condition, unless the new zoning ordinance prohibits the uses permitted by the covenant
   e. parties can buyout the restriction. WEST LAND
IV. Courts can enforce a restrictive covenant by an injunction or by damages
V. Owner cannot abandon their property interest in an attempt to terminate their obligation to pay affirmative easements. POCONO
VI. Other than common interest communities > covenant to pay money or provide services terminates/may be modified if
   a. A reasonable time passes ???
   b. The obligation becomes excessive in relation to the cost or the services or facilities received
VII. Condemnation (eminent domain) by govt. > govt. takes land free of all private restrictions
   a. Govt. may have to compensate covenantor and covenantee

39. Common Interest Communities
   What are condominiums and co-ops?
   How are they regulated?
   Issues
   I. 
   II. 

   Rules
   I. Pets are not protected by the FHA
      a. In 2000, CA enacted a statute > common interest communities cannot prohibit the owner of a separate interest form keeping at least 1 pet within the development.
   II. States have statutorily imposed schemes for the organization of common interest communities
a. Must have a declaration of rules governing the community that must be disclosed to original purchasers
b. HOA enforces servitudes
   i. It is governed by an elected board of members
   ii. Board may adopt new regulations to manage common property, enforce the servitudes, protect the community members from interference of enjoyment of their individual property

III. There are 3 types of common interest communities:
   a. HOA
   b. Condo’s
      i. each unit is owned separately in fee simple
      ii. exterior walls, land beneath, hallways and other common areas are owned by unit owners as tenants in common
      iii. condo documents fix the fraction of each unit owners % of burden of the common expense
      iv. association may have the rights to make improvements and assess fees
   c. Coop’s
      i. Title to the land and building is held by a corporation and the residents own a share of the corporation. CB
      ii. Subject to a blanket mortgage
      iii. If any coowner doesn’t pay > others must make up $ otherwise > foreclosure
      iv. NY > coop’s boards can deny entry to anyone without giving any reason, as long as they don’t violate federal and state civil right laws.

IV. NAHRSTEDT case
   a. Common interest restrictions are enforceable unless unreasonable
   b. Reasonable can be a subjective view or can be based on the restrictions being passed by a majority of the owners or the board

V. Direct restraint on alienation is valid if it is reasonable
   a. Ie. prohibitions on transfer without the consent of the HOA, right of first refusal, etc

VI. Indirect restraints on alienability is invalid only if it lacks rational justification
   a. Examples of indirect restraints: pets, paint color, planting restrictions