Write a brief

1. Define Rule
2. Apply to facts
3. Distinguish contrary authority

Spring 2012

Steward Sterk – Property – Attack Outline

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# 

# POSSESSION

## Discovery

* + 1. *Johnson v. M’Intosh* – Acquisition by conquest results in superior title to land over natives 🡪 Title from US Government is superior to title from Native Americans
       1. Natives have right to occupation but not right to ownership
    2. **Policy** – Objectives of property system
       1. Promote productivity
       2. Minimize fighting – Lower transaction costs
       3. Promote “fairness”

## Capture

* + 1. *Pierson v. Post* – Rule of capture 🡪 pursuit alone is insufficient
       1. Physical possession
       2. Intent to possess
          1. Mere pursuit?
          2. Mortal wounding – Would that will objectively prove fatal – deprive animal of liberty/subjectively manifest intent to seize the animal
       3. Dissent – Custom 🡪 hunters may argue pursuit constitutes possession sometimes
    2. **Policy**
       1. Outcome promotes certainty and is administratively cheap
       2. Tension between peace and order vs. promoting productive activity

# RELATIVE OWNERSHIP

* 1. **Generally**
     1. Replevin – Return of taken good
     2. Trover – Damages
     3. Lost Property – Unintentionally misplaced property
        1. Goes to finder
     4. Mislaid Property – Property intentionally placed but forgotten
        1. Goes to owner of premises
     5. Abandoned Property – Property intentionally relinquished
        1. Goes to finder
     6. **Exceptions**
        1. Land owner > Trespassing finder
        2. Land owner > Guest finder
        3. Employer > Employee
        4. Tenant > Landowner

## Rule of First in Time

* + 1. *Armory v. Delamirie* – Chimney sweep trover action for jewel stolen by jeweler’s asst
       1. Holding: Finder has title better than all the world but True Owner (TO)
       2. Damages: Max value of a jewel that fits in the setting
       3. NOTE: If TO shows up, TO only collects from jeweler if jeweler has not paid damages to finder 🡪 If jeweler bought jewel, TO wins, if jeweler stole the jewel and lost judgment, TO loses
    2. *Anderson v. Gouldberg* – Π trespasses on TO’s land, cuts trees which Δ-mill steals
       1. Holding: Π’s possession is lawful and superior WRT Δ
  1. **Policy**
     1. Protect prior possessor encouraging people to invest in goods
     2. Relative ownership is simpler to implement than absolute title
     3. Absent true owner, thief wins against subsequent finders

# ADVERSE POSSESSION

* 1. **Analysis**
     1. **Hostile possession under claim of right**
        1. Objective – State of mind irrelevant (*West v. Tilley*, *Przybylo*)
           1. Difficult for purchaser to know whether AP was possessing in good-faith
        2. Bad Faith – Intentionally take when property is not yours (*Van Valkenburgh*)
        3. Good Faith – Must think you owned the land (*Van Valkenburgh*)
           1. Disincentive to trespassers
        4. Negating Hostility
           1. Admission of inferior title during SOL negates AP (*Van Valkenburgh*/*Tonawanda*)
           2. Seeking permission from TO negates hostility (*Tonawanda*)
        5. Presumption of Hostility
           1. When all other elements are proven, hostility is assumed (*Tonawanda*)
     2. **Actual Possession**
        1. Triggers the COA for trespass
        2. Color of Title – Partial occupancy is deemed complete occupancy
     3. **Open and Notorious**
        1. Notice to TO – sufficient to provide notice to reasonably attentive TO
           1. Acts typical of owners of similar property in the area (*Kunto*/*Przybylo*/*Tubolino*)
        2. Actual knowledge trumps reasonably attentive standard
        3. Minor Encroachment – Does not create presumption of notice (*Manillo*)
           1. Innocent encroachment results in forced sale if great hardship would result
        4. New York – Substantial enclosure or usual improvement or cultivation when not under color of title (*Van Valkenburgh*/*Tonawanda*) 🡪 burden to demonstrate *usual* use
           1. Color of Title – Ordinary use under COT is sufficient for cultivation/improvement (*Tubolino*)
           2. Minor Encroachment – Forced property rule in favor of TO
     4. **Exclusive**
        1. AP holds land to exclusion of TO and other AP’s
     5. **Continuous** – Interval when AP does not use the property?
        1. Must be same as a TO under the circumstances (*Kunto*)
        2. Tacking – SOL doesn’t restart with new AP if there is privity between parties (*Kunto*)
           1. NOTE: If AP is ousted and returns later, SOL is tolled. If AP abandons and returns later, SOL restarts
  2. **Color of Title** (*Tubolino*)
     1. Entering land under bad deed constitutes constructive possession of whole property even if cultivation is partial
        1. Not under color of title, only occupied land is possessed (*Tonawanda*)
        2. Non-COT rule kicks in if TO is occupying another part of the land at same time

## Co-tenants – See co-tenant section BUT point is that mere ouster is insufficient!!!

* 1. **Minor Encroachment/Boundary Dispute** – Property or liability rule (*Amkco Ltd. v. Wellborn*/*Manillo v. Gorski*)
     1. TO must show irreparable harm if removal were denied
     2. Even if proven, balancing test comparing hardship to TO if denied to hardship to AP if granted
     3. Agreed boundary – Oral agreement enforceable if accepted for long time
     4. Acquiescence – Evidence of agreement can fix boundary line
     5. Estoppel – Acquiescence/agreement allowing great expense of AP results in estoppel
  2. **Disability**
     1. SOL is tolled during time TO is disabled
     2. Disability must exist at time AP enters land
     3. Examples
        1. Minors/infants
        2. Mentally ill
        3. People in prison
        4. People in the military
  3. **NY Adverse Possession Statute**
     1. §501
        1. Adverse possessor – With or without knowledge of other’s superior rights
        2. Claim of right – reasonable basis for the belief that the property belongs to the AP or TO as the case may be (NOTE: This is nonsensical, no way to know the standard)
     2. §511 – Color of title – Constructive occupation; §521 – Not COT – Only occupied
     3. §522 – Deemed possessed when acts are sufficiently open OR protected by substantial enclosure (except §543)
     4. §543 – Boundary lines
        1. *De minimis* non-structural encroachments including fences, hedges, shrubbery, plantings, sheds, and non-structural walls are deemed permissive and non-adverse
        2. Acts of lawn mowing or similar maintenance across the boundary line is deemed permissive and non-adverse
  4. **Cases**
     1. *Van Valkenburgh v. Lutz* – VV acquired land by tax foreclosure occupied by Lutz
        1. NOTE: If VV gave notice of foreclosure to L, AP claim would automatically fail
        2. Not under color of title, must show “actual” occupation 🡪 substantial enclosure or usually cultivated or improved
        3. Brother’s house – Cannot concede that land was not AP’s
        4. Garage encroachment – No AP if unaware it is not AP’s land
        5. Farm – Had to be enclosed or completely developed
     2. *West v. Tilley* – Distinguishes VVv.L 🡪 land is enclosed by sea wall
     3. *City of Tonawanda* – Used/replaced dock, Light pole, retaining wall, mowed grass
        1. When all elements are established, hostility is presumed
        2. Not under color of title – cultivation, enclosure, improvement kicks in
        3. Seeking permission from TO negates hostility
     4. *Tubolino v. Drake* – Paid property tax, Cut down trees, built foot bridge, posted no trespassing sign
        1. Color of title – Use of land as an ordinary owner is sufficient to establish cultivation/improvement
        2. AP trumps good title
     5. *Walling v. Przybylo* – Bulldozed, deposited fill/topsoil, dug trench and installed pipe, watered and mowed lawn
     6. *Manillo v. Gorski* – 15in encroachment
        1. Minor encroachment does not create presumption of notice
        2. Innocent encroachment that can’t be removed without great expense results in forced sale irrespective of notice
     7. *Howard v. Kunto* – Deed to property adjacent to the one AP’s house was on
        1. Taking with privity, and summer occupancy is continuous in summer home
  5. **Policy**
     1. **Generally**
        1. Promotes alienability of land
        2. SOL against trespass
        3. Evidence decays over time, and stale claims to property should be barred
        4. Preserves the status quo
     2. **Liability vs. Property Rule**
        1. Property – TO sets price, autonomy of TO, accounts for subjective value, incentive to respect property boundaries
        2. Liability – Faster, avoids economic waste, avoids unjust enrichment of TO
     3. **Enclosure or Improvement Requirement**
        1. Notice
        2. Don’t reward unproductive behavior
        3. Ease of adjudication – proves someone occupied the land
     4. NOTE: AP does not acquire *record* title without an *action to quiet title*
     5. NOTE: No AP against the government

# PRESENT INTERESTS

* 1. **Generally**
     1. **Fee Simple Absolute** – Grant lasting to infinity
        1. O to A and her heirs
     2. **Life Estate** – Grant lasting the life of the grantee
        1. O to A for life, remainder to her heirs
     3. **Leasehold** – Fixed period
     4. **Fee Simple Determinable** – Automatically reverts to grantor upon event
        1. Time indicating language – “Give until,” “So long as,” “while”
        2. SOL for AP begins running against O on occurrence of event
     5. **Fee Simple Subject to Condition Subsequent** – Grantor can retake upon event
        1. Conditional language – “Provided that,” “On condition that,” “but if”
        2. SOL for AP runs on statute, or when O shows up
     6. **Fee Simple Subject to Executory Interest** – 3rd party can take upon event
     7. NOTE: Condition subsequent default over determinable, Simple absolute default over life estate (*White v. Brown*)
     8. **NOTE**: Modern trend allows ***inter vivos* transfer of reverter** and right of re-entry but this is opposite the common law rule (*Mahrenholz*)
     9. NOTE: Value of reverter is zero (BUT SEE *Ink*/*City of Palm Springs*)
  2. **Examples**

|  |  |  |  |
| --- | --- | --- | --- |
| Granting Text | Rights of Grantee | Rights of Grantor | Rights of 3rd Party |
| O to A and her heirs | A: Fee simple absolute | None | None |
| O to A for life, remainder to her heirs | A: Life estate | Reversion | H: Remainder |
| O to A for life so long as used for residential purposes | A: Fee simple determinable | Reverter | H: Fee simple determinable |
| O to A so long as used for school purposes | A: Fee simple determinable | Reverter | H: Fee simple determinable |
| O to A, but if not used as school, O has right to retake | A: Fee simple subject to condition subsequent | Right of Re-entry | H: Fee simple subject to condition subsequent |
| O to A, but if not used as a school, to B | A: Fee simple subject to executory interest | None | B: Executory interest |

## Waste

* + 1. Life estate holder should not be able to use property in a manner that unreasonably interferes with the expectations of reverter/remainder holders (*Baker v. Weedon*)
    2. **Ameliorative Waste** – Life tenant can modify property as long as value of remainder/reversion is not diminished (or prop value increased) (*Melms v. PBR*)
    3. **Affirmative Waste** – Voluntary acts
       1. Liability for acts that have more than trivial effect 🡪 substantial reduction in property value
       2. Typically granted injunctive relief BUT SEE *Woodrick v. Wood*
    4. **Permissive waste** – Failure to act
       1. Question of negligence -= failure to take reasonable care of property
       2. Typically granted damages

## Restraints on Alienation

* + 1. **Disabling Restraint** – NOT ALLOWED (*White v. Brown*/*Mountain Brow*)
       1. O to A and her heirs, but all transfers hereafter are null and void
    2. **Forfeiture Restraint**
       1. O to A and her heirs, but if A attempts to transfer, then to B and her heirs
       2. NOTE: Can be subverted if A and B work together
    3. **Promissory Restraint**
       1. O to A and her heirs, and A promises that it won’t be transferred
       2. Enforceable through contract remedies
    4. **Restraint on Use**
       1. *Mountain Brow Lodge v. Toscano*
          1. Grant of land to Mountain Brow restricted use to benefit Mountain Brow only, reverts to grantor if not used for Mountain Brow or if attempt to sell
          2. Holding: Sale restriction is void, but use restriction is acceptable

NOTE: Use restriction like this would have to be periodically recorded

* + - * 1. Dissent: Use restriction amounts to a restraint on alienation
      1. *Falls City v. Missouri Pac. R. Co.* – Invalid use restriction providing land must be used as company HQ which has the practical effect of restraining alienability by unreasonably limiting the class of person to whom it may be alienated
  1. **Cases**
     1. *White v. Brown*
        1. Operative text: White to have my home to live in and not to be sold. My house is not to be sold 🡪 Brown claimed life estate
        2. Holding: Granted fee simple absolute with invalid restraint on alienation (Flips common law rule
     2. *Baker v. Weedon* – Baker owns life estate, wants to sell land and put in trust to live on
        1. Remaindermen (grandkids) object claiming waste
        2. Holding: Property sold if (1) necessary and (2) in best interest of all parties
        3. Rule – Alienation of life estate in favor of life tenant is affirmative waste
     3. *Woodrick v. Wood* – Action to prevent barn being torn down
        1. Tear down would increase land value = not waste
        2. $3200 to Woodrick for value of barn to protect her interest
     4. *Melms v. PBR* – Life tenant can make substantial alterations to the property as long as it doesn’t diminish the value of the remainder/reversion
     5. *Mahrenholz v. County Board of School Trustees*
        1. Operative text: This land to be used for school purposes only; otherwise to revert to Grantors herein 🡪 “only” = condition subsequent, “otherwise to revert” = determinable
        2. Holding: Grant is for fee simple determinable which cannot be transferred *inter vivos*, but can be inherited 🡪 Result is that son sold property interest to Board
           1. NOTE: Important because either the son had the property interest through reversion or he had right of re-entry which couldn’t be transferred
     6. *Mountain Brow Lodge v. Toscano*
        1. Grant of land to Mountain Brow restricted use to benefit Mountain Brow only, reverts to grantor if not used for Mountain Brow or if attempt to sell
        2. Holding: Sale restriction is void, but use restriction is acceptable
           1. NOTE: Use restriction like this would have to be periodically recorded
        3. Dissent: Use restriction amounts to a restraint on alienation
     7. *Falls City v. Missouri Pac. R. Co.* – Invalid use restriction providing land must be used as company HQ which has the practical effect of restraining alienability by unreasonably limiting the class of person to whom it may be alienated
     8. *Ink v. City of Canton* – Land to be used only as a park
        1. Issue: Who gets proceeds from condemnation of defeasible fee? 🡪 What is the value of a reversion/right of reentry/executory interest?
        2. Common law (Majority rule) – Reverter has no value
        3. Holding: Ink should get difference between fee simple determinable and fee simple absolute
           1. Any money the city gets to be used only for the park
           2. Money invested by city in park goes to city
           3. NOTE: Reverter only seemingly has value after land is condemned
     9. *City of Palm Springs v. Living Desert Reserve* – When condemner (City) owns present possessory interest in the land, condemnation action makes violation of condition imminent 🡪 holder of reverter gets the value of the land
  2. **Policy**
     1. **Fee Simple Absolute over Life Estate**
        1. Marketability of life estates is low
        2. Conflicts between life tenants and remaindermen 🡪 high transaction costs
        3. Can’t lease beyond life tenant’s lifetime
        4. Can’t get a mortgage on property
        5. Life tenant has no duty to insure, but gets proceeds from any insurance purchased in the event of an accident
     2. **Restraints on Alienation**
        1. Restraints make property unmarketable
        2. Perpetuate concentration of wealth
        3. Discourage land improvement
        4. Prevent owner’s creditors from reaching the property

1. FUTURE INTERESTS – LOOK AT TEXT, THEN CASES
   1. **Retained by Transferor – These are all vested for RAP**
      1. **Possibility of Reverter** – Follows fee simple determinable
      2. **Right of Re-entry** – Follows fee simple subject to condition subsequent
      3. **Reversion** – Everything not covered by the other two
   2. **Created in Transferee**
      1. **Vested Remainder** – Owned by an ascertained person, not subject to condition precedent
         1. Vested Subject to Divestment – Subject to condition subsequent/executory interest
         2. Vested Remainder Subject to Open – Person is ascertained, but more can still join the class – **Not vested for RAP**
         3. Indefeasibly Vested Remainder – Not subject to open
      2. **Contingent Remainder** – Owned by an unascertained person or subject to condition precedent – **Not vested for RAP**
      3. **Executory Interest** – Follows fee simple subject to executory interest – **Not vested for RAP 🡪 Interpret will, can be vested in a single person otherwise not vested**
   3. **Class Closing Rule** – NOTE THIS HELPS FAVOR **EARLY VESTING**
      1. Class closes physiologically once no other can be born into it 🡪 Parent dies
      2. **Rule of Convenience** – Class closes when any member can demand possession
         1. A person born before closing, but hasn’t met condition precedent can take once condition is met.
         2. NOTE: This is distinct from Vested Subject to Open
   4. **Examples**

|  |  |
| --- | --- |
| Granting Text | Result |
| O to A for life then to B if B gives A a proper funeral | Executory interest in B divesting O’s heirs |
| O to A for life, then to B and her heirs | Life estate in A, vested remainder in B |
| O to A for life, then to A’s children and their heirs. A has one child: B | Life estate in A, vested subject to open in B |
| O to A for life, then to the heirs of B. B is alive | Life estate in A, contingent remainder in B’s heirs 🡪 Heirs are those that are alive at B’s death |
| O to A for life, then to B and her heirs if B survives A, and if not, to C and his heirs | Life estate in A, contingent remainder in B, contingent remainder in C 🡪 NOTE C cannot divest B’s interest |
| O to A for life, then to B and her heirs, but if B doesn’t survive A, to C and his heirs | Life estate in A, vested remainder subject to executory interest in B, executory interest in C |
| O to A and B for their lives, then to the survivor in fee simple | Contingent remainder in A and B |
| O to A for life, then to A’s children who reach 21. A has B who is 17. | Contingent remainder in B which is vested subject to open when he turns 21 🡪 NOTE Rule of Convenience |

* 1. **Cases – NOTE: Presumption of early vesting! Now intent of grantor.**
     1. *Browning v. Sacrison*
        1. Operative Text: I give and devise my daughter a life estate… with remainder to my grandsons, or if either of them be dead, then all to the other, subject [to their father getting nothing]
        2. Issue: One grandson died before the daughter, does his wife inherit?
        3. Holding: Grandsons had contingent remainders so once one didn’t outlive daughter, his share went to the other
           1. NOTE: This is the only way to truly satisfy the “subject to” condition
        4. **Case highlights intent of grantor trumps presumption of early vesting/text**
     2. *Swanson v. Swanson* – Opposite of *Browning*
        1. Father died creating trust managed by mother. If not distributed, then:
           1. If any of my children shouldn’t be in life @ death of wife, share of each deceased child shall go to his or her surviving children

The child has a vested remainder subject to condition subsequent. Grandchildren would have something like an executory interest.

**NOTE: No contingent language 🡪 vested 🡪 Don’t “read in” survival requirement**

* + - * 1. Remaining assets divided into 9 shares, one for each of my surviving children or for the then surviving issue of each deceased child
      1. Issue: What about a child that dies leaving only a wife?
      2. Holding: Created vested remainder subject to condition subsequent
         1. Either mother distributes, or kid survives mother vesting in kid/issue
         2. Otherwise goes to kid’s heirs (the wife)
         3. NOTE: Survivorship condition in (b) but not litigated at trial

# RULE AGAINST PERPETUITIES

* 1. **The Rule** – Any interest, in order to be good, must vest or fail within the period of lives in being plus 21 years
  2. **Analysis**
     1. Determine, *by the terms of the instrument*, the last moment at which the interest could *vest or fail*
     2. Determine whether that moment is within the period permitted by the rule
        1. Find a measuring life
  3. **Warnings!**
     1. Interests contingent on an event (rather than life in being) will usually fail
        1. Executory interest that are inheritable usually fail
     2. Recipient described by label (wife, child, widow, etc.) will often fail
  4. **Class Closing Rule** – NOTE presumption in favor of early vesting
     1. Class gift is not vested in any member until vested in all members
     2. **Rule of Convenience** – Once one member is eligible to take, we close the class, divest to eligible person and hold the rest to see if others satisfy condition
  5. **Corporations**
     1. *Symphony Space Inc. v. Pergola Properties* – Commercial purchase options are subject to RAP
        1. Option for tenant to purchase property not subject to RAP
        2. Right of first refusal not subject to RAP (*MTA v. Bruken Realty Corp.*)
  6. **Uniform Statutory RAP** – Wait and see approach for 90 years
  7. **Current State of RAP**
     1. Common law rule – Alabama
     2. Common law rule abolished replaced by nothing – RI
     3. USRAP – CA, CT, GA, KA, Mass., MN, Montana, NM, OR, WV
     4. Common law rule replaced with rule against suspension of alienation – Wisc, Alaska
     5. Common law with statutory reform – NY
     6. Wait and see – Miss., VT
     7. Wait and see for life tenant’s life or lives of living beneficiaries – IL, Maine, Maryland
     8. USRAP with opt-out (perpetual trusts permitted) – DC, VA
  8. **Examples**

|  |  |
| --- | --- |
| Granting text | Result |
| O to A for life, then to A’s first child to reach 21 | Valid – Contingent remainder in kids that vests at 21y after A’s death |
| O to A for life, then to A’s first child to reach 25 | Invalid – Contingent remainder in kids that won’t vest til 25y after A’s death |
| T to T’s grandchildren who reach 21, T leaves two kids and three grandkids under 21 | Valid – Contingent remainder in grandkids that closes when 1 turns 21 or within 21y of death of last of T’s kids |
| T to A for life, then to A’s children for the life of the survivor of them, then to A’s grandchildren.  A is 80y with two kids: B/C  **Fertile Octogenarian** | Invalid – If T dies then A has another kid (life not in being), then B and C die right away, the new kid can outlive B and C by more than 21y invalidating the grandchildren’s remainder |
| O to A for life, then to B if B attains age of 30. B is 2y/o | Valid – B is his own measuring life, reverts to O’s heirs |
| O to A for life, then to A’s children for their lives, then to B if B is then alive, and if not, to B’s heirs. A has no kids at time of conveyance | Valid in A’s children 🡪 A is measuring life  Valid in B 🡪 B is his own measuring life  Valid in B’s heirs 🡪 B is the measuring life  B/B’s heirs 🡪 Vested remainder not yet possessory |
| O holds $1k in trust to all members of O’s present class that pass the bar | Valid – all class members are their own measuring lives |
| O holds $1k in trust to the first child of A to pass the bar | Invalid – A may have another kid that may never pass the bar |
| O to A for life, then to A’s children who reach 25. A has a child, B who is 26 | Invalid – Even with rule of convenience, if A dies with newborn, class does not vest til new born dies or reaches 25y |
| O to A for life, then to A’s widow, if any for life, then to A’s issue then living | Invalid – A gets married to someone born after O dies  **Unborn widow rule** |

* 1. **Policy**
     1. Controlling property from the grave (dead hand control) is not favored
        1. Guarantees a “floor” for descendants for generations to come
        2. Couldn’t pay debts using the land
     2. Inalienability
        1. There would be no person alive for several generations that could sell the property

# CO-OWNERSHIP

## Joint Tenants

* + 1. **Generally**
       1. Right of survivorship
       2. Severable unilaterally through conveyance to 3rd party
       3. Murder forfeits right of survivorship
    2. **Four Unities**
       1. Time – Acquire at the same time
       2. Title – Acquire by same instrument or joint adverse possession
       3. Interest – Equal, undivided shares
       4. Possession – Each has right to possession of the whole
    3. **Severance** – When one joint tenant of several severs joint tenancy, it is severed between that joint tenant and the rest, but the remaining joint tenancy is intact
    4. **Strawman**
       1. 3rd party to whom land is transferred in order for that person to transfer it immediately back creating or dissolving a joint tenancy
       2. Not needed in many jurisdictions (*Riddle v. Harmon*)
          1. NOTE: Required in common law jurisdictions, no strawman 🡪 tenancy in common because fails unity of title and time
          2. NOTE: Possibility of fraud – Give conveyance to strawman to exercise in event of W dying first, then if H dies first, tear it up
          3. *Riddle v. Harmon* - Wife allowed to sever joint tenancy without strawman

## Tenancy in Common

* + 1. **Generally**
       1. Default tenancy
       2. No right of survivorship 🡪 Passes to estate of person that dies
       3. Each co-tenant has equal right to possess the whole property and to share equally in appreciation in value
       4. Interest can be assigned and transferred

## Tenancy by Entirety

* + 1. **Generally**
       1. Like Joint Tenancy but can’t be dissolved through unilateral action
       2. Only created in husband and wife
       3. Terminates with divorce
       4. Has right of survivorship
       5. If unavailable, default for husband and wife is joint tenancy
    2. **Liability** (*Sawada v. Endo*) – NOTE: designed to protect current interest of spouse
       1. Group I – Estate owned by H, W has right of survivorship
       2. Group II – Interest of debtor spouse can be sold or levied upon for his or her separate debts, subject to the other spouse’s contingent right of survivorship (Minority)
       3. Group III – Any conveyance by one spouse is void, estate may not be subject to the separate debt of one spouse only (Majority)
       4. Group IV – Contingent right of survivorship appertaining to either spouse is separately alienable by him/her and attachable by his/her creditors during the marriage
       5. **Examples**
          1. *Sawada v. Endo* – H in car accident, transferred property to kids to defraud judgment, no ruling on fraud

Property can’t be attached because HI doesn’t allow attachment of H’s debt in tenancy by entirety

* + - * 1. *US v. Craft* – SCUSA holds land owned by entirety subject to IRS lien
        2. *US v. 1500 Lincoln Ave* – H illegally selling drugs out of pharmacy owned by entirety 🡪 only H’s survivorship forfeited
        3. *US v. Lee* – no forfeiture if the home isn’t actually used for the crimes

## Possession and Ouster

* + 1. **Generally**
       1. Each co-tenant has the right to use the entire property
          1. No rent is due without ouster first
       2. Ouster – Occupying tenant act to prevent other co-tenants from using property
          1. Co-tenant must make a demand for use and be denied
          2. Starts the clock on AP
    2. **Examples**
       1. *Spiller v. Mackareth* – Co-tenants in warehouse 🡪 No rent w/out ouster
          1. NOTE: Bring partition action (or threaten) and force settlement
       2. *Swartzbaugh v. Sampson* – Lease for boxing pavilion 🡪 No ouster, no rent
          1. NOTE: Person holding a lease cannot get leased land through AP

## Contribution, Improvements, Repairs

* + 1. **If There is no Occupying Co-tenant**
       1. All co-tenants pay their share of taxes, interest on mortgage, etc.
       2. Co-tenant that pays down principal on mortgage has a lien on the property
    2. **If There is an Occupying Co-tenant**
       1. No contribution for repairs, maintenance, improvements or taxes unless they exceed the fair rental value
    3. Co-tenant gets contribution on mortgage payment when *due or past due*, not before
    4. **Settlement on Sale** – Co-tenant who has not been reimbursed for taxes, interest, mortgage on principal, repairs, maintenance, insurance, and other common expenses is reimbursed from sale proceeds
       1. Improvements get the sales proceeds attributable to the *value added* by the improvement, amount paid is irrelevant – Accounting on partition
    5. **Accounting** – Co-tenant that rents out the property must share in the *profit*, can account for expenses incurred – Also includes improvements. Action at partition.

## Partition

* + 1. **Partition in Kind** – Court divides up the land between parties
       1. Owelty – Payment to other co-tenants when equitable partition isn’t possible
       2. *Delfino v. Vealencis* – Partition in kind for woman running garbage business
    2. **Partition in Sale** – Court sells the land and divides the proceeds
       1. *Johnson v. Hendrichson* – Sale ordered when value of whole land was greater than sum of the parts
    3. **Policy**
       1. Judicial partition keeps a holdout from blackmailing cotenants
       2. Partition in sale is significantly less stressful on judicial resources
       3. Arguing for partition in kind – consider subjective/idiosyncratic value
          1. *Ark Land Co. v. Harper* – Partition in kind when high idiosyncratic value

## Adverse Possession

* + 1. Co-tenant claiming AP needs to give clear notice, usually in writing, beyond ouster
    2. Can’t adversely possess against each other because there is no trespass
    3. After ouster and other acts inconsistent with co-tenancy, SOL *might* run
       1. NY – SOL is tolled for 10y, after which SOL begins to run
  1. **Examples**

|  |  |
| --- | --- |
| Grant | Result |
| O to A/B/C as joint tenants. A 🡪 D. B dies, leaving H. | A🡪D creates tenancy in common D/(B joint C)  B dies 🡪 C gets B’s share, H gets nada |
| T to A and B as joint tenants for their joint lives, remainder to the survivor | Joint life estates with contingent remainders to each  No way to unilaterally sever |
| To S and G as joint tenants with right of survivorship. S🡪A. S dies | A argues S severed joint tenancy 🡪 tenancy in common 🡪 A gets half  G argues joint life estates w/ contingent remainder   * A counters that language was only to rebut presumption in favor of tenancy in common |

# MARITAL INTERESTS

* 1. **Common Law** – Property is owned by the spouse who paid for or inherited it
  2. **Community Property** – Whatever one spouse earns is deemed owned by both
  3. **Marital Property**
     1. All property acquired by either spouse subsequent to the marriage
     2. **Exceptions**
        1. Property acquired by gift, bequest, devise or descent
        2. Property acquired in exchange for property acquired prior to marriage or gift, etc.
        3. Property acquired after decree of legal separation
        4. Property excluded by valid agreement of parties
     3. **Degrees and Professions** (Compare *Graham/Mahoney* with *O’Brien/Elkus*)
        1. *In re Marriage of Graham* – Couple w/ no marital property, W supported H to get a degree during marriage
           1. Distinguishes professional practice which could be bought/sold
           2. Value a degree – Average income of degree holder minus income of non-degree holder back-solved to present value
           3. Holding: Degree is not marital property in CO, W could have sought alimony and had a restitution claim for degree factored there, but not marital property
        2. *Mahoney v. Mahoney* (NJ) – Professional degree too speculative to value 🡪 reimbursement alimony
        3. *O’Brien v. O’Brien* (NY) – H’s medical license was marital property
        4. *Elkus v. Elkus* – W’s singing career/professional reputation is marital property
           1. H took care of kids, was voice coach
        5. *Dugan v. Dugan* (NJ) – Goodwill as reputation that can generate future business is marital property
        6. Hypo: H and W are married, H has premarital law degree. H runs for office, is elected, then loses. On divorce, W wants piece of reputation for congressional career.
           1. W argues she helped campaign, etc.
           2. H argues that legal career would have been more lucrative even factoring gains to reputation 🡪 if there is *no increased earning capacity* there is nothing to divide on divorce

# LEASEHOLDS

* 1. **Types**
     1. **Periodic** – Automatically renewing after term of time
        1. Requires T to give notice of termination, usually length of tenancy (1y🡪6mo)
     2. **Term of Years** – Fixed period of time
        1. Must be able to ID start and end date
        2. Can be inherited
     3. **Tenancy at Will** – Period of time terminable by L or T
        1. Not transferrable or assignable
     4. *Garner v. Garish* (NY) – Holding tenancy at will terminable by T only is acceptable
        1. Must be unambiguous by the express terms of the lease
     5. Hypo: L leases to T “for the duration of the war”
        1. Either tenancy at will or life estate subject to condition subsequent
     6. **Form Leases** – Allowed, lower transaction costs, more flexible than leases mandated by statute
  2. **Holdover** – T does not vacate after lease terminates
     1. **Common Law**
        1. L can evict – Ejectment/damages
        2. L can consent – Express/implied creates new tenancy, usually periodic
        3. **Note analogy to bona fide purchaser for value**
     2. **Self-Help** – Generally not allowed
  3. Fair Housing Act (p.431)
     1. §3603 (Exemptions)
        1. (b)(1) – Nothing applied to any single-family house sold or rented by the owner provided the owner doesn’t own *more than three* such houses, only if rented (A) without the services of a real estate broker, and (B) without publication/advertisement in violation of §3604(c)
        2. (b)(2) – Rooms or units in dwellings containing living quarters to be occupied by no more than 4 families living independently of each other, if owner *actually maintains and occupies* one of such quarters as his residence
     2. §3604 (Discrimination)
        1. (a) Unlawful to refuse to sell/rent… to any person because of **race**, **color**, **religion**, **sex**, **familial status**, or **national origin**
        2. (b) Unlawful to discriminate in the terms, conditions or privileges of sale/rental
        3. (c) To make, print, or publish any notice/advertisement WRT sale or rental of a dwelling indicating preference (reasonable person standard)
        4. (f)(1) – Unlawful to discriminate in sale/rental based on **handicap**
        5. (f)(2) – Unlawful to discriminate in terms/conditions/privileges based on handicap
        6. (f)(3) – Discrimination includes (A) refusal to *permit reasonable modification* of existing premises (rental – L may require T to restore after lease); (B) a refusal to *make reasonable accommodations* in rules, policies, practices, or services; or (C) in connection with housing built after Sept. 13, 1988 (occupancy 30mo after), *failure to design* and construct those dwellings in such a manner that common and public areas are readily accessible to handicapped persons
     3. NOTE: Renter from an exempt L must sue under § 1983 (race/ethnicity only)
     4. *Soules v. Downs* – Remember *McDonnell Douglas* burden shifting
        1. Holding: No discrimination when Δ showed evidence that she had attempted to rent to other people in same protected class and didn’t rent to Π cause she’s a bitch
        2. **Consider**
           1. Π must qualify to rent the apartment
           2. Evidence of past rentals to same protected group
           3. Permissible bases for discrimination – noise, etc.
           4. Have well defined criteria applied to all cases

Credit score

Rent-to-income ratio

Employment for x-years

Make the decision automatic

* + 1. *Fair Housing Justice Center v. Silver Beach Gardens Corp.*
       1. Holding: Discrimination 🡪 references from current residents to screen black ppl
    2. Handicap – Is Π handicapped per statute? Is reasonable accommodation possible?

## Sublet vs. Assignment

* + 1. **Generally**
       1. Assignment – Transfer of the whole of the unexpired term of the lease
       2. Sublease – Partial transfer of less than the full remaining term of the lease
          1. Does not transfer covenant to pay rent to L, only to T via privity of K
       3. *Ernst v. Condit* – Go-Kart business, assigns to Δ who defaults on rent

Common Law – No reversion back to T from T1 🡪 assignment, else sublease

Minority Rule – Intent of parties

* + - * 1. Holding: Either by *common law* or *intent of parties* 🡪 assignment
    1. **Privity of K vs. Privity of Estate**
       1. Land transfer results in *privity of K* and *privity of estate*
          1. Lease is the K
          2. Estate is when both have mutual, immediate, and simultaneous interest in the leased premises 🡪 T has possession, L has reversion

Estate results in liability for rent

* + - 1. **Transfers**
         1. Privity of estate transfers when T *assigns* to T1
         2. Privity of K only transfers if L expressly agrees to sub T1 for T

Then only T1 is liable for rent/satisfy other obligations on lease

* + - * 1. NOTE: Sublease only results in privity of K between T/T1 unless L is explicitly included as 3rd party beneficiary

L can sue T through privity of K, sue T1 through privity of estate

* + 1. **Consent Provisions** (Compare Common Law with *Kendall*)
       1. Common Law – L can arbitrarily refuse to allow transfer for any reason
       2. *Kendall v. Ernest Pestana Inc*. – L can only refuse transfer when L has a commercially reasonable objection to proposed assignee or use
          1. **NOTE**: This case had a consent provision, left open the possibility to negotiate for a foreclosure of subleasing
          2. NOTE: This was a **commercial** lease, arguably should apply to residential because of bargaining asymmetry, BUT harder to make objective decisions
       3. *Carma Dev. V. Marathon Dev.* – upheld termination clause allowing L to terminate with T and sign with T1 cutting T out of any realized profit
          1. Holding: Commercial lease negotiated by sophisticated entities with lawyers
       4. NOTE: Acceptance can be made by accepting rent from T1
          1. Once waived, L must reassert the right or lose it
       5. **NOTE**: Duty to mitigate undercuts consent provisions!!
       6. **Ejectment**
          1. If L ejects T, S is ejected also
          2. If L accepts T’s surrender, S is not ejected

## Tenant Defaults

* + 1. **Generally**
       1. *Berg v. Wiley* (Minn.) – L/T fight over remodeling restaurant to bring it up to code, eventually restaurant closed, L locked out T
          1. Holding: On T-default, without *abandonment* or *voluntary surrender*, no self-help, must resort to judicial process
          2. NOTE: leads to higher rent for T’s subsidizing judicial eviction of defaulters
       2. Common Law (Majority) – L could use self-help without liability for wrongful eviction as long as L was entitled to possession 🡪 breach/holdover
          1. Level/kind of force allowed depends on jurisdiction
          2. Many allow self-help for commercial leases also
       3. *Ann Arbor Tenants Union v. Ann Arbor YMCA* – Owner and resident relationship in single-room occupancy residence is like hotel/guest 🡪 self-help ok
       4. Establishing Tenant Abandonment
          1. Leave note on the door
          2. Send letter inquiring about intentions
          3. Watch premises for T to show
          4. Determine if T is still paying rent (NOTE: Necessary but not sufficient)
          5. Consider negotiation or buyout over rush to summary proceedings
    2. **Duty to Mitigate**
       1. *Sommer v. Krindel* (NJ) – L has duty to make *reasonable effort* to mitigate damages on T’s default 🡪 Must treat the same as any other vacancy in L’s stock
          1. L is in better position to find a new T
          2. L knows more about finding T’s
          3. Analogous to K-law duty to mitigate
          4. Ensures both parties try to mitigate 🡪 T already has an incentive to try
       2. Common Law (NY) – No duty to mitigate (more common in commercial also)
          1. Don’t impose duty on L though T’s wrongdoing
          2. T has purchased interest in real-estate
          3. L shouldn’t be forced into undesirable personal relationships with T1, etc.
          4. L shouldn’t have to constantly search for new T
          5. *Restatement* – Abandonment is an invitation to vandalism 🡪 discourage
       3. Burden of Proof – Compare *Austin Hill* (T) with *Snyder v. Ambrose* (L)
       4. **Damages**
          1. Common Law – either sue T each month, or wait til end and sue for all

NOTE: T may not be solvent and premises is sitting idle

* + - * 1. L *must ensure* mitigating lease refers to other lease – otherwise it is acceptance of abandonment and no damages. Or L sues T and: Δ(fair market and K-value) can be “accelerated” if in the lease and allowed by statute
        2. Acceleration – when in lease & no duty to mitigate and allowed by statute

## Landlord Defaults

* + 1. **Covenant of Quiet Enjoyment**
       1. Breach results in liability in damages to T, but T still liable to rent
       2. Actual Eviction – L physically prevents T’s entry 🡪 T not liable for rent
       3. Constructive Eviction – (1) Intentional acts of L that breach a duty to T and (2) cause substantial interference with T’s enjoyment of premises, or render it unfit for T’s purpose, and (3) **T vacates premises** (4) within a reasonable time after L’s breach 🡪 REQUIRES T to vacate
          1. *Lounsbery v. Snyder* (NY) – L stacks wood with T’s permission, T wants to revoke permission later

Entry in the nature of trespass that doesn’t interfere with enjoyment of the premises is not constructive eviction

Must be *exclusion* of T from portion of premises or substantial deprivation of the enjoyment of property in whole or part

* + - 1. *Reste Realty Corp v. Cooper* (NJ) – Office floods due to leaky retaining wall
         1. Holding: T was constructively evicted so not liable for rent
         2. Material Breach – Significant breach that persists over time that L *has notice and opportunity* to remedy

Consider lease, who is in best (or only) position to make repairs

Does problem affect more than just T’s premises?

* + - 1. *5th Ave. Building Co*. v. *Kernochan* (NY) – Lease includes basement vault under revocable license with city 🡪 city revoked
         1. Partial Actual Eviction – If L’s fault 🡪 total rent abatement, if 3rd party’s fault 🡪 Apportionment. Policy that L cannot apportion his own wrong
         2. BUT SEE *Movie Theater Case* – Exception for *de minimis* PAE due to pylons

### Duty to Deliver Premises – Failure to deliver premises on promised date constitutes a material breach of the rental agreement.

* + 1. **Implied Warranty of Habitability**
       1. Safe, decent and habitable housing for T
          1. Distinct from *Covenant of Quiet Enjoyment* because no need to vacate upon *constructive eviction*
          2. Luxury items usually not included
       2. *Hilder v. St. Peter* – T rents crappy place from L, complains, but L never fixes
          1. Implied warranty is in every lease, covers latent/patent, can’t be waived
          2. Breach – L must have *notice and opportunity* to repair

Must be material breach – Look @ housing code, effect on T’s health/safety, length of time and seriousness, eyes of reasonable person

* + - * 1. Remedies – **T may withhold rent, sue for damages, repair/deduct, constructive eviction**

T should give notice & establish escrow account for rent

**T does** **not need to vacate**

Punitive

Willful/wanton or personal ill will

L has notice and fails to repair facility essential to health/safety

* + - * 1. Policy

Modern T is incapable of fixing premises themselves

Often facilities are common to many T in building

T has limited bargaining power

* + - 1. Exceptions to Warranty
         1. Single family residences (maybe), agricultural leases, long-term leases, casual leases by non-merchant landlords, commercial leases
      2. Determining Breach
         1. *Millbridge Apts. v. Linden* – Loud noise 🡪 breach
         2. *Park Hill Terrace Assocs. v. Glennon* – Failure of central AC
         3. *Ludlow Properties LLC v. Young* – Bedbugs
         4. *Poyck v. Bryant* – 2nd hand smoke
         5. *Park West Management Corp. v. Mitchell* – L’s maintenance staff strikes, garbage piles up, rats, etc.
         6. *Solow v. Wellner* – Missing promised amenities (doorman, door buzzer)
         7. *Knudsen v. Lax* – L must let T move if T objects to sex offender neighbor
      3. Damages – Must wait to the end of the lease THEN sue.
         1. *Hilder* – Difference between as warranted and as rented
         2. *Kline v. Burns* – Difference between agreed rent and market rate as rented
         3. Other – Agreed rent reduced by percentage
    1. **Illegal Lease**
       1. Cannot make a lease for premises that are not habitable or are in violation of the housing code – Problem exists *before* creation of the lease
          1. Minor violations don’t count
          2. L must have at least constructive notice
          3. T must pay reasonable rental value
       2. Damages – T pays abated rental price
       3. *Brown v. South Hall Realty Co* – No rent due because unsafe and unsanitary conditions violated housing code
  1. **Rent Control**
     1. Artificially holding rent at below market rate concurrent with not allowing L to evict T at end of lease to bring in new T’s at market rate
     2. **Criticism**
        1. Reduces housing supply
        2. Hurts the poor
        3. Unconstitutional taking of L’s property without compensation
        4. Economically inefficient
     3. **Defenses**
        1. Help keep poor/elderly tenants in place
        2. Aims is to help the poor
        3. Lack of affordable housing is a legitimate public concern
     4. **Other Approaches**
        1. Subsidy to T – Shifts demand by giving T more money, quantity of housing increases
        2. Subsidy to builders – Increases supply to lower prices

## Policy Arguments for Zoning Resulting in Unforeseen Costs to Tenants

### Increases vacancy rates and costs, decreases available stock of apartments

### Drives up rent

### Ls will ask for big deposits and put in acceleration clauses

### May prohibit other practices like assignment/sublease, may undercut ability to mitigate

### Puts burden on insolvent breaching parties

### Can undercut ability to comply with warranty of habitability

### Bad policy 🡪 restraint on alienation

# LAND TRANSACTIONS

* 1. **Generally**
     1. Land transactions have two steps: Escrow and Closing
        1. Policy – Information inequality, outside financing/opportunity to sell existing property, time for title search
  2. **Housing Sale K**
     1. Attorney review provision – Opportunity to break out if attorney does not approve of K-provisions **within 5 business days**
     2. Mortgage contingency clause – Break out if buyer can’t secure mortgage (**5bd**)
     3. Down payment in escrow account as liquidated damages – limitation to seller’s damages in the event of breach by buyer
        1. Plat of survey – Boundary issues are negotiated: As is, remove encroachments, adjust insurance price, title insurance, etc.

### Seller’s representations – Seller has not received *written notice* of (a) zoning or other violations (b) pending rezoning or (c) any other assessment affecting the property. Also that there are no known encroachments or easements not in public records.

* 1. **Mortgages**
     1. **Generally**
        1. Most people don’t pay cash for property, the property itself acts as security
        2. Borrower is the mortager, lender is the mortgagee
     2. **Judicial Foreclosure Sale**
        1. NY permits only judicial foreclosure sale – court sets sale date/time, provides notice to buyers, etc.
        2. Deficiency Judgment – If property is unable to pay value of loan DJ for remainder
     3. **Non-Judicial Foreclosure Sale**
        1. *Murphy v. Fin Dev. Corp* – Δ postponed foreclosure for Π, Δ bought property @ auction for value on loan then sold to someone else later that day for profit
           1. Δ must act in good faith and use due diligence during foreclosure
           2. Determine Bad Faith

Inadequacy of price is probative but must shock the conscience or be grossly inadequate

Intentional disregard of duty or a purpose to injure

* + - * 1. Due Diligence

Would a *reasonable person* in Δ’s place have adjourned the sale or taken other measures to get fair market price?

Establish upset price

Advertise commercially

* + - * 1. Damages

Fair market *value* – Price obtained for bad faith sale

Fair market *price* – Price obtained for failure of due diligence

* + 1. **Subprime Loans**
       1. *Commonwealth v. Freemont Investment and Loan* – Δ servicing subprime loans
          1. Holding: When the loan is *presumptively unfair*, Δ must explore alternatives to foreclosure first, then seek permission from court before proceeding
          2. Presumptively unfair

Adjustable rate with into period < 3y

Intro rate at least 3% below fully indexed rate

Debt-to-Income ratio over 50% at fully indexed rate

Loan-to-Value ratio of 100%

Substantial prepayment penalty or prepayment penalty beyond intro period

* + - * 1. Moral Hazard

Borrowers were assuming housing prices would continue to climb

Lenders securitized loans – Banks front-loaded profit through fees, etc.

* + - * 1. Shit hit the fan when borrowers challenged lenders since they couldn’t produce the note due to securitization

## Recording Acts

* + 1. **Generally**
       1. Common Law – First in time, first in right
          1. O to A, O to B. A v. B 🡪 A wins
       2. Recording Acts – Reverse the common law to encourage buyers to record
       3. Grantor-Grantee Index – Majority – separate alphabetical/chronological indices by surname
          1. NOTE: In grantor index, upon finding deed, search from year of execution not year of recording
       4. Tract Index – Indexing by parcel ID number – problematic if tracts are subdivided
    2. **Example Statutes**
       1. Notice Statute (FL) – No conveyance shall be good against subsequent purchasers for a valuable consideration *and without notice*, unless the same be recorded according to the law
       2. Race-Notice Statute (CA) – Every conveyance of real property is void against any subsequent purchaser in good faith whose conveyance if first duty recorded, and as against any judgment affecting the title, unless the conveyance shall have been duly recorded prior to the record of notice of action
    3. **Easy Example Problems**

**ADDRESS COMMON LAW THEN RECORDING ACT RESULT!!**

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Fact Pattern | O🡪A  O🡪B no notice  A records  A v. B | O🡪A  O🡪B no notice  B records  A v. B | O🡪A  O🡪B no notice  A records  B🡪C with notice  A v. C | O🡪A  O dies🡪H  H🡪B no notice  B records  A v. B | O🡪A  O🡪B no notice  A records  A🡪C no notice  B records  C records  B v. C |
| Common Law | A wins | A wins | A wins | A wins | C wins |
| Notice | B wins | B wins | C wins (Shelter Rule) | B wins | C wins |
| Race-Notice | A wins | B wins | A wins | B wins | C wins  Note: A is first to record an O-deed |

* + 1. **Tricky Example Problems and Case Rules**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Fact Pattern | *Messersmith v. Smith*  O🡪A  O🡪B not notarized  B🡪C  B records  C records  A records | O🡪A not notarized  A records  A🡪C  C records  O🡪B no notice  & no title search  B records  B v. C | O🡪A  O🡪B  B🡪C  C records  A writes name on deed\*\*  A records  B records  A v. C | O🡪A  O🡪B with notice  B records  A records  B🡪C  C records  A v. C\*\*\* |
| Common Law | A wins | C wins | A wins | A wins |
| Notice | XXXXXXXX | B wins | A wins | *Morse v. Curtis* –  C wins  *Woods v. Garnett* –  A wins |
| Race-Notice | A wins  Improper notarizing can’t record | C wins\* | A wins  (C has a Wild Deed) | A wins |

* + - 1. *\*Messersmith* Rule – Prior unrecorded valid and effective conveyance wins against deed which does not convey title if not properly acknowledged and recorded
      2. *\*Messersmith rehearing* Rule – Subsequent purchaser is on constructive notice of a defectively acknowledged deed, **that actually conveys title**, that is discoverable by ordinary title search
         1. Counter – What is the point of having proper acknowledgment in this case?
      3. \*\**Board of Ed. Of Minneapolis v. Hughes* Rule – Deed is executed at the time the parties names are entered on the deed, NOT the time of deed transfer
      4. \*\*\*NOTE: Standard title search by C would stop at O🡪B deed
         1. Otherwise this would require search to present time for each grantor in chain

### Bona Fide Purchaser for Value

* + - 1. *Daniels v. Anderson* (IL) – Daniels retains right of first refusal on an unrecorded lot. Lot is sold to Z, but before Z finishes paying D gives notice of right. Z then finishes paying off the lot.
         1. Holding: Z was not yet a bona fide purchaser 🡪 Convey to D, but D pays purchase price to Z plus property taxes

NOTE – Majority would only award Z’s *payments made before notice*

* + - * 1. NOTE: SP would have to run title search @ closing under this rule
      1. *Lewis v. Superior Court*
         1. Purchaser who makes a down payment obligated himself to pay the remainder and so should get the property
         2. Otherwise P would have to do a title search before each payment
      2. *Alexander v. Andrews* - $1k is adequate value compared to “for love & affection”
      3. **Analysis**
         1. Determine subsequent purchaser by *Daniels* and by *Lewis*
         2. Determine if prior or subsequent purchaser had notice 🡪 LOOK @ FACTS!

### Notice – Must look at other deeds from O, and NOTE if deed refers to a plan!!!

* + - 1. Constructive Notice
         1. *Luthi v. Evans* – O🡪T with “Mother Hubbard” clause, T records. O🡪B

Issue: Did Mother Hubbard clause provide *constructive notice* to B?

Holding: Mother Hubbard provides inadequate notice without *actual notice* 🡪 requires specific description of property for adequate recording

Recording office does not index Mother Hubbard clauses

NOTE: If office messes up index of recorded deed 🡪 constructive notice

Policy – Purchaser need only record parcel once and all have notice

*Lis pendens* – Recordable notice of a lawsuit regarding a property

* + - * 1. NOTE: Duty is to search the records, failing to search results in constructive notice of the contents of the records
        2. *Guilette v. Daly Dry Wall* (Mass) – Deed refers to a recorded plan which refers to other tracts in plan. One tract deed contains use restrictions that apply to all tracts.

Holding: Δ had a duty to search and view all deeds in the plan

BUT SEE *Simone v. Heidelberg* (NY) – Opposite holding (50/50 J-split)

* + - 1. Actual Notice – Personally aware of conflicting interest
      2. Record Notice – Notice based on properly recorded instruments
      3. Inquiry Notice – Based on facts that would cause a *reasonable person* to make inquiry into possible existence of a competing interest in real property
         1. *Harper v. Paradise* – O🡪A life estate, but lost the deed. O dies, heirs deed to A in fee simple noting the lost deed. A🡪B🡪C. All deeds are recorded. A dies, heir of A finds original deed and claims reversion from the life estate

Holding: Since recorded deed from O’s heir to A mentions the lost deed, C was required to at least look into its existence. Award to A’s heir.

* + - * 1. *Waldorff Insurance and Bonding Inc. v. Eglin National Bank* (FL)

C owns condos, sells one to W. C borrows $ from Bank. W records. Bank forecloses entire condo tract

Holding: Open, visible and exclusive possession puts all those who would acquire title or a lien on *inquiry notice*

NOTE: something like transfer between mother and daughter living in same unit wouldn’t have same effect 🡪 not inconsistent w/ normal use

* + - * 1. *Grose v. Sauvageau* – G buys from R but doesn’t record. G pisses off S. S searches for G’s deed from R, doesn’t find it, buys from R

Holding: G’s use of the property was consistent with R’s ownership so no inquiry notice of possible unrecorded deed

* + 1. **Title Insurance**
       1. Marketable Title
          1. Unmarketable when purchaser may be subject to litigation
          2. Encumbrances/defects – Undisclosed co-owners, mortgages/liens, easements, real covenants/servitudes, leases, mineral rights, options, flaws in deed records, erroneous acreage designations, ownership based on AP
          3. Landlocked property may be unmarketable
       2. Only protects against issues that would turn up in a title search
       3. Title Insurance DOES NOT
          1. Does not protect against physical condition of land, etc.
          2. Does not run with land
          3. Does not cover any unrecorded problem
          4. Does not recover defects discoverable by inspection
       4. *Lick Mill Creek Apartments v. Chicago Title Insurance Co* (CA)
          1. Land contamination requiring cleanup doesn’t affect marketability of title
          2. Different outcome if government had put a lien on the property
       5. *Walker Rogge Inc. v. Chelsea Title and Guarantee Co.* (NJ)
          1. Land purchased with price based on size of plot, survey was incorrect, Δ had a correct survey but didn’t mention it
          2. Without a *recital of acreage* in the title, or an *agreement* from Δ to *run a title search*, there is no duty regarding the records

# NUISANCE – Who is the best cost/nuisance avoider???

* 1. **Rule** – Private nuisance is an *act or condition* on Δ’s land that *substantially and unreasonably* interferes with the use and enjoyment of Π’s land
     1. **Factors**
        1. Extent and character of the harm
        2. Social value attached to Π’s use or enjoyment
        3. Social value the law attaches to Δ’s conduct and suitability of Δ’s activities to the character of the general locality
        4. Burden on Π to avoid the harm 🡪 Did Π come to the nuisance?
        5. No nuisance for ugly shit
  2. **Analysis**
     1. Threshold – Under Coase 🡪 it is a nuisance if the best cost-avoider caused it.
        1. What happens if court finds a nuisance?
        2. What happens if court does not find a nuisance?
     2. Which outcome will drive the more efficient solution? Note the 2-way monopoly
     3. Propose a rule
        1. Who has the burden and are they in the best position to avoid conflict?
        2. How easy is it to administrate?
        3. Was the user abnormally sensitive?
     4. Coase Theorem – As long as only economic interests are at stake, the legal rule won’t affect the outcome absent transaction costs
     5. **Remedies** – Balancing test using factors from above
        1. Abate activity and grant injunction (*Morgan*/*Estancias*)
           1. Intentional invasion – Liability when unreasonable
           2. Unintentional – Liability when negligent, reckless, or ultrahazardous
        2. Have Δ pay damages but allow activity to continue (*Boomer*)
        3. Let Δ continue and tell Π to fuck himself
        4. Abate the activity and have Π pay damages to Δ (*Spur*)
        5. CONSIDER EACH, WEIGHT BOTH SIDES
  3. **Cases**
     1. *Morgan v. High Penn Oil Co.* – Oil refinery 1000ft from Π spews nauseating gas 2-3x per week making ordinary people uncomfortable and sick
        1. Holding: Injunction and damages – Refinery was second in time and in best position (buy buffer land, etc.)
        2. **Intentional invasion** – Liability when conduct is unreasonable
        3. **Unintentional invasion** – Liability when negligent, reckless, or ultrahazardous
     2. *Restatement* – Intentional invasion requires balancing test between harm and utility of Δ’s conduct
     3. *Amphitheaters Inc. v. Portland Meadows* – No nuisance to drive-in when adjacent amusement park lights fucked up view of screens 🡪 **Abnormally sensitive Π**
     4. *Estancias Dallas Corp. v. Shultz* – Gigantic AC outside apartment, installed instead of individual units to save costs
        1. Holding: Nuisance is only permitted to continue under **stern rule of necessity** 🡪 injunction.
        2. NOTE: Without nuisance, Shultz has to move because he can’t pay to move AC
     5. *Boomer v. Atlantic Cement Co* – Cement plant spreads dust, smoke and scares the crap out of kids with explosions, etc.
        1. Holding: Nuisance was permanent and unabatable, awarded injunction until Δ paid **permanent damages** for all past and future injury (saves Π from bringing periodic suits)
        2. NOTE: With injunction, Δ has to settle with 20-Π 🡪 risk of holdouts
        3. Compare *Estancias* 🡪 1-Π
     6. *Spur Industries Inc. v. Del. E. Webb Development Co.* – Town expands into an area where cow feedlot is located, people bitch at developer, developer sues feedlot
        1. Δ’s business is lawful and Π is **coming to the nuisance**
        2. Injunction granted, but Π must pay damages to Δ for moving feedlot
        3. **Public vs. Private Nuisance**
           1. Public Nuisance – Affected Π can only bring abatement action. Π must have “special injury” to get damages

# EASEMENTS – First mention easement appurtenant/in gross

* 1. **Creation**
     1. **Express Easement**
        1. Must be created by written instrument 🡪 **Statute of Frauds**
        2. *Willard v. 1st Church of Christ, Scientist* – Willard buys two properties from a dude 🡪 Dude bought the second property from TO subject to easement
           1. Common Law – Can’t reserve an easement for a stranger to the title

Circumvent Common Law Rule

Deed property to church, have church reserve easement

Reserve easement in gross then assign to church

Grant easement to church, then transfer land

* + - * 1. Holding: Common law rule gone, *intent of grantor* rules
        2. RTP §2.6(2) – Easement can be created in favor of 3rd parties
        3. NOTE: Majority still uses common law rule
      1. License – Permission to do something that is otherwise trespass – revocable
    1. **Easement by Estoppel/Irrevocable License**
       1. *Holbrook v. Taylor* – H gave T’s predecessor license to cut road on H’s land
          1. Elements

Servient owner consents to dominant owner’s use

Servient owners knows/should know dominant owner will *materially change* his position believing that permissive use would not be revoked

Dominant owner substantially changes his position by investment in *either* the dominant or servient estate

* + - 1. Subsequent purchaser is bound through *inquiry notice*
      2. RTP §2.10 – Investment in improvements in either estate may result in estoppel
         1. §4.1 cmt. g – *Reasonable* expectations creating the servitude define its scope.
    1. **Easement by Necessity**
       1. Elements
          1. Common owner severed property
          2. Necessity existed at the time of the severance (severance caused necessity)

*Othen v. Rosier*

* + - * 1. Easement is *strictly necessary* for egress/ingress to parcel

Not for *convenience* nor for *reasonable necessity*

* + - * 1. Only lasts as long as necessary
      1. Policy – An owner that buys a landlocked parcel would never do so knowingly
      2. Strict Necessity – NY/TX use strict, majority use *reasonable* necessity
         1. *Schwab v. Timmons* – No strict necessity when public road was available on foot down a steep cliff
         2. *Weaver v. Cummins* – Easement when access to land exists but is inadequate, difficult, or costly
      3. *Othen v. Rosier* (TX) – Hill owned parcells, sells, O using road on R’s land which R renders useless by flooding it
         1. Court indicates that Hill owned land to north/south so necessity didn’t exist at severance
    1. **Easement from Prior Use**
       1. Elements
          1. Common owner severed the property
          2. Use was in place, AND visible/apparent *prior to severance* (Quasi-easement)

Includes anything discoverable by reasonable inspection (*Van Sandt*)

* + - 1. *Van Sandt v. Royster* – Sewage in home from upstream. Lateral sewer easement.
         1. Quasi-easement – sewer burdened one part of O’s property for benefit of another part
         2. Apparent – If Π carefully inspects, modern plumbing had to drain somewhere
         3. Necessary – Plumbing is necessary for enjoyment of Δ’s home
    1. **Easement by Prescription**
       1. Elements
          1. Actual Use – Only affirmative easements
          2. Open and Notorious – Servient owner must have notice
          3. Hostile – *Without* permission ≠ Acquiescence.

Permissive possession can become adverse if claimant acts beyond scope

* + - * 1. Continuous and uninterrupted – Consistent with reasonable easement holder
        2. Exclusive – Concurrent use with servient owner is consistent

Minority – must be distinguishable from general public, landowner can’t use the property in a way that interferes with the easement

* + - * 1. For statutory period
      1. NOTE: Very hard to do with co-tenants, requires more than just ouster!!!

## Scope of Easements

* + 1. **Intensity**
       1. RTP §4.10 – Manner, frequency, and intensity may change over time to take advantage of new technology, and accommodate normal development of dominant. Cannot unreasonably damage servient estate or interfere w/ enjoyment.
       2. Consider how the easement was created in arguing for/against expansion
    2. **Non-dominant Property**
       1. *Brown v. Voss* – Dominant owner buys adjacent lot expanding his estate
          1. Liability rule vs. Property Rule

Liability rule – Restricts dominant to single family home

* + - * 1. Holding: Extension of a parcel that enjoys an easement appurtenant is a misuse of the easement. Selection of a rule depends on the facts.
        2. Sterk: Is there a case for estoppel?
    1. **Location** – Servient owner can locate *ex ante* within reason
       1. *Ex Post* – *Davis v. Bruk* – Once fixed, need dominant owner permission
       2. RTP §4.8 cmt f – Servient owner can Δ at his expense if it doesn’t lessen utility of the easement, increase burden on dominant, or frustrate purpose of easement

## Termination

* + 1. **Terms of the Grant** – Expiration date, etc.
    2. **Purpose ends**
    3. **Merger** – Easement owner buys servient estate
    4. **Forfeiture for Misuse** – Usually injunction, not forfeiture
    5. **Release** – Requires a writing
    6. **Abandonment** – More than mere non-use, must be *unambiguous* and *identifiable act* that is *inconsistent* with the easement use
       1. *Preseault v. US* – RR-Co abandons easement which gov. takes for “rails-to-trails”
          1. Rule – Without regard to documentation, RR acquires only the estate needed for its purposes 🡪 almost always an easement
          2. Rule – Δ in scope almost never encompasses substantive Δ in use
          3. Rule – For abandonment, need acts by dominant conclusively and unequivocally manifesting present intent to relinquish or inconsistent w/ future use
          4. Policy – Protect subsequent purchasers who may see easement and see recorded instrument and assume it is part of purchase
    7. **Estoppel** – Dominant consents to use inconsistent with easement which he should know will result in servient owner *materially* changing position in reliance
    8. **Prescription** – Servient prevents use of easement for prescriptive period
    9. **Recording Act** – Subsequent purchaser takes without *actual*, *constructive*, or *inquiry* notice of the easement is not bound
    10. **Eminent Domain** – Government must pay damages to easement holder
    11. RTP §7.10 – Court may modify/terminate servitude if circumstances have changed

# COVENANTS AND SERVITUDES

* 1. **Running with the Land**
     1. *Tulk v. Moxhay* – Eng. – Garden in square, servitude to maintain garden
        1. Equitable Servitude – Seek injunction, requires notice
        2. Real Covenant – Seek damages, requires privity
        3. BOTH require touch and concern
     2. **Land from Common Owner – Notice**
        1. Problem – Individuals buying from developer @ different times wouldn’t be able to sue each other to enforce covenants – CIRCUIT SPLIT
        2. *Sanborn v. McLean* – Gas station in residential neighborhood
           1. Inquiry Notice – Significant # of bound deeds; Uniformity of houses
           2. Holding: Owner of 2+ lots sells one with restrictions benefiting retained land, restriction becomes mutual
        3. *McQuade v. Wilcox* – Purchasing from common owner puts buyer on inquiry notice to search all other lots sold by that owner for restrictions
        4. *Riley v. Bear Creek Planning Com.* (CA) – Requires written instrument IDing burdened lot, can’t be implied from restrictions on other lots in subdivision
        5. *Citizens for Covenant Compliance v. Anderson* – Recorded subdivision map w/ restrictions is enforceable against subsequent purchasers
     3. **Touch and Concern**
        1. Rule – Would a *reasonable* person upon calm reflection & hindsight have intended the covenant to run with the land?
        2. Rule – Restrictive covenants touch and concern the land
        3. Positive Covenants – Usually no, some exceptions
           1. *Neponsit Property Owners Assn. v. Emigrant Industrial Savings Bank*

Holding: Δ must pay HOA dues

Reasoning: Δ is granted an easement/right of common enjoyment with other owners in the roads, beaches, parks, spaces, or other improvements the dues pay for

NOTE: Court eliminates privity requirement because HOA is comprised of homeowners that own land affected by covenant

* + - * 1. RTP §3.2 – Default rule that covenant is valid (no T&C)

Only invalid if illegal, unconstitutional or against public policy

§§3.4-5 – Spiteful/capricious, burdening a constitutional right or restraints on alienation

* + - * 1. RTP §2.6 cmt d – Benefits in gross run, but (§7.13) terminates if owner can’t be found
      1. Policy – Benefit of positive covenant can be purchased elsewhere; negative covenant can’t be got anywhere but from *that* landowner
    1. **Privity** – Not required (RTP/*Neponsit*) – Horizontal/vertical

## Termination

* + 1. **Terms of Grant**
    2. **Merger**
    3. **Release**
       1. *Rick v. West* – Δ refuses to release Π from covenant Π created
          1. Rule – Restrictive covenants are enforced unless the attitude of complaining owner is unconscionable or oppressive
       2. Avoid Holdout – Allow release with vote of 90% of owners
    4. **Unclean Hands** – Landowner can’t violate and enforce the same covenant
    5. **Acquiescence/ Abandonment** – Covenant is already violated by a lot of people
       1. Must be so general as to frustrate the original purpose (*Western Land*)
    6. **Changed Conditions** – Terminated if conditions in neighborhood change such that covenant no longer serves intended purpose
       1. *Western Land Co. v. Truskolaski* – Developer wants to violate their own covenant
          1. Rule – Restrictive covenants are still enforceable if single-family residential character of the neighborhood hasn’t been adversely affected, and purpose of the restrictions isn’t thwarted
          2. Policy – If it is efficient to eliminate covenant, developer should merge land
       2. RTP §7.10(1) – When change makes it impossible to accomplish purpose of servitude, court can modify or terminate it subject to compensation
    7. **Relative Hardship** – Balance benefit of maintaining against burden of maintaining
    8. **Recording Act** – Bona fide purchaser who takes without notice is not bound
    9. **Eminent Domain**
    10. **Reform**
        1. §1951 NY – Supersedes *Rick v. West*
           1. (1) No restriction is enforced if it appears it is of no actual and substantial benefit to the person seeking enforcement either because the purpose has been accomplished or purpose can’t be accomplished because of Δ conditions
           2. (2) If purpose has been frustrated, servitude is extinguished upon payment of damages to servient owner
        2. Mass. Statute
           1. No restriction is enforceable unless it is of actual/substantial benefit to owner
           2. Even if it is beneficial, only $ damages available if:

Changes in the character of the properties affected it

Person enforcing is a dick

Restrictions are no longer appropriate

Continuation would impede reasonable use of the land

* + 1. *Pocono Springs Civic Assn. v. MacKenzie* – People trying to walk away from worthless lot burdened with homeowner’s dues
       1. Rule – Can’t abandon property owned in fee simple
       2. RTP §7.12 – (1) Covenant to pay terminates after reasonable time if covenant doesn’t specify total sum or definite termination point unless covenant is in exchange for services or facilities provided the burdened estate. (2) May be modified/terminate if excessive in relation to services provided/value received. (3) 1 & 2 don’t apply to common-interest communities or conservation servitudes
  1. **HOA’s, Condo Associations and Co-ops**
     1. *Nahrstedt v. Lakeside Village Condo Assn* – CC&R recorded in county office indicates pet restriction, Δ wants to keep her cats
        1. Holding: Reasonableness of use restriction are determined by reference to development as a whole. When recorded, presumption of reasonableness unless arbitrary, violation of public policy, or burdens *substantially* outweigh benefits
        2. Restrictions created later by HOA, not recorded, get *reasonableness* standard
        3. Violation of Public Policy – Restriction on age/sex/race/etc.
        4. Arbitrary – No rational relationship to protection, preservati0on, operation or purpose of affected land
     2. *40 West 67th St. Corp. v. Pullman* – Business judgment rule for kicking Π from Co-op
        1. Standard – Actions in good faith and exercise of honest judgment in furtherance of legitimate corporate purposes 🡪 Procedures, etc. Consider Due Process

1. **POLICY – SERVITUDES** – Servitudes fill gaps in K-Law WRT property
   1. K between neighbors would not run with the land
   2. Don’t necessarily want to sell part interest in the land (co-tenancy) cause partition action is always possible
   3. Defeasible fee would make the land undesirable to subsequent purchasers because of risk that land will revert in event of violation

# PUBLIC CONTROL OF LAND USE

* 1. **Zoning**

### Exercise of police power – Power of the government to protect the health, safety, welfare, and morals

* + 1. *Village of Euclid* – Rezone such that Ambler couldn’t use their land for industrial purposes 🡪 claim loss of 75% of land value
       1. Rationalization – Quasi-Nuisance argument
          1. Consider connection with circumstances/locality, if validity of legislative classification is *fairly debatable*, legislative judgment controls
       2. **Variance** – Granted when landowner can show there is a hardship unique to the owner’s property

### *Nectow v. City of Cambridge* – Distinct from *Euclid*. Challenged law as applied rather than on its face. Court held that there was no valid exercise of police power WRT Π’s property so the law was unconstitutional as applied.

### Policy

* + - 1. Holdout problem that would not allow servitudes
      2. Nuisance law would only deal with problems *ex post*
      3. Either way – High transaction costs/uncertainty
  1. **Eminent Domain** – **Requires “public use”**
     1. *Kelo v. City of New London* – Development plan, condemned property to make commercial park for Pfizer and some public parkland
        1. Rule – Condemnation is only allowed for “public use”
        2. Holding: “Public purpose” is sufficient to satisfy “public use”
        3. Dissent: Any use is a “public use” given this definition
     2. Ends Test – *Kelo* – if ends are sufficiently “public” 🡪 good to go
     3. Means Test – Is ED *really* necessary to accomplish government’s goal?
        1. *County of Wayne v. Mathcock* (Mich.) – Overturned ED of non-blighted land that was turned over to business to stimulate local economy
     4. Just Compensation – Market value, inherently ignores subjective value
  2. **Takings**
     1. **Takings Clause** – Constraint on government so it doesn’t over-regulate
     2. **Analysis** – Note conceptual severance
        1. Categorical Rules
           1. Permanent physical occupations are takings (*Loretto*)
           2. Land use regulations that prohibit all economic uses of property are takings unless the prohibited uses are common law nuisance (*Lucas*)
        2. Investment Backed Expectation Test (*Penn Central*)
           1. **Character of the government action** – Physical invasion? Adjusting benefits/burdens for the common good?

Nuisance control measures are not takings (not standard nuisance) (*Hadacheck*) 🡪 compare facts to the case

On balance, have measures gone too far? (*PA Coal*)

No taking if prohibition applies over a **broad cross-section** of land securing an **average reciprocity** of advantage (*Penn Central Dissent citing PA Coal*)

Burdening the few for the benefit of many

* + - * 1. Regulation’s economic effect on landowner
        2. Extent of interference with reasonable Investment Backed Expectations

Interfering with present use of the property

* + - 1. *Palazzolo* – A regulation that would otherwise be unconstitutional absent compensation isn’t transformed into a background principle of the State’s law by virtue of passage of title
    1. **Conceptual Severance** – “Deciding the Denominator”
       1. *PA Coal* – Majority – Conceptual severance of mineral/surface rights
       2. *Penn Central* – Rejection of conceptual severance of air building rights
          1. Counter argument – What about Condos?
       3. *Lucas* – No conceptual severance of land – Affirmed in *Palazzolo*
    2. **Transferrable Development Rights** – Which side of the equation?
    3. *Penn Majority* (Takings) vs. *Penn Dissent* (Compensation)
    4. **Two Hypos**
       1. Leave this to the political process and never provide compensation
          1. Unjust 🡪 people want their cheddar
       2. Force government to pay everyone every time
          1. Government would get nothing done
          2. Might foreclose valuable regulations
          3. Takings/regulations/zoning have very high transaction costs
    5. **Cases**
       1. *Loretto v. Teleprompter Manhattan CATV Corp* – TV cable on building
          1. Physical occupation is *de facto* taking
       2. *Hadacheck v. Sebastian* – Brickmaker ordinance in LA
          1. Distinguish *Loretto* – No physical occupation
          2. Quasi-nuisance – This is not sufficient for nuisance law, but declared nuisance at law

Can’t be exerted arbitrarily or with unjust discrimination

* + - 1. *PA Coal Co* – Kohler act prevented coal co’s from mining so that surface integrity was compromised (subsidence)
         1. Majority – K-law, mining co reserved the right to allow subsidence and buyer got a lower price (Conceptual severance of mineral and surface rights)

Kohler only applied when surface/mineral rights were owned by separate parties 🡪 Majority interprets that this can’t be a safety measure

* + - * 1. Dissent – If owned by one person, self-interest would prevent subsidence. People shouldn’t be allowed to K-out of this.
      1. *Penn Central* – NYC law designating Π’s property a landmark preventing vertical development not a taking. (No conceptual severance of vertical building rights)
         1. Majority

Doesn’t interfere with Π’s primary investment backed expectation concerning the use of the parcel

Doesn’t interfere with present use of the terminal

Hasn’t been denied permission to occupy *any* airspace just not the requested airspace in the two plans

Building rights can be transferred

Factors

Economic impact of the regulation on Π (Transferrable development rights)

Extent to which the regulation has interfered with investment-backed expectations

Character of the governmental action

Physical invasion?

Adjusting benefits/burdens in furtherance of a common good?

* + - * 1. Dissent

Main point is that *PA Coal* exception would not apply 🡪 this isn’t zoning, and it does not apply over very many buildings, etc.