# Who owns property?

## Discovery

* **Title**: The union of all elements constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself.
* **Discovery Doctrine**: Discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession (*Johnson v. McIntosh*)
  + **Rule**: First in time, first in right [Based on customary international law]
  + Property law based on societal norms, not absolutes; to do otherwise would invalidate US and it’s authority.
  + Issues Driving Opinion
    - Fear of consequences 🡪 Will make a mess of land grants if went other way
    - Limited power of judiciary 🡪 If US grant void, then power of court is void
    - Locke’s labor theory
    - Cultural/Religious superiority
  + **Themes:**
    - Locke’s Labor Theory: Ownership rights arise out of your labor on property 🡪 fruits of efforts and labor; We like to reward productivity
    - First in time, first in right 🡪 1st European/Christian in time, 1st in right
    - Right of occupancy 🡪 Government has title (Power to convey/sell land), but Indians only have right to occupy
    - Bundle of Sticks: Property Ownership [rights] are aggregate laws (Right to possess, exclude, use, dispose of)
    - **Utilitarian Theory of Property**: This is the dominant view of property today; the concept of property is, like any man made object, merely an artifact, a human invention, a social institution, a means of organization. Property systems are a means of distributing and redistributing the wealth of a society. It is to promote economic efficiency by facilitating the movement of resources from lower to higher valued uses, letting property owner A sell to buyer B at a price that makes both parties better off. (If it didn’t, there would be no sale)

## Capture

* **Ratione Soli**: Property owner has constructive possession of all wild animals on owner’s land
* **Certain Control Rule**: Mere pursuit is not enough to be capture, but mortally wounding it is by wounding, circumventing, or ensnaring it (*Pierson v. Post*)
  + **Exception to certain Control**: When certain control is impractical, ownership shall be determined by act of appropriation accepted by custom (*Ghen v. Rich*)
    - More in favor of justice and fairness
    - Whaling community. There is a custom that the one who finds the whale gets a finders fee and is not the true owner. The one who shot the whale down is the true owner. It would not be practical for the boat to stay out until the whale surfaces, so the custom is that whoever finds it a few days later doesn’t get to keep it.
    - Damages: Market value of the oil obtained from the whale, less the cost of trying it out and preparing it for the market, with interest on the amount so ascertained from the date of conversion.
    - Pros: More feasible, works well in the real world, fairness (Person doing bulk of work should own it), settles expectations
    - Cons: Not all customs are good (Maybe it serves the local community, but not the greater good) or maybe we like whales and we don’t want people to kill them.
    - Libertarian Approach: When you have a customary rule, it’s a free market approach because people decide for themselves, which approach is best.
* **Oil & Gas**
  + Like wild animals, can capture if under your own property even if only part of the oil/gas is under your land; but it doesn’t matter if other half is under another person’s property
  + First in time, First in right: Incentive to find it first and fast
  + RULE: They belong to the owner of the land, and are part of it, so long as they are on or in it, and are subject to his control. But when they escape, go into other land or come under another’s control, the title of the former owner is gone.
* **Groundwater**
  + **Common law; English Rule**: Every person can take as much water as is on their property
  + **US Rule**: Overuse of water
    - **Rule of Reasonable Use**: If it harms your neighbors, it’s unlawful
* **Surface Water**
  + **Eastern States (plentiful)**: Riparian Rights
    - If land adjacent to water source, you can use it as long as it’s reasonable
  + **Western States (scarce)**
    - Prior appropriation 🡪 goes back to family history of what was previously used
      * First person to put the water to beneficial use has superior right
      * Theme: First in time, First in right; Locke’s labor theory; Consequences
* **Tragedy of the Commons**
  + Lots of people share one resource and act in their own interest 🡪 leads to overconsumption
  + Resources owned in common (Like air or water) will always be abused absent coercive intervention by the government.
  + Argument for private property ownership
* **Tragedy of the anticommons**
  + Many people have rights to the same resource and can’t decide how to use it 🡪 leads to underconsumption
  + Example: There is a new treatment for cancer. 1 company has the patent to kill the tumor, another has the patent to the machine, another on a microchip needed for the machine, etc. A lot of different people need this 1 thing as a whole, but it’s difficult to negotiate to get all the patents together to offer the new treatment

## Property in One’s Person

* [**Majority**] Once blood, tissue, etc. leaves our bodies, it is no longer considered within the real of rights for the individuals as personal property (*Moore v. UCLA*)
  + But court’s do require **informed consent**
    - Duty to disclose (Financial value, scope of research)
  + **Policy**
    - We restrict individual’s continuing rights in bodily fluids for public health reasons
  + **Other arguments to consider**
    - [**Concurrence**]: We should not treat body parts as commodities, ethics argument, and maybe profit sharing? Economic exploitation;
    - [**Dissent**]: Real property v. Personal property distinction
      * You can’t apply bundle of rights to personal property, but you can contractually limit use of personal property
* Other Example: Selling a Kidney
  + Pros: New market; giving people ability to make money, Shuts down black market, we already sell things like eggs, sperm (removing arbitrary lines)
  + Cons: People might feel pressure/exploitation due to financial situation, adverse health effects, slippery slope, fair compensation, regulations, less incentive to donate

## Find

* A finder of property acquires no rights in mislaid property, is entitled to possession of lost property against everyone except the true owner, and is entitled to keep abandoned property
* Location of where lost property is found impacts who gets ownership of the property because it determines whether it is designated as lost, mislaid, or abandoned.
* *Armory*: The finder is entitled to it against everyone but the true owner
* *Bridges*: Property found in public area belongs to finder, not land owner
* *Staffordshire*: If the employee finds property, it belongs to the employer. Lost property found on private land belongs to landowner
* *McAvoy*: Mislaid Property; Property owner gets to keep it because loser is likely to retrace steps

# Adverse Possession

* Elements
  + **Actual Entry**: Use of property in the manner than an average true owner would use it under the circumstances. Neighbors and other observers would regard the occupant as the person exercising exclusive dominion
    - % of land use matters
    - When the clock starts running: When you start making use of the property, such as…
      * Examples: Fencing in, paying taxes, keeping trespassers off, building a house, harvesting natural resources
      * *Ewing v. Burnett*: Using vacant lot for digging sand and gravel
  + **Exclusive Possession**: You and the people you approve are the only people on the land. Not necessarily exclusive use, but exclusive possession or ownership counts
    - Example: paying fee to dig
    - You have to be in control of the land you’re adversely possession, controlling interactions
  + **Open and Notorious**: Need to do something visible 🡪 If property owner came back, they would notice
    - Majority Rule: If landowner had bothered to show up, they could have known about the use (Constructive knowledge assumption)
      * Tunneling doesn’t count; If it’s visible it’s O&N
    - Minor encroachment on common boundary exception: Actual knowledge by owner is required. *Manillo v. Gorski*
      * 1-2” is counted as open and notorious because you can theoretically see it over the line. The landowner has the burden to properly survey it to verify the borders of the land.
  + **Adverse**: Must be without the owner’s permission.
    - You won’t lose title to land merely by allowing a friend to live there.
    - Get a written instrument for evidentiary problems: Give permission so you can revoke later
    - If you know someone is using your land and don’t do anything about it, it can give rise to AP.
  + **Claim of Right / Claim of Title**: Some states care whether you intended to adversely possess the property or whether you were an innocent adverse possessor, turning on the state of mind
    - Majority: Like TX; Don’t care about state of mind
    - Minority 1: Adverse possession is allowed only if acting in good faith; Like you accidentally build your house 2” over the property line
    - Minority 2: Bad faith; You can only adversely possess if you intended to adversely possess
  + **Continuous**: Continued in a way that ordinary people would have used under the circumstances
    - Using home for summers, consistent with how other people use it. Going on vacation; realm of what a normal owner does. Contrasted with only trespassing 2 months of the year and not the rest unless it’s a “ski town” and the regular owners would only use the land for 2 months out of the year.

* **Color of Title**: Faulty deed that doesn’t actually pass title to property, but person things they have it. You can get ownership of whole thing if you live only on a piece of the land if you’ve met all of the elements of adverse possession.
  + Actual possession under color of title of only a part of the land covered by the defective writing is constructive possession of all that the writing describes.
    - Advantage that a person may gain from constructive possession is that the activities relied upon to establish adverse possession reach not only the part of the premises occupies, but the entire premises described in a deed to the claimant.
* We encourage trespass, rewarding those by giving them property, which is counterintuitive.
  + Statute of limitations: a clock begins to run when someone trespasses on your property and starts all the requirements
* How to get rid of a squatter: Go to court to get an ejection, or call sheriff’s office. Generally don’t want to confront and remove yourselves. You the landowner have an obligation to visit your land and check on it.
  + Generally can’t adversely possess mineral rights just by living on a property (maybe if you started using the minerals)

# Eminent Domain

* The power of the government to force transfers of property from owners with due monetary compensation, but without consent
  + 3 Acceptable categories (O’Connor’s Dissent in *Kelo*)
    - Transfer of property to public ownership
    - Common carriers, property transferred to private property, but open to public
    - Transfers to private parties as part of a program to serve public purpose
* Theory of Takings
  + For Eminent Domain:
    - Hobbes: “Might is Right” Absolute sovereign power; we get protection but we must give some rights in exchange
      * Without government, we’d live in a state of nature. Life would be short and brutish. In exchange for protection of the government, we give up absolute land ownership rights [Price for order and security]
    - Bentham: Utilitarian; make majority happy by government taking land
      * We’re trying to maximize pleasure and minimize pain. Taking land from 1 individual to benefit many people is okay because it’s causing many others to benefit.
  + Against Eminent Domain:
    - Locke: Labor Theory; You put work into land, it should be yours
      * Government power is limited by natural rights
      * 5th: Federal; 14th: State
* Takings Clause (5th Amendment)
  + Limits power to public use
  + With just compensation
* Takings can prevent monopolies: Eminent Domain can create competition if company gets rights to land, efficient use of land
* Public Use:
  + Ends: if the ends are sufficiently public in one sense or another, the test is passed {Kelo}
  + Means: Whether the power of ED is really necessary to accomplish whatever aim the government has in mind
* States can restrict the extent of Eminent domain, but not over the federal government’s Eminent Domain use.
* *Kelo v. City of New London*
  + Government tries to take over some houses in blighted area even though houses themselves aren’t blighted.
  + Promoting economic development serves a “public purpose” and is therefore public use
  + Is ED for general economic development enough?
  + Berman 🡪 Look at property as a whole area, if the whole thing is blighted, then its okay
  + Theme: Dual sovereignty, if the states don’t like the federal rule for takings, they can change the law regarding it
  + O’Connor’s Dissent:
    - 3 acceptable categories that have been held to satisfy the public use requirement:
      * Transfers of private property to public ownership [A road]
      * Transfers to private parties such as common carriers, railroads
      * Transfers to private parties are part of program to serve public purpose
        + Fear that government will hand property to private companies, allowed to go from one private party to another as long as there is a secondary benefit (increase value, aesthetics)
        + Berman & Midkiff were taken to cure public harms
        + This case takes it too far. Nearly any lawful use of real private property can be said to generate some incidental benefit to the public
        + Worried that those who have deep pockets will be able to have disproportionate power to say the land is being used for the public good

Limits: The court claims it will look at the alleged public purpose. When looking at it, it will try to discern something nefarious

# Regulatory Takings

* Does a per se categorical rule apply? If not, then we go to the Penn Central Balancing Test.

1. Permanent Physical Occupation 🡪 Taking
   1. A permanent physical occupation on property
      1. Can even include airspace right above land (*Causby*) and can be as nominal as $1 (*Loretto*)
2. Nuisance 🡪 Never a taking
   1. Nuisance: preventing regulation is not a taking (sounds, ugly, smell) *Hadacheck*
   2. You’re not allowed to harm other people with your land. Not the government actions, your own personal actions on your land
3. When a regulation denies owner of ALL economically viable use of their land 🡪 Did property value as a whole go to 0 [100% Diminution of value]? If yes 🡪 Taking
   1. Must lose ALL economic worth as measured by development of property (ability to build)
      1. No conceptual severance; you can’t look at the property piecemeal, but rather, you have to look at the property as a whole and the benefits they receive later.
   2. Loss must be permanent (*Lucas*)
   3. Total deprivation of beneficial use, is from the land owners point of view, the equivalent of a physical appropriation

## Penn Central Balancing Test

* 1. Owner’s economic impact (investment backed expectations, diminution of value, benefit from regulation)
     1. Effect on current value
        1. *Euclid*: 75% wasn’t enough; 100% is for sure a taking, but the in between is a gray area
     2. Effect on ability to continue to use property
     3. Owner’s ability to recoup investment (extent that they have sunk into property)
        1. Investment backed expectations have to be reasonable
     4. Benefits that individuals will gain from regulation
  2. Character of government action
     1. Is regulation singling out a single property?
     2. How many people are benefitting from the regulation?
        1. Only a few benefitting?
        2. How much of a benefit?
     3. Government misusing regulatory power
     4. Acting in bad faith, artificially trying to depress the value, malicious?
* Can be manipulative. You can buy the land in separate transactions and then you can claim a 100% diminution of value on one section of land when the government puts rules on it that it can’t be used. You can say it is a 100% diminution of value and is a taking vs. buying the whole thing at once and it not being a 100% diminution of value
* Temporary Taking: If you are prohibited from building for 5 years, you may be entitled to compensation for those years that you weren’t able to develop the land while you were in litigation
  + *Tahoe-Sierra Preservation Council v. Tahoe Regional*
    - States impose regulation in compliance with a federal law barring people from doing anything near a lake. They try to argue temporal severance (32 months of being unable to build anything). SC says *Lucas* only applies when the regulation is permanent. This regulation is temporary.
    - Armstrong Principle: The takings clause was designed to bar government from forcing people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.

# Exactions

* Concessions that local government requires as a condition of an approval being granted of building project, renovation, etc.
* **Permissible Exaction Test [Must meet both!]**

1. **Essential Nexus** between legitimate state interest and Permitting condition exacted by the government (*Nollan*)
   * + People want to make their beach house bigger, but the government says they must add an easement across their property (from 1 beach to another beach, not from the road to a beach). Harm caused must be proportional to exaction. Court says that this is a permanent physical presence and don’t buy the argument that it was proportional to the visual barrier to the beach caused by a bigger house
     + Theme: Interfering with the right to exclude people off property with easement
2. **Rough Proportionality** (*Dolan*)
   * + Business owner lives near a floodplain and wants to increase the store size by 2x. The city says part of the land must go to the city for the storm drain and a bike path easement
     + The Nexus test was met
       - There was a legitimate public interest in preventing flooding by preserving floodplain, having a new bikeway could theoretically reduce car traffic
     + Rough Proportionality Not met
       - Pathway interferes with her right to exclude and is extreme. There is no real evidence it would reduce traffic, only that it could
       - Flood plain: The court understands not building on it, but it does not need to become part of city property as suggested. It would achieve the same goals of reducing flooding if π just promised not to develop it.
       - You can come up with something less harmful to the π that will alleviate/ address all the same concerns

# Zoning

* Based off of police power: Government has a right to regulate land use in order to protect health and safety of people
* Pros: Avoiding incompatible use, maximizing property value,
* Cons: Arbitrary (completely random), less diverse, convenience
* Police Power held by states and delegated to cities
  + Use of police power has to be reasonable and not arbitrary and capricious and reasonably related to public safety, health, and welfare
* **Is Zoning Constitutional?**
  + A zoning ordinance will only be declared unconstitutional where its provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general Welfare (*Euclid*)
* **Euclidian Zoning:** Districts are graded from highest (single family residences) to lowest (worst kind of industry). The uses permitted in each district are cumulative. Higher uses are permitted in areas zoned for lower uses but not vice versa (can put a single family home in apt. district, but not the other way around)
  + You can zone height, area, square footage, space from street, etc.
* **Pre-Existing Use 🡪 Non-conforming Use**
  + Pre-existing use of land in one way and then new zoning ordinance makes use unlawful
    - Want to allow non-conforming use so people are not afraid to have a business
    - THEME: bundle of sticks 🡪 protect the right to sell
    - Damages:
      * Can grandfather people in that use in non-conforming way just get paid once
      * Rights run with the land, the new owner must follow same business though
  + **Amortization**: Government sets a time period for zoning ordinance to take effect 🡪 try to phase out the business
    - Any commercial enterprise which would constitute a pre-existing use and which would be in conflict with the requirements set forth in the amendment to the ordinance has a certain amount of time from the date the ordinance becomes effective to come into compliance with the ordinance
    - Provisions for the amortization of nonconforming uses are constitutional exercises of police power so long as they’re reasonable
      * To determine reasonableness: each case must be determined on it’s own facts. Must be decided by observing the impact upon the property under consideration.
    - Gives you a period to wrap up your business, find another place, tell your customers. It’s a cost but less of a cost
      * E.g. Adult bookstore; zoning law changed 4 days after it opened and they only have 90 days to move: per se illegal
  + **Grandfathering**: a zoning ordinance passes and you find your use of land isn’t allowed but you’re grandfathered in because you were already there before. You are free to continue to use it in a nonconforming was as long as it was allowed before
    - If a business stops being used as a café, it would end grandfathering
    - Like there was a fire, you shut down for long period of time, go from café to café+ karaoke bar)
  + Framework: *PA Northwestern Distributors v. Zoning Hearing Board Concurrence*
    - **BALANCING TEST** (Majority)
    - Length of time to amortize based on nature of the business
    - Length of time in relation to investment, $ sunk into property
    - Degree of offensiveness to neighborhood
  + Minority Rule 🡪 amortization is A taking Per se and unlawful and you must pay (*PA Northwestern*)
  + Should be given a reasonable amount of time to close up shop; get in compliance

# Variance

* Allows administratively authorized departure from zoning ordinance, granted in cases of unique and individual hardship, where strict application of the ordinance would be unconstitutional (Zoning Ordinance does not include this particular use)
* Okay when rights gained by owner > adverse effect to public
* Variance runs with the land 🡪 transfers to next owner
* **Framework (*Commons v. WW Zoning Board)***
  + Exceptional and undue hardship
    - Need to show that land would be worthless without variance; No effective use can be made of the property in the event the variance is denied
    - People need to have made good effort to solve problem
      * Includes trying to buy or sell land near lot to conform to ZO
    - Can’t create your own hardship (splitting lots and not hitting square footage requirement and asking for a variance)
    - Not detrimental to neighbors
  + Board must be satisfied with negative criteria
    - Grant of variance can’t be detrimental to public good
    - Can’t substantially impair the intent and purpose of the zoning plan
  + Case: Family wanted to build a home, but the lot didn’t meet the existing zoning requirements of frontage and total area. Neighbors opposed proposal to build narrow, but similar home to the others in the neighborhood. Court held on appeal that board couldn’t base decision on size of house, because planned construction didn’t violate any of the traditional zoning purposes of light, air, open space reflected in ordinance.

# Special Exception

* A use permitted by the ordinance in a district in which it is not necessarily incompatible, but where it might cause harm if not watched (built into the ordinance)
  + *Cope v. Inhabitants of the town of Brunswick*
    - Developers sought to build an apartment complex in a suburban residential use area. They needed a special exception to build. The zoning board had the authority to grant the exception if: other requirements of ordinance were met, use would not adversely affect the health, safety, or general welfare of the pubic, the use will not tend to defeat the purpose of the ordinance or the comprehensive plan of development, and the use will not tend to devalue or alter the essential characteristic of the surrounding property
    - Denied because it failed 2 and 4
    - Issue arose from the fact that local zoning boards have no inherent authority to regulate the use of private property
    - Overruled: should grant special exception
  + Example: it’s a residential neighborhood, but you put we will consider on a case by case basis for schools, grocery stores, churches, with extra needs like more parking, etc.

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|  | **Eminent Domain** | **Regulatory Takings** | **Exactions** | **Zoning** |
| **Distinguishing Characteristics** | Condemnation proceedings  \* Government takes possession of land | Regulation passed regarding land | Apply for a permit and government asks for something in exchange (eg. Give public access to beach) | City ordinance that says areas of land must be used for certain purposes |
| **Highlights of Test** | 3 categories:  1. Public use  2. Common carrier  3. Transfer to private parties for economic development | CR:  - Physical occupation  - Nuisance\*  - Lose all economic value (100%)  - If failure above, go to Penn Central Balancing test | - Nexus between legitimate government interest + harm  - Rough Proportionality | - Consider constitutionality  - Must be considered with circumstances and locality |

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|  | **Pre Existing Use (Including Amortization)** | **Variance** | **Special Exception** |
| **Distinguishing Characteristics** | Non conforming use gets to continue for some period of time | Explicitly not allowed, but they give you a variance to allow the activity (e.g. spacing between houses)  After ordinance is in place | A use permitted by ordinance in a district in which it is not necessarily incompatible but might need to be watched (hospitals)  Built into ordinances |
| **Highlights of Test** | - Grandfather in pre-existing use even if not permitted under new zoning ordinance  - Amortization: time to phase out the business  Majority: Factor Test  Minority: Per Se | - Exceptional and undue hardship (exhaust all of your options) + Detrimental to public good  - Personal injury doesn’t count  - Consider area vs. use | - Constitutionality (was there a specific grant of power to the city?)  - Look to the language that gives the exception (vague v. specific)  - No need for undue hardship |

* **Spot Zoning**: Zoning changes, typically limited to small plots of land, which establish a use classification inconsistent with surrounding uses and create an island of nonconforming use within a larger zoned district, and which dramatically reduce the value for uses specified in the zoning ordinance of either the rezoned plot or abutting property
  + Has the benefit of one that was singled out been detrimental to everyone else?
* Invalid where some or all of the following factors are present:
  + Small parcel of land is singled out for special and privileged treatment
  + The singling out is not in the public interest but only for the benefit of the landowner
  + The action is not in accord with a comprehensive plan

# Present & Future Interests (System of Estates)

* See end of outline

# Concurrent Ownership

## Tenancy in Common:

* + O: To A and B; presumed to be TIC unless there is explicit language that it is supposed to be a JT
  + Multiple people own property, separate but undivided interest in the whole property
  + When the property is sold, they get a cut according to their share
  + Can have unequal shares
  + Can sell your share
  + It passes to your heirs/ who you designate upon death of your share, people can also buy you out
  + Creditors can get to this property 🡪 they only get your share of the estate
  + Disadvantage: Need to deal with probate when someone dies

## Joint Tenancy

* + O: To A, B, C, D as Joint tenants with full rights with survivorship, and not tenants in common
  + Intent to create + 4 unities
    - Time: interest of each tenant must have been acquired or vested (as a FI) at the same time
    - Title: One document/instrument where all parties are acquiring interests
    - Equal Interest: Each tenant must have equal undivided shares and identical interests
    - Possession: Each must have a right to possession of the whole
  + Majority: Have to use a straw man to incorporate someone else into the JT
  + Minority: No straw man, can just gift it back to yourself with other owners named (*Riddle v. Harmon*)
  + With rights of survivorship means when your rights are survived by your partners after you die; doesn’t pass to heirs
  + Creditors can’t get to this property
  + Advantage: Don’t deal with probate when someone dies
    - That tenant’s share just gets distributed to the remaining tenants 🡪 can have some tenants still be JT (with each other) and some that are TIC
    - When you are the only person left, it becomes fee simple absolute 🡪 it can pass on to that tenants heirs
  + Destruction of Joint Tenancy
    - Selling your share destroys JT, but allows it among the other remaining tenants to each other
    - RULE: One person can destroy JT without other tenants’ knowledge by gifting the land back to themselves 🡪 Minority Rule (*Riddle v. Harmon*)
    - Can destroy JT while alive, but not after you die 🡪 Because it is automatically, at the point of your death, transferred to other tenants
* Tenancy by the entirety: Can only be created by husband and wife (4 unities + marriage) surviving tenant has the right of survivorship. Neither husband nor wife can defeat the right of survivorship of the order by a conveyance of a moiety to a third party. Only a conveyance by both husband and wife can do so.
  + TX: Community property state; don’t recognize tenancy by the entirety
* Destruction of Concurrent ownership in General
  + What will maximize property value and minimize burden on court?
    - 1st Option 🡪 All tenants amongst themselves agree on how to divide up $ from sales of the land
    - 2nd Option 🡪 partition in kind
    - 3rd Option 🡪 Partition by sale
    - Majority Rule: only do cost benefit analysis to see which approach costs less
    - Minority Rule: Take into account people’s sentiment with the land even if it is more expensive to do partition in kind (*Delfino v. Vealencis*)

## Types of Destruction

### Partition in Kind

* + - Physically chop up the land based on % interest 🡪 each person then has fee simple absolute over their chunk of land
    - It allows people to keep sentimental value with land and lets them have more of a say
    - Pros: people’s homes (idea of *Kelo* that value to people who love their land vs. forcing them off)

### Partition by Sale

* + - Should only be ordered when 2 conditions are satisfied:
      * The physical attributes of the land are such that a partition in kind is impracticable or inequitable
      * AND the interests of the owners would better be promoted by a partition by sale
    - Sell the land and then just divide up proceeds by share of each tenant
    - Pros: maximize value of land, easy, physical attributes of land sometimes impractical to do partition in kind, interests of owners bested with partition by sale (more valuable to sell as a whole than subdivided)
* **Ousting**
  + Assertion of absolute dominion where one co-tenant can oust another only if possession is adverse to the possession of another co-tenant
  + Ousting can mean either:
    - The beginning of the running of the statute of limitations for adverse possession
      * A claim of absolute ownership and a denial of the cotenancy relationship by the occupying tenant
    - The liability of an occupying cotenant for rent to other contents
    - The occupying cotenant refuses a demand of the other cotenants to be allowed into use and enjoyment of the land, regardless of a claim of absolute ownership
  + **Majority Rule**: *Spiller v. Makereth*: rule of non liability for mere occupancy, cases have held that the occupying cotenant is not liable for rent notwithstanding a demand to vacate or pay rent
    - Before an occupying cotenant can be liable for rent if he denied his cotenants the right to enter. There can be no denial of the right to enter unless there is a demand or an attempt to enter. Simply requesting the occupying cotenant to vacate is not sufficient because the occupying cotenant holds title to the whole and may rightfully occupy the whole unless the other cotenants assert their possessory rights
      * No ouster in *Makereth* because he never tried to enter and was denied entry. Out of luck
  + **Minority Rule**: Establishes liability for rents on a continued occupancy after a demand to vacate or pay rent

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|  | **TIC**  **“O: To A and B”** | **JT**  **“O: To A, B, C, D, as joint tenants, full rights of survivorship”** |
| **Creation** | Default: Presumed to be TIC unless there is explicit language that it is supposed to be a JT | Intent + 4 unities: time, possession, title, interest (if fail one of these at time of attempted formulation, then back to TIC) |
| **Death** | Goes to heirs | Rights of survivorship: does not go to heirs, automatically passes to other JT’s |
| **Destruction** | Partition in kind, partition by sale, adverse possession (open & notorious, continuous, exclusive possession, claim of title, actual entry, adverse) | Partition in kind, partition by sale  Defeat one of the unities  Death  If you try to sell your share, it becomes a TIC  Adverse possession |
| **Divided / Undivided Interest in property use** | Undivided interest in the whole property regardless of share | Undivided interest in the whole property regardless of share |
| **Equal / Unequal Shares** | Can have unequal shares | Equal shares |
| **Advantages / Disadvantages** | Have to go to probate court  Death  Interest to anybody  Creditors can get to this property after you die | No need to go to probate court  Death  Easier if kids are JT’s  Straw man – shady business  Creditors can’t get to this property after you die |

Relations Gone Sour

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Partition in Kind** | **Partition by Sale** | **Other Considerations** |
| **Distinguishing Characteristic** | Split land based on person’s interest | Sell land, divide money by share (when tenants can’t work it out)  Use when partition in kind (Look at *Delfino*) | Consider *Delfino*  Minority Rule: sentiment with the land |
| **Preference / Advantages** | Still have land  If there is sentiment with the land, then good  Applies to life estate  But hard to divide  Can diminish value of land by split | Easy  A lot of courts go this way  Gives you max value of land (fair market)  MAJORITY | *Johnson v. Hendrickson*: maximizes value of the land; aren’t concerned with emotional attachment of the land |

**Examples**

1. O: BA "To A, B, and C as Joint tenants." Subsequently, A conveys his interest to D. Then B dies intestate, leaving H as his heir. What is the state of the title? What if B had died leaving a will devising his interest to H.
   1. 1/3 Undivided Interest in whole property
   2. A sells his interest to D. A has broken JT because A sold interest to D. B and C are STILL JT.
   3. D is in a TC with B/C.
   4. D still has 1/3 interest
   5. B/C still JT. Still have 1/3 interest each. If the next day, B dies, C takes over that whole interest because they're still in JT. D= 1/3, C=2/3 and they'd be TC.
      1. Have to destroy JT while you're still alive, not at death.
   6. If someone in JT sells off interest. Whoever is buying can't meet 4 requirements of JT. B/C didn't do anything to hurt their interest
2. 2010: A,B,C = JT Each have equal 1/3 undivided interest in the whole property

2011: C dies; C names X as heir

It doesn't matter who C named as heir. When C died, her interest automatically passed to the other JT. Her will does nothing.

X has nothing

A and B are still JT; Now they have 1/2 Undivided interest

2013: A sells her interest to Y.

A is still alive. A --> Y; JT is broken and becomes TC. Y and B are TC. And each has 1/2 undivided interest of the whole property

1. 2010: A,B, C = JT; Each have equal 1/3 undivided interest

2011: A sells interest to X

Breaking JT. X has 1/3 undivided interest as a TC with B/C [Who are still JT with 1/3 undivided interest]

2012: X dies and X leaves everything to Z.

Permitted because X is merely a TC. Now Z is a TC with B/C. each has 1/3 undivided interest. B/C still have JT with one another.

1. A and B are JT.

A leaves all to X.

B leaves all to Y.

A and B both die! Nobody knows who died first.

If A dies first, B gets everything and it goes to Y.

If B dies first, A gets everything and it goes to X.

Uniform simultaneous Death Act: If no sufficient evidence of who died first, you treat it as though 1/2 of property if A survived.

--> 1/2 of the property will pass to X. 1/2 will pass to Y. Then it becomes that X and Y are TC with 1/2 undivided interest

Majority: Sell it off and split the proceeds even if 1 person wants to stay.

Minority: Partition in kind; draw a boundary line and subdivide

You can also buy the other person out.

1. 2000: A,B,C,D as JT. A, B,C,D have 1/4 equal undivided interest in the property as a whole

2005: A sells her interest to X.

X is now a TC with a 1/4 undivided interest with remaining parties [B,C,D=JT]

2007: B sells the interest to Y.

Y is now also a TC with 1/4 interest. [C/D still have JT with 1/4 divided interest. If either died, it would pass to the other]

# Leaseholds

## Term of years

* + An estate that lasts for some fixed period of time or for a period computable by a formula that results in fixing calendar dates for beginning and ending, once the term is created or becomes possessory
  + No notice of termination is necessary to bring the estate to an end

## Periodic Tenancy

* + A lease for a period of some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination
  + “To A from year to year”
  + If notice is not given, the period is automatically extended for another period
  + CL: ½ year is required to terminate a year to year tenancy; 1 year or less (equal to period of lease but not longer than 6 months)
  + Death of landlord or tenant has no effect on the duration of the term of years/periodic tenancy, but does on a tenancy at will

## Tenancy at Will

* + A tenancy of no fixed period that endures so long as both landlord and tenant desire
  + Ends when one of the parties terminates it, or the death of one of the parties
  + Modern statutes ordinarily require a period of notice (like 30 days) in order for one party or the other to terminate
  + Garner Rule: If it’s at will for tenant, court won’t imply that the landlord has the same right. But if the lease says the landlord has a right to terminate at any time, we do imply the tenant has the same right
    - *Garner v. Gerrish*: Held the lease simply grants a personal right to the named lessee Gerrish, to terminate at a date of his choice, which is a fairly typical means of creating a life tenancy at will of the tenant. The lease will terminate, at the latest, upon the death of the named lessee. **The lease expressly and unambiguously grants to the tenant the right to terminate, and does not reserve to the landlord a similar right**. **But if the lease states the landlord can terminate at will, we imply the tenant can terminate as well**
    - Policy: Protecting tenant with unequal bargaining power. Landlord should’ve done more due diligence. We give more slack to the tenant.
    - It matters primarily whether or not an arrangement amounts to a lease because leases give rise to the land-tenant relationship, which carries with it certain incidents certain rights and duties and liabilities, and remedies that do not attach to other relationships.

## Tenancy at sufferage

* + Holdover: Arises when a tenant remains in possession after termination of the tenancy
  + TX: Gives rise to a new lease on the same terms as prior one. If the lease was for 1 year, and you holdover, you’ve now created a new 1 year lease for the same terms and NOT a month to month (which is CL)
  + CL: Landlord has 2 options:
    - Eviction (plus damages); OR
    - Consent (implied [cash rent check]/express) to the creation of a new tenancy
      * Limited to no more than 1 year
      * *Polles v. Smith*
  + Usually subject to the same terms and conditions (amount of rent/duty to repair) as those in the original lease unless the parties agree otherwise or unless some term or condition is regarded as inconsistent with the new situation
* **Difference between Sublease and Assignment**: General rule as to the distinction between an assignment of a lease and a sublease is an assignment conveys the whole term, leaving neither interest nor reversionary interest in the grantor or assignor.
  + Whereas, a sublease may be generally defined as a transaction whereby a tenant grants an interest in the leased premises less than his own, or reserves to himself a reversionary interest in the term.
  + *Ernst v. Conditt*:
    - If an instrument purports to transfer the lessee’s estate for the entire remainder of his term, it’s an assignment, regardless of its form or the parties’ intention. If the instrument purports to transfer the lessee’s estate for less than the entire term, even for a day less, it’s a sublease regardless of its form or parties intention.
    - Under CL or modern rule, the agreement between Rogers and ∆ is an assignment. L can sue T2.

## Sublease

* + Lessee is said to have retained a reversion; the right to possession goes back (reverts) to him at the end of the period designated in the transfer
  + Example:
    - Transfer something less than full remainder of lease (Sublease and not assignment, if at the of lease with T2, T1 wants to take it back over)
    - T1: 5/1/15 – 4/30/16
    - T2: 6/1/15 – 8/1/15
    - You got a job in Dallas for Summer 2015. You want the rest of the lease, but want someone else to take over rent for that summer. Person will assume part of the lease. There is something left over

## Assignment

* + Most Common: Arises when the lessee transfers his entire interest under the lease, when that is, he transfers the right to possession for the duration of the term.
    - If the lessee transfers anything less than his entire interest (If 2 years remain on the lease and the lessee transfers for a term of 1 year), a sublease results
  + Less Common: intention of the parties. The actual words used, “sublease” or “assignment” are not conclusive, though they may be persuasive.
  + Example:
    - Lease: 8/31/15 to 8/30/16. You line up a job in Dallas. You want to transfer the last 3 months to someone else.
    - T1: 8/31/15-6/1/16
    - T2: Will take over 6/2/16 – End of lease
    - CLASSIC ASSIGNMENT
* **Privity of Contract (POK)**: If the lease also contains promises by one party to the other, those promises create a Privity of contract
* **Privity of Estate (POE)**: Whether oral or in writing, the lease between the landlord and the original tenant amounts to a conveyance of a right of possession from the former to the latter, and that conveyance creates between the landlord and tenant the so called Privity of estate (Property Relationship)
  + T1 assigns all the possession to T2; it’s like T2 is stepping into the shoes of T1.
* **Covenant:** Promise from one person to another to do something (or refrain from something) on the land
* **Examples of POE and POK [Look to one note]**



LL

T1

T2

Assignment

Vertical P

POK

Horizontal P

POE

LL

T1

T2

Sublease

Weak Vertical P

POK

Horizontal P

NO POE

# Evictions & Abandonment

* Self Help **[Tenant who defaults; in possession]**
  + CL Rule: a landlord may rightfully use self-help to retake leased premises from a tenant in possession without incurring liability for wrongful eviction provided 2 conditions are met:
    - The landlord is legally entitled to possession, such as where a tenant holds over after the lease term or where a tenant breaches a lease containing a reentry clause AND
    - The landlord’s means of reentry are peaceable
  + Modern/Majority Rule: A landlord must always resort to the judicial process to enforce his statutory remedy against a tenant wrongfully in possession. Self help is never available to dispossess a tenant who is in possession and has not abandoned or voluntarily surrendered the premises
    - *Berg v. Wiley*: Changing the locks is not peaceable. Had Berg been there when Wiley was changing the locks, violence would’ve erupted.
  + Policy: We want to protect the tenants; scrapping the common law rule. We want people to go to court and not take the law into their own hands.
    - Cons: Not an easy process. It can take months to evict a tenant not paying rent, difficult for landlord to use court system (but we still expect landlords to bear the burden because they’re in the superior position)
* **Summary Proceedings**
  + CL remedy of landlord to recover possession of leased property. Quick and efficient means by which to recover possession (some rent) after termination of tenancy. To promote quickness, the typical statute requires only a few days’ notice to the tenant prior to bringing an eviction action, and range of issues subject to litigation is narrow
* Mitigation of Damages **[Tenant who has abandoned possession]**
  + Tenant has skipped town, taken all their stuff, no notice, completely gone = abandonment
  + If you abandon lease, you’re still liable. You tenant can still get sued.
  + **Surrender and Acceptance**: Tenant approaches landlord and says they need to move. Can I work something out where I move out, hand you the keys, and agree lease is over?
    - If landlord accepts surrender, under CL, all obligations end
    - Practical implication is landlord acknowledges lease is over and can’t sue. Always want to get it in writing, not oral promise
  + Burden of proof usually on party who would benefit from the mitigation of damages (Tenant)
    - Can do this by having a friend try to rent the place and having the landlord refuse because “someone is living there”, when you know that you’ve moved out
  + *Sommer v. Kridel*
    - Modern/Majority Rule: Fairness and equality. A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant. Landlord has to show all apartments and treat them all the same. One with a lease still attached can’t be treated any different than the other stock. Can’t treat it as a loss
    - Hold: π could’ve avoided the damages which eventually accrued, and that the ∆ was relieved of his duty to continue paying rent.
  + Factors to show the landlord satisfactorily carried his burden:
    - Offered or showed the apartments to any prospective tenants and accepting a suitable tenant
    - Advertising in newspaper (1 issue not enough)
    - Placing sign in window
    - Employing a realtor
* Example:
  + 01/2015:
  + L - T $1,000/Month
  + August 2015: [Tenant skips out]
    - Landlord gets rent now at $1200/month
  + Majority: landlord gets to keep windfall
* Actual Partial Eviction: the landlord puts a padlock on your garage (but not whole house)
* Partial Constructive Eviction: part of your property is uninhabitable (like you can no longer use the basement, but can still use the rest of the house)

# Landlord’s Duties, Tenant’s Rights and Remedies

## Covenant of Quiet Enjoyment

* + Exists under property law
  + Right to undisturbed use and enjoyment of property by tenant or landowner
  + Right to be free from foul smells, nuisances, serious repairs, and omissions that impair the character and value of the leasehold
  + Major defect: No AC, flooded with water
  + Remedy: Tenant can stop paying rent, stay in apartment until problem is solved or tenant can move out and use constructive eviction
  + For these remedies, if you stop paying rent, you will be sued by your landlord. Risky
  + Weak: Landlord had to provide property that was in good repair at beginning of tenancy and had duty to maintain common areas; read in a duty to maintain a habitable premises

## Constructive Eviction

* + Any act or omission of the landlord of anyone who acts under authority or legal right from the landlord, or of someone having superior title to that of the landlord, which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of the tenant
  + YOU MUST MOVE OUT OF PROPERTY; so bad that you’ve been forced to flee and you have
  + Typical situations: Apartment floods, you call landlord to fix and give reasonable time to fi, and they don’t. You move out, without rent and go to court to resolve situation
    - Example: Heat stops and it’s 0˚ outside, main waste pipe clogged for long period creating offensive odor/health problems
  + *Reste Realty Corp. v. Cooper*
    - Cooper leased from π’s predecessor the ground floor/basement to be used for commercial office space. But every time it rained, the place would flood.
    - Hold: landlord was guilty of a breach of covenant which justified tenant’s removal from the premises
    - Issue must be permanent; it’s equally obvious that permanent doesn’t mean everlasting and unending. If its recurrence follows regularly and is sufficiently serious in extent to amount to a substantial interference with use and enjoyment of the premises for the purpose of the lease, the test for constructive eviction has been met.
    - General rule: tenant’s right to claim constructive eviction will be lost if he does not vacate the premises within a reasonable time after the right comes into existence.

## Implied Warranty of Habitability

* + Contract law
  + Creates a duty that landlord must keep rental property in good condition
  + Establishes Damages
    - Punitive
      * A willful or wanton or fraudulent breach may be shown by conduct manifesting personal ill will, or carried out under the circumstances of insult or oppression, or even by conduct manifesting a reckless or wanton disregard of one’s rights.
    - Compensatory
  + *Hilder v. St. Peter*
    - Fact: The apartment π was occupying had trash from the people prior, there was a broken window, no front door key, bathroom toilet clogged and unworkable
    - Hold: the state of disrepair of π’s apartment, which was known to ∆, substantially reduced the value of the leasehold from the agreed rental value, thus constituting a breach of IWH.
  + **Old Rule**: Caveat Lessee: the tenant took possession of the demised premises irrespective of their state of disrepair. Landlord’s only covenant was to deliver possession to tenant. Tenant’s obligation to pay rent existed independently of landlord’s duty to deliver possession, so long as possession remained in the tenant, the tenant remained liable for payment of rent. Landlord was under no duty to render the premises habitable unless there was an express covenant to repair in the written lease. CL courts assumed that an equal bargaining position existed between landlord and tenant
    - Exception: Constructive eviction; if the landlord wrongfully interfered with the tenant’s enjoyment of the demised premises, or failed to render a duty to the tenant as expressly required under the terms of the lease, the tenant could abandon the premises and cease paying rent
  + **Today; Majority Rule**: Tenant is in an inferior bargaining position compared to landlord because there is a shortage of safe, decent housing. Tenants vying for this limited housing are virtually powerless to compel the performance of essential services. Now hold expressly that in the rental of any residential dwelling unit, an implied warranty exists in the lease, written or oral, that the landlord will deliver over and maintain throughout the period of the tenancy, premises that are safe, clean and fit for human habitation. Covers all latent and patent defects. A tenant who enters into a lease agreement with knowledge of any defect in the essential facility can’t be said to have assumed the risk. Nor can this implied warranty of habitability be waived by any provision
  + **To determine Breach**
    - Look to housing code to see if there is a substantial violation that will constitute PF evidence that there has been a breach of warranty. 1 or 2 minor violations are okay. Landlord not liable for defects caused by tenant.
      * If you can find a violation of housing code, it’s a prima facie showing of breach; strongest argument to make because it’s a statute; per se
    - Inquire whether claimed defect has an impact on the safety or health of the tenant
  + To bring a COA for breach:
    - Tenant must first show that he/she notified landlord of the deficiency or defect not known to the landlord and allowed reasonable time for its correction.
    - Measure of damages: shall be the difference between the value of the dwelling as warranted and the value of the dwelling as it exists in its defective condition. Can also factor in damages for annoyance or discomfort.
    - Tenant must show:
      * Landlord had notice of the previously unknown defect, and failed within a reasonable time to repair AND
      * The defect, affecting habitability, existed during the time for which rent was withheld.
    - When the landlord is notified of the defect but fails to repair it within a reasonable time, and the tenant subsequently repairs the defect, the tenant may deduct the expense of the repair from future rent.

# Land Transactions

* Contract of sale; Statute of Frauds
  + A memo of sale must, at a minimum, be signed by the party to be bound, describe the real estate, and state the price, in writing
  + When a price has been agreed upon, most courts regard it as an essential term, but if no price was agreed upon, a court may imply an agreement to pay a reasonable price
    - K for sale at fair market value is enforceable
* **Exceptions to SOF (2):**
  + Part Performance
    - Allows the specific enforcement of oral agreements when particular acts have been performed by one of the parties to the agreement
    - The acts of the parties must substantially satisfy the evidentiary requirements of the statute
    - Example: buyer takes possession and pays all or part of sales price or making valuable improvements
    - It’s a doctrine used to prevent injurious reliance on the k
  + Estoppel
    - Applies when unconscionable injury would result from denying enforcement of the oral k after one party has been induced by the other seriously to change his position in reliance on the k
    - Unjust enrichment would result if the party who has received the benefits of the other’s performance were allowed to rely upon the statute
    - Defense in law
* **Attorney Review**
  + **Title Contingency**: conducts a title search to determine whether the title being transferred by the seller is good (Marketable)
  + **Mortgage Contingency**: arranges for financing, generally a mortgage
  + **Inspection Contingency**: has property inspected to ensure that house is in good condition
    - Most important from perspective of buyer in transaction
    - This is where you learn what is latent defects
    - You negotiate with seller
      * Blinds, air conditioner (willing to take credit or have seller fix before closing date?)
  + **Appraisal Contingency**: Has property appraised to ensure k price is fair market value or less
    - Look through home owners association documents, any documents affecting structures of common areas, try to figure out what risks there are down the line (typically 10 days)
* **Deed**
  + Purchase and sale k doesn’t affect the transfer of the property
  + Property is transferred by a separate and permanent document, the deed
  + Typically executed at closing
  + Recording not required for valid transfer, but it puts everyone on notice that you own the property. Otherwise, buyer could lose property to subsequent bona fide purchaser

## Marketable Title

* + Title free from encumbrances and any reasonable doubt to its validity and such that a reasonably intelligent person well informed to legal bearings and facts would be willing to accept in ordinary business prudence this title (reasonable person standard)
  + Before closing, if there is a defect on the title, you buyer can rescind the k during attorney review, walk away and get earnest $ back.
  + **Lohmeyer Test** *Lohmeyer v. Bower* [Time before closing]
    - **Public Encumbrance** 
      * A zoning ordinance, any local ordinance, that hinders ability to use property
      * Mere existence of a law that affects your use of property alone in and of itself doesn’t cause a problem to marketable title
      * Has to be a substantial violation of a municipal restriction = There is an encumbrance and does violate marketable title
      * If Seller DISCLOSES THIS PUBLIC ENCUMBRANCE FROM THE VERY BEGINNING; it meets marketable title because it was disclosed
      * There is no marketable title here because there is already a 1 story house, and the ordinance calls for a 2 story house
      * Not something property owner is necessarily involved with
    - **Private Encumbrance** 
      * Lis pendens, real covenant, easement
      * Just a mere existence of a private encumbrance even if it hasn’t been violated = No marketable title
      * It can be found much easier than public; if there is some kind of restriction on the deed, it will be recorded
* **Equitable Conversion**
  + After you enter the sales K, but before closing, if something happens in between (fire, earthquake destroy property, death)
    - CL: after purchase and sales K is signed, buyer has now equitable title. Buyer is now the one with the long term interest in the property. While seller still maintains legal rights, they’re only holding it for buyer. Why bear the loss if there is an earthquake/fire and k doesn’t say anything
    - Majority: Buyer bears the risk (you the buyer still have to cough up the money at sale time)
      * Any good sales k will have a provision about the person who is on the hook (makes sense for seller to bear risk because homeowner still has homeowner’s insurance)
      * Because buyer has equitable interest in the land, buyer still has right to get property even in event of sellers death

# Duty to Disclose Defects

* Still in period of time where k has been signed, but not yet closed
* 3 approaches

## 1. Caveat Emptor

* + *Stambovsky v. Ackley* (Minority)
  + Buyer Beware
    - Buyer is expected to exercise due diligence in checking property she’s considering buying; prudently assessing value and fitness of purchase; bars buyer from seeking rescission to not do due diligence. Burden is on the buyer
    - House was possessed by ghost and ∆ (seller) knew of ghost and made clear to community it was possessed, but didn’t tell buyer. The seller didn’t make any misrepresentations, but the buyer would not have discovered the haunting after reasonable inspection of the property
  + Exceptions to Caveat Emptor
    - If buyer asks and seller lies or doesn’t tell = fraud/misrepresentation [grounds for rescission]
    - Active concealment (Earthquake damage/bad foundation; you cover up cracks that show the damage; hiding evidence of the problem) [grounds for rescission]
    - Fiduciary Duty between parties: some relationship between parties that already exists
    - Affirmative misrepresentations: doesn’t lie, but makes statement inconsistent with the truth (This backyard would be great for kids to play, but really it was used before as a nuclear dump site)
    - Partial Disclosure: You can’t disclose only part of the problem, but not all (seller says the bathroom leaks when it rains, but doesn’t tell the buyer that ALL the rooms leak when it rains)
  + Equitable Remedy: As a matter of law, there is nothing we can do, but as a court, we have equitable power
    - A condition created by seller, materially impairs value of k and is within knowledge of seller and unlikely to be discovered by buyer through due diligence, nondisclosure constitutes a basis for rescission as a matter of equity
  + Rescission is available because seller created this condition; mere puffery is not lying (This is the best house ever)

1. ***Johnson v. Davis Minority*;** Duty to disclose latent defects
   * Facts: Buyers bought a house. Seller knew there was a leaky roof, and lied. During home inspection, they find the roof leaks. Buyer is seeking rescission
   * Court looks to: buyer saying there was no problems (actual lying, not mere silence), a seller has a duty to disclose
   * Applies to some kinds of defects
     + Ones that are obvious (patent): don’t have to disclose
     + Latent: not obvious; seller has an AFFIRMATIVE DUTY TO DISCLOSE all material latent defects if (1) seller knows of defect (doesn’t have to create the defect), (2) it materially affects value of property, and (3) not readily observable to buyer
   * Active misrepresentation v. passive non disclosure
     + We don’t care. Either is unethical. Anytime seller knows of defect and doesn’t disclose, it’s a problem
2. **Majority;** Duty to Disclose ALL KNOWN DEFECTS
   * Texas; Seller has to make disclosures to buyer (doesn’t obligate you to get house inspected; the obligation is you must disclose what you ALREADY know)
   * If problems are found, you can either walk away or negotiate
   * If the sale falls apart and the seller now knows of the defects from an inspection by prior possible buyer, they have to disclose this now to the next potential buyer

* **Merger**
  + Old Doctrine: When a buyer accepts a deed, the buyer is deemed to be satisfied that all the contractual obligations have been met. The contract thus merges into the deed and the deed is deemed the final act of the parties expressing the terms of their agreement. The buyer can no longer sue the seller on promises in the k of sale not contained in the deed, but must sue the seller on warranties
    - Exceptions: Fraud, contractual promises collateral to the deed
    - After closing, the terms of the purchase and sales k cease. Purchase and sale agreement is a temporary k.

# Implied Warranty of Quality

* Post Closing; \* These apply only to titles and defects with them
* Subsequent purchase can sue when… (*Lempke v. Dagenais*)
  + Issue: Whether a subsequent purchaser of real property may sue the builder/contractor on the theory of IW of workmanlike quality for latent defects which cause economic loss, absent POK
  + Hold: POK is not necessary for subsequent purchaser to sue a builder or contractor under an implied warranty theory for latent defects which manifest themselves within a reasonable time after purchase and which cause economic harm.
  + In keeping with judicial trends and the spirit of the law, the court holds that the Privity requirement should be abandoned in suits by subsequent purchasers against a builder or contractor for breach of an implied warranty of good workmanship for latent defects
  + Facts: In 1977, Dagenais had a garage built. They then sold property to π, Lempke, and the garage began to have structural defects soon after
  + Policy reasoning: the essence of IW is to protect innocent buyers. As such, this principle which protects first purchasers is equally applicable to subsequent purchasers; the builder is in a better position to get insurance and is better off financially
    - Incentive for developers to do a quality job
    - Contractor shouldn’t be relieved of liability for un-workmanlike construction simply because of the fortuity that the property on which he did the construction has changed hands. Therefore, Subsequent purchaser can sue!
* **5 Reasons why IWWQ should be extended to subsequent purchasers**:

1. Common experience teaches that latent defects in a house will not manifest themselves for a considerable period of time after the original purchaser has sold the property to a subsequent unsuspecting buyer
2. Our society is rapidly changing; the character of society has changed such that the ordinary buyer is not in a position to discover hidden defects
3. Like an initial buyer, the subsequent purchaser has little opportunity to inspect and little experience and knowledge about construction
   1. Consumer protection demands that those who buy homes are entitled to rely on the skill of a builder and that the house is constructed as to be reasonably fit for its intended use
4. The builder will not be unduly taken unaware by the extension of the warranty to a subsequent purchaser. The builder already owes a duty to construct the home in a workmanlike manner
5. Arbitrarily interposing a first purchaser as a bar to recovery might encourage sham first sales to insulate builders from liability

* **Economic Loss**
  + Issue: whether we should allow recovery for purely economic harm, which generally is that loss resulting from the failure of the product to perform to the level expected by the buyer and is commonly measured by the cost of repairing or replacing the product
  + Hold: Courts that allow economic recovery for IW for subsequent purchasers, finding that the contention that a distinction should be drawn between mere economic loss and personal injury is without merit. No rational basis for the distinction
* **Limitations**
  + Limited to latent defects
  + Limited to a reasonable period of time
  + Π still has burden to show the defect was caused by ∆’s workmanship
  + Duty inherent in IWWQ to perform in a workmanlike manner and in accordance with accepted standards.

# Types of Deeds

## General Warranty Deed

* + Warranty against all defects in title
  + Provides warranty against all defects in title no matter who caused it, when it arose, no matter whose fault, or how many years ago
  + ONLY APPLIES TO DEFECT IN TITLE, not defects in workmanship, etc.
  + Provides with most protection; most typical in real estate transaction
  + Doesn’t matter if seller was wholly innocent in the whole thing
  + 6 covenants apply

## Special Warranty Deed

* + Warranty against all defects CAUSED BY GUARANTOR (seller)
  + All defects in title, but only related to guarantors acts, if the seller caused the problem
  + 6 covenants apply

## Quit Claim Deed

* + No warranty; “As is”; after closing, you can’t sue afterwards
  + Can’t get a mortgage on this deed, but cheaper than normal market value
  + BEWARE!
    - Okay if buying from family member (like parent to child)
    - Caveat lessee

# Present Covenants

* Breached if at all at the time of transfer; SOL starts running day deed transfers

## 1. Seisin

* 1. Grantor warrants that she owns and possesses the interest in the property that she is conveying
     1. If brother actually owned the land, it would be a breach
  2. If someone is selling property in FSA, they’re saying that own it and have a right to legally possess it and transfer it
  3. Damages: You’re suing for loss of fair market value, not what you paid for the property (suing to be made whole)

## 2. Right to Convey

* 1. Seller may own the property, possess it, but not the right to sell it
  2. Guarantor is promising they have the right to sell the property
  3. When you can’t sell: typically one spouse trying to unilaterally sell the property if they own it in a tenancy in the entirety or restriction on who you can sell it to
  4. Damages: you’re suing for loss of fair market value, not what you paid for the property (suing to be made whole)

3. Against Encumbrances [Used Most Often]

* 1. Mortgage, lien, easement, restrictive covenant [financial stake against property or restriction put in place by private property]
  2. You buy property and 6 months later, find out neighbor had an easement
  3. Damages: Suing for market difference in value on the property
  4. Doesn’t protect if there is a zoning ordinance (this only protects against private encumbrances)
  5. *Frimberger v. Anzellotti*
     1. Owner fills wetlands, then transfers land by quitclaim 🡪 then transferred to another person with general warranty 🡪 all 6 covenants covered
     2. This was a latent zoning violation, so not violating warranty of encumbrances
     3. Later, the owners found out that there was a regulation violation 🡪 π claims this is a breach against encumbrances
     4. The concept of encumbrances can’t be expanded to include latent conditions on property that are in violation of statutes or government regulations. The parties to a conveyance of real property can adequately protect themselves from such conditions by including protective language in the k and by insisting on appropriate provisions in the deed.
     5. **Majority RULE**: Latent violation of a land use regulation is not a violation because it’s not an encumbrance. Easements, liens (narrow view-private encumbrances) don’t encompass public encumbrances. Only protects for private encumbrances. We don’t care what city statutes were breached.
     6. **Minority Rule**: The property lacked a certificate of occupancy. In order to get the certificate, the buyer would have to fix the septic system. The court found a violation of zoning regulations that exist and violated at the time of conveyance (sale) is an encumbrance, at least when it has a substantial impact on the use and enjoyment of the property [*Bianchi v. Lorenz*]
        1. If you have a violation of a zoning regulation at time of sale, if the violation has a substantial impact on use and enjoyment of land, it’s an encumbrance
        2. Substantial here: couldn’t get substantial occupancy without certificate and the $40k to bring the house up to code

# Future Covenants

* Much weaker than present covenants; if you’re still within SOL, use present covenant instead; Occurs when someone comes and asserts an adverse claim against you. Actual interference

## 1. General Warranty

* 1. Requires seller to defend you in a lawsuit; paying attorney’s fees
  2. Interchangeable with quiet enjoyment
  3. Grantor (seller) will defend grantee if anyone raises lawful claims to the property
     1. Person who sold it to you has an obligation to defend you. They have to pay your attorney’s fees if 3rd party prevails; and change in property value
     2. Will not pay your attorney’s fees if you lose/crazy person on street

## 2. Quiet Enjoyment

* 1. Requires seller to defend you in a lawsuit
  2. Protects you against your ouster from property if someone claims superior title
  3. Interchangeable with general warranty
  4. Has to be substantial/extreme (Major defect in the title) like a large easement running right through the middle of a small property. If it’s merely an annoyance (small effect) court’s wont allow you to use
  5. *Brown v. Lober*
     1. Owner conveys land to Bosts, but reserves 2/3 mineral rights interest, then the Bosts sell to Browns who realize that they only have 1/3 of mineral rights
     2. Browns claim breach of warranty of quiet enjoyment because owner could come and drill on their land which would disturb their enjoyment of the land 🡪 try to use the future covenant because the statute of limitations ran out on the present covenants (usually would have used covenant of seisin)
     3. RULE: need to actually have someone disturb the peace (like drill) in order to claim breach 🡪 no recouse here, need to wait for someone to come and drill

## 3. Further Assurances

* 1. Specific Enforcement
  2. When you transfer property at closing, certain steps seller has to take after closing time. It’s subject to a mortgage. After you give them $, seller promises to pay off the lien/mortgage. If they don’t, it’s a further assurance because they promises to pay it off

# Mortgages

1. Buying personal property: In most transactions, you give a note to the bank saying you promise to pay. If you stop paying, the lender can seize the car. It's a secured loan on the car itself. Not just a debt being made with no security interest (like credit card debt)
2. Buying real property: you wish to purchase a house, you don't have the full amount, so you get a mortgage. Mortgage is secured by the house. Lender wants to have priority over other creditors, so they take mortgage on land, structures, etc.
3. Buyer of property; borrowing money: Mortgagor
4. Lender of money: Mortgagee

Adjustable Rate Mortgages: only lock in mortgage rate for a short time. After time elapsed, it would go to fair market value, which could be anything. It assumed housing values would continue to rise. But they didn't. it fueled the crash (subprime crisis)

**Financing Real Estate Transactions**

1. For years, the only type of mortgage loan offered in the US was a fully amortizing fixed interest rate mortgage. With this type of loan, borrowers make a constant payment each month that includes both a component for interest and one for principal. The amount of the payment stays the same for the life of the loan, usually 15-30 years.
2. 1980's came the adjustable rate loans, featuring an initial below-market interest rate that gradually increases according to an index based on debt issued by the Federal Reserve Bank.

In a case of default the lender will want to be able to reach, with priority over other creditors of the borrowers, some specific property. To secure the note the lender will require buyers to execute a mortgage on the property they're buying. If the buyers fail to pay their note or don't otherwise perform their obligations, the lender can have the property sold (foreclose the mortgage) and apply the proceeds of sale to the amount due on the note.

The mortgagor's interest in the property is "Equity of redemption"

**Deed of Trust**: [a way for the lender to sell the land and be paid soon after default] Majority:

Under a deed of trust, the trustee is given the power to sell the land without going to court if the borrower defaults

Changes we saw after mortgage crisis: Now, it's much harder to get a mortgage and they're strict on the documentation they require. More caution in real estate industry (buy a home in your budget)

**2 primary groups of states**

1. **Lien theory states**
   1. 33 states; including TX; majority; mortgagees (bank) interest is simply a lien interest on the property
   2. When you buy a house, the deed to the property stays with person borrowing money and the lender has a lien on the property that secures an interest on the property.
   3. You still own the property, keep the documents
2. **Title theory states**
   1. 15 states; old English system
   2. Mortgagee (lender) has title to property until mortgage is paid off
   3. Hold the title to the property in the name of the borrower in a 'deed of trust'
   4. Lender is title holder with regard to lien, the buyer is treated as owner of property

Few states that do something in between

**Standard Mortgage Documents**

1. Promissory Note
   1. Document that establishes who is the borrower, who is the lender, the amount of debt, and what the terms of repayment are, and the interest rate
   2. A promise by borrower to repay loan and the terms of repayment
   3. Then secured by mortgage…
2. Mortgage (Deed of trust)
   1. Document; borrower conveys title to lender as security
   2. Arrangement involving 3 parties: a borrower, a lender, and a neutral 3rd party (trustee)
      1. Borrower executes deed of trust to trustee rather than lender
      2. If you pay your debts on time after you've paid off your loan, the trustee reconvey’s the title to borrower
      3. If default, lender tells trustee that borrower defaulted, it's time to foreclose
      4. You can foreclose very quickly in TX.

Implications:

1. Mortgages get sold all the time. With regard to foreclosures, the bank that buys the mortgage lacks the promissory note/deed of trust. In that case, you can get out of foreclosure. If the bank doesn't have proof of original documents, some states limit ability to foreclose
2. Forgery of documentation: banks started forging documents and changed property lines
3. Wrong house evictions; bank forecloses the house

**Foreclosure**

* *Murphy v. Fin. Dev. Corp*
  + Judge found the lenders didn’t mislead or deal unfairly with π’s, engaging in serious efforts to avoid foreclosure. The basis for the decision was that the lenders failed to exercise good faith and due diligence in obtaining a fair price for the property.
  + The mortgagee must exert every reasonable effort to obtain a fair and reasonable price under the circumstances, even to the extent if necessary, of adjourning the sale or of establishing an upset price below which he will not accept any offer.
  + The lenders didn’t act in bad faith by discouraging other buyers, but the lenders didn’t make any attempt to obtain fair market value for the property but were concerned only with making themselves whole. Such disregard for the interest of the mortgagors was a breach of fiduciary duty by the mortgagees.

**3 ways to lose a house**

1. **Foreclosure**: bank takes over house and puts it up for sale
2. **Short Sale**: you know your house is worth less than what is owed on mortgage. Negotiate with bank saying you will sell your house on the open market. If you owe $300k and you sell your house for $250k on open market, you can negotiate and bank will write off the $50k to receive the 250k fetched at the sale. Hit to credit
3. **Deed in lieu**: borrower hands property back to bank and the bank agrees to forgive what is owed. Hit to credit.

# Title Assurance

* Functions
  + Establishes a system of public recordation of land titles
  + Preserves in a secure place important documents that in private hands may be easily lost or misplaced
  + Protecting purchasers for value and lien creditor against prior unrecorded interests
  + Bona Fide purchaser: under the recording acts, a subsequent bona fide purchaser is protected against prior unrecorded interests; someone who buys (pays, not gift) in good faith at fair market value
* Indexes
  + **Tract Index**
    - Not common
    - Legal address of the property and every transaction will show up
  + **Grantor-Grantee Index**
    - Most common
    - Separate indexes are kept for both
* In most states, not TX, there is a marketable title act. It sets an amount of time you have to worry about, usually 30 years.
* *Luthi v. Evans*
  + Owens assigned interest in oil and gas leases to International Tours. Then, Owens again assigns the same interest to Burris. Burris checked the records and found no information of title reflected assigning the title to Tours. Controversy between Tours and Burris.
  + Mother Hubbard Clause: seldom used; but have been found to be convenient for death bed transfers and in situations where time is of the essence and specific information concerning the legal description of property conveyed is not available.
  + Hold: agree that a subsequent purchaser who has actual notice or knowledge of such an instrument, is bound thereby and takes subject to the rights of the assignee or grantor
    - Concluded that the legislature intended that recorded instruments of conveyance, to impart constructive notice to a subsequent purchaser or mortgagee, should describe the land conveyed with sufficient specificity so that the specific land conveyed can be identified
    - Burris Wins; Tours was in a better position to sufficiently record with specificity, but didn’t.
* **3 Types of Notice**
  + Actual Notice**:** Where you have actual knowledge that there is something affecting title out there
  + Record Notice**:** Does someone have knowledge if they actually looked through the records?
  + Inquiry Notice**:** Dicey circumstances such that you should’ve thought to ask more questions
    - E.g. you’re buying property, it’s subject to an easement, they don’t tell you, but you see a road and see people walking over the property

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| Types of Notice | |
| Constructive | Actual |
| You should have known because it was publically recorded  Inquiry: circumstances that suggest buyer should have asked about title (Harper) | Someone knows about it 🡪 Hard to prove |
| No constructive notice unless property was sufficiently described (Luthi) |  |

* Types of Recording Acts
  + Race Statute: Rare; NC and LA. As between successive purchasers of blackacre, the person who wins the race to record prevails. Whether a subsequent purchaser has actual knowledge of the prior purchaser’s claim is irrelevant
    - Limits inquiry into matters off the record
    - Protects a subsequent purchaser only if the subsequent purchaser records first
    - O: A; O:B; then B records. B wins. If A recorded first, A would’ve won
  + Notice Statute [TX] If a subsequent purchaser had notice of a prior unrecorded instrument, the purchaser could not prevail over the prior grantee, for such would work a fraud on the prior grantee
    - Protects subsequent purchaser who has no notice of prior deed against any prior unrecorded instruments even if subsequent purchaser fails to record
    - E.g. B would not prevail over A because B has notice of A’s prior deed
    - O:A; O:B; nobody records. So long as B has no record notice, which he wouldn’t because A didn’t record, B is going to win. He’s the last person who bought the property and has no notice of any shenanigans
    - O:A; A records. O:B. B is lazy and doesn’t check. B is deemed to have record notice by virtue of fact that it was recorded properly. B would lose because B has constructive notice by virtue of the fact that A recorded.
    - Protects subsequent purchaser against prior unrecorded instruments even though the subsequent purchaser fails to record
  + Race-Notice Statute: a subsequent purchaser is protected against prior unrecorded instruments only if the subsequent purchaser (1) is without notice of the prior instrument and (2) records before the prior instrument is recorded
    - Tends to eliminate lawsuits turning on extrinsic evidence about which deed was delivered first
    - The allegation that B’s deed was delivered after A’s is irrelevant if one of the deeds has been recorded; the first to record wins
    - Preferable because, by punishing non recording, it provides motivation to record, making the public records complete

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| Types of JS for Recording | | | | |
|  | CL | Race | Notice | Race-Notice |
| Rule | First bona fide purchaser | First person to record. If no one does, we go back to CL | Protect subsequent purchaser for prior unrecorded instruments even though the subsequent purchasers failed to record | Protects subsequent purchaser against prior unrecorded instruments only if:  1. No notice (Constructive and actual) of prior instrument AND  2. Records first |
| Who is protected? Who Wins? | First person | First person to record | Above | If no one does, we go back to CL  - Consider Wild deeds  Exceptions:  1. Adverse Possession  2. Doesn’t work against federal government claims |

* Exceptions:
  + Adverse possession
  + Not against federal government claims
* Bona Fide Purchaser: strongest claim to property
  + But if gifted land, not considered BFP🡪 much weaker
* Shelter Rule: Applies to all 3 (R, RN, N)
  + Person who buys property from BFP who is protected by recording act has same rights as grantor
* Chain of Title: The recorded sequence of transactions by which title has passed from a sovereign to the present claimant
  + The period of time for which records must be searched and the documents that must be examined within that time period.
  + Includes the series of recorded documents that, in the particular jurisdiction, give constructive notice to a subsequent purchaser.
  + A deed in the chain of title, discovered by the investigator, is constructive notice of all other deeds which were referred to in the deed discovered, including an unrecorded plat included in the deed discovered
  + *Harper v. Paradise*
    - The second deed that they created tried to reproduce the previous deed that had been lost
* See Examples!
  + **Early deed**
  + **Wild deed**
* Marketable Title Acts
  + Have as their purpose limiting title searches to a reasonable period, typically 30-40 years
    - Idea: when one person has a record title to land for a designated period of time, inconsistent claims or interests are extinguished
    - Under the act, all claimants of interests in land, to be safe, must file a notice of claim every 30-40 years after the recording of their instruments of acquisition
    - Not TX; There are some limited exceptions
      * Clearly obvious restriction on property; like visible easement restriction, even if it hasn’t been recorded in the last 30 years
      * Anyone who occupies the property, if someone is living there, there should be a tip off that there could be a problem. Start asking questions

**Title Insurance**

Developed because of the inadequacies and inefficiencies of the public records in protecting private titles.

* Creates liability to the insured only and doesn't run with the land to subsequent purchasers
* A subsequent purchaser must take out a new policy if the purchaser wants title insurance
* Is the opinion of the insurer concerning the validity of title, backed by an agreement to make that opinion good if it should prove to be mistaken and loss results as a consequence
* 2 types: Mortgagees policy (only protects the mortgage lender and not the homeowner) and owners policy
* Doesn't protect against implied easements or adverse possession or public encumbrances

# Land Use Controls

* Easement: agreement allowing a non owner to enter upon and use a piece of property
  + Easement Appurtenant: attaches to or benefits a particular tract of land.
    - Is this easement making a piece of land more valuable?
    - Easement will run with the land. Y’s future owner down line can cross the line. X’s value will go down
      * But you can also grant a non transferrable 10 year license (limited type of easement)
      * But generally, the easement runs with the land
      * Anticipates a certain volume of use; can’t convey thinking it’ll be 1 person, but it’s 30.
      * Only way to get rid of easement is for that person to buy it back
  + Easement Engross: doesn’t benefit any particular landowner. Public utilities/railroads
* Servient Estate: Gives the easement
* Dominant Estate: gets to use easement
* To create an easement: subject to statute of frauds, express agreement; can be sold, given away. Needs only to be in writing. Good idea to record easement. Bona fide purchaser could make it go away
* Implied Easements(CL Rules)

1. **Easement by Estoppel**
   1. *Holbrook*
      1. Hold: use of roadway by appellees to get to their home from the public highway, use of the roadway to take heavy equipment and material and supplies for construction of the residence, the general improvement of the premises, the maintenance of the roadway, and the construction by appellees of a $25 k approval, clearly demonstrate that the rule in *Lashley Telephone Co. v. Durbin*, that the license to use the subject roadway may not be revoked. Holbrook’s are now estopped from revoking license. Taylor’s now have easement to the property. Taylor’s were depending on it, anticipating that it would be usable in the future. Landlocked 🡪 likely easement by estoppel, particularly vulnerable, easement will run with the land
         1. *Lashley Telephone Co. v. Durbin*: Rule: where a license is not a bare, naked right of entry, but includes the right to erect structures and acquire an interest in the land in the nature of an easement by the construction of improvements thereon, the licensor may not revoke the license and restore his premises to their former condition after the licensee has exercised the privilege given by the license and erected the improvements at considerable expense (leads to license becoming irrevocable)
   2. RULE: Easement by Estoppel (an irrevocable license) created if:
      1. License granted; AND
      2. Licensee expends money/labor in good faith reliance; AND
      3. Licensor has knowledge/reasonable exception that reliance will occur
      4. Not a sure thing; not easy; Need to meet ALL requirements
2. **Easement by Judicial Implication**
   1. Implied/Prior Existing Use
      1. 1 original owner
      2. Necessity at time of severance
      3. Prior existing use by original owner
         1. Apparent
         2. Continuous, and
         3. Permanent
            1. Some proof that original owner used property in such a way that a reasonable person would expect that the property use would continue no matter who owned the property; like A used a road and it was still visible (worn path) and B who now owns would expect to be able to continue to use the road
      4. Reasonable Necessity
         1. Majority Rule: Reasonable necessity meaning easement doesn’t have to be absolutely necessary, but rather you need the easement to avoid delay, high costs (yes there is another road I can take, but it’s not usable part of the year, will take 3 hours to get to town rather than 30 min.)
         2. Minority: TX and NY; You have to look at whether easement was granted or reserved
            1. Who was trying to benefit from the easement? The person who used to own both pieces of land or just the person who purchased the property?
            2. Granted Easement: currently has no easement and currently seeking to be granted an easement. (B bought the property and expected to get an easement, it follows majority rule) “Reasonable necessity”
            3. Reserved Easement: person who sold the property created the problem. What she should’ve done when she sold the property was reserve an easement; requires you to show strict necessity; very difficult to show. Have to s how it’s your ONLY option
      5. *Van Sandt v. Royster*: RULE: taken the view that appearance and visibility are not synonymous, and that the fact that the pipe, sewer, or drain may be hidden underground does not negative its character as an apparent condition; at least where the appliances connected with and leading to it are obvious
         1. Hold: an easement by implication was created
      6. Public prescriptive easements: public en masse can meet the requirements. If the private landowner tries to restrict later, it’s a publically accessible land now
      7. Beach access: usually customary rights; public gets to use land to the high tide line no matter what signs beach home owners put out
   2. Necessity
      1. 1 original owner
         1. It was one big piece of land and the landowner breaks it in two, and the other has no way on or off the property
      2. Necessity at time of severance AND
      3. Strict necessity for entry/exit to landlocked parcel (Very strict; if there is a road, even if it’s crappy, you still have a way off)
         1. EXTREME: mountains, water surrounding where you’d have to take a boat to get off the land
            1. If down the line, it’s no longer landlocked, B will lose easement. When necessity is gone, easement goes away as well
3. **Easement by prescription**
   1. Adverse Possession like way of getting easement
   2. Same elements as AP
   3. If you wish to move easement; CL Rule: A can’t move the easement. It’s stuck wherever it is. Also, the easement you received is for walking. You can’t later use it with a truck
   4. Lower of standard to meet each of requirements
      1. Actual Entry: person seeking easement just has to show they’ve been entering the property in a way that is consistent with easement ownership, not landownership; like driving across the road (driving across the road doesn’t typically mean you own it)
      2. Exclusive: No one was interfering with your use of the property. You are able to use the easement whenever you liked. No one is blocking you
      3. Open and Notorious: visible
      4. Adverse: can’t have permission to use an easement
      5. Claim of right/title: most jurisdictions don’t care what your state of mind is.
      6. Continuous: continuous in the sense that person who owns an easement would use; consistently being used
         1. Like if you’re meant to only use it once a week and you do
         2. Or you only need to use it a couple months of the year and you do

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| Implied Easements | | |
| By Estoppel | Judicial Implication | By Prescription |
| *Holbrook*  1. License created  2. Spend $ or effort in reliance on license  3. Person with license should have R exceptions | 1. Prior existing use:  (3) must be apparent, continuous, permanent (4) requisite necessity [Majority: R standard; minority: strict]  2. By necessity:  E has to be strictly necessary for entry/exit | 1. Actual entry  - Use Easement  2. Exclusive Use  -No one preventing you from using E  3. Open and Notorious  -Has to be apparent  4. Adverse  5. Claim of right/title  6. Continuous |

* **Negative Easement**:
  + The right of the dominant owner to stop the servient owner from doing something on the servient land.
  + English courts recognize 4 types of negative easements. Right to stop your neighbor from…
    - Blocking your windows (Sunlight) most common
    - Easement not to block flow of air through a defined channel
      * Cross breeze
    - Easement to support a building: excavating or removing a supporting wall; and
    - Interfering with the flow of water in an artificial stream
  + USA: also added Conservation easement: A and B make agreement that B promises not to develop land in exchange to money from A.
* **Termination of Easements**
  + For 1 person to own servient property and dominant property; easement just disappears. Don’t need easement to cross your own property; if subdivided again, easement doesn’t just come back into existence; Merger [buying out the person’s easement]
  + Release: someone from an easement in writing
  + Easement by prescription to try and get your land back. If A can block you off, you can AP it back and you meet statutory requirement [Adverse Possession]
  + Abandonment: not enough to stop using it for a period of time. Need to show unequivocal manifestation that you intend to abandon the easement. Easiest way to show is write it.
    - Like railroad
  + Easement by estoppel no longer exists if it no longer exists. Like the house disappears (burns down)
  + If necessity goes away, easement also goes away
  + Buy back the land. You can’t have an easement on your own land
* **Real Covenants {Explicit Easement}**
  + **1st Restatement (TX/CL)**
    - Restrictive Real covenant: 2 property owners are promising each other not to do something to the property
      * Like not cutting down trees, not use land for industrial purposes, not building a house higher than 2 stories
      * Clearly enforceable when they follow the 4 requirements
    - Affirmative Real Covenant: B promises to mow the lawn every week, or trim back hedges
      * Affirmative action, but still relating to the property itself
  + **Requirements: (4)**
    - **Statute of Frauds**
      * Make sure it’s in writing, signed by parties to be bound
    - **Parties must intend for covenant to run with the land**
      * Express statement saying “we intend these promises to run with the land”
    - **Privity of Estate** (2 forms you need to have) both HP and VP
      * Horizontal: you must have HP to make a burden (some obligation to not do something or obligation to affirmatively do something) run
        + Exists if the parties trying to enter into the real covenant share some interest of the land independent of the covenant they’re trying to create (2)

Landlord Tenant relationship (automatic)

One party sells off part of their land and wants promises to be created at the same time

A Y X; subdivide the property and make promises that x won’t cut down trees and y also won’t cut down trees

A owned the whole lot. Then subdivided it and sold to Y and X.

No promises if it’s just that they’re simply neighbors (unless straw man)

A and B own the land next to each other before hand and then decide to make an agreement

* + - * Vertical: looking at relationship between 1 of original parties and someone who is succeeding them. What is this relationship that they have?
        + STRONG: when 1 party transfers their entire interest in the property to someone else (Selling; Assignment. NOT sublease)

Assignment: T1 and T2 have strong VP because T1 transferred the entire interest in the property to T2.

* + - * + Sublease: weak; L can’t make any of the burdens T1 promised run to T2

Enough for the benefit to run, not burden. If L is a slum lord, the L can’t sue T2, but T2 can sue L if L stops keeping the apartment in good repair

* + - **Covenant Must touch and concern the land** 
      * If it has something to do with the land or is connected to the enjoyment of the land
        + Restrictive real covenant: easy
        + Affirmative real covenant: the promise being made must relate to the property itself

Trim hedges, mow lawn, keep property in good repair, touch and concern the land

Crazy promises that don’t have anything to do with property are usually not: I promise to walk your dog every day, or the sun salutation must be done on the front lawn at sunrise

Has the lands value been increased by it?

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| --- | --- | --- |
|  | Burden | Benefit |
| Definition | Something onerous | Something nice. Treat yourself |
| Horizontal Privity Required? | Required | Not Required |
| Vertical Privity Required? | Strong VP | At least Weak VP |

* **Equitable Servitudes**
  + A covenant respecting the use of land enforceable against successor owners or possessors in equity regardless of its enforceability at law.
  + 4 Requirements
    - Statute of Frauds
    - Intent to Run
    - Notice (Actual, Record, Inquiry)
      * Trying to prove the person you’re trying to enforce the equitable servitude against had notice
    - Touch and Concern the land
  + You can get an injunction whereas a real covenant (only get cash damages)
    - If Privity (Real covenant) doesn’t exist, might this be enforceable under equitable servitude instead?
  + *Sanborn v. McLean*
    - RULE: if initial owner of all the property had some kind of general plan or general scheme of development and there is an intent to apply this common scheme to the property, a negative easement can be implied for the remainder of the property
    - Evidence of a common scheme: some kind of pattern of including restrictions in other deeds. Also brochures associated with the development (planning to move into a planned community) 🡪 imply restrictions
      * Subdivision plans/development plans that hint at what developer intended to do original vision
      * Majority: implied reciprocity, most of the other lots are restricted and will imply
      * Minority: few jurisdictions say we don’t do this. CA. Won’t imply any type of restriction on property
      * Hold: Didn’t say that Mr. McLean should have asked his neighbors about restrictions, but that the notice he had from a view of the premises on the street, clearly indicating the residences were built and the lots occupied in strict accordance with a general plan, he was put to inquiry, and had he inquired he would have found a record the reason for such general conformations, and the benefits thereof serving the owners of lot 86 and the obligations running with such service and available to adjacent lot owners to prevent a departure from the general plan by an owner of lot 86.
        + Implied equitable servitude/negative easement

**ESTATES**

**I. Classification of Present Possessory Estates**

* **Absolute Estates: No condition subsequent**
  + Fee Simple Absolute (or “fee simple”): O conveys Blueacre “to A and her heirs”
    - **Future Interest:** O has no future interest, nor does any of A’s children (if she has any).
  + Life Estate: O conveys Blueacre “To A for life.”
    - **Future Interest:** O has a reversion
  + Term of Years: O conveys Blueacre “to A for ten years”
    - Note: unlike fee simple and life estate, this is a nonfreehold estate. No seisen.
    - **Future Interest:** O has a reversion
* **Defeasible Estates**
  + Fee Simple Determinable: Ends automatically when an event occurs. The grantor is conveying a fee simple only until an event happens.
    - **Identification** 
      * Uses words of duration, such as “so long as,” “as long as,” “while used for”, “until,” or “unless.”
      * Limitation is not separated by a comma
      * **Ex.** O conveys Blueacre “to A as long as A does not divorce.” A has a fee simple determinable, O has a possibility of reverter.
      * **Ex.** O conveys Blueacre “to A as long as A does not divorce, then to B.” A has a fee simple determinable, B has a shifting executory interest.
    - **Future Interest**
      * Either O has a possibility of reverter or a 3rd party has a shifting executory interest.
  + Fee Simple Subject to a Condition Subsequent: May be cut short or divested at the tranferor’s (O’s) election when a condition occurs.
    - **Identification** 
      * Uses words such as “but if”; “provided, however”; and “on condition that”.
      * Condition subsequent appears after a comma
    - **Ex.** O conveys Blueacre “to A, but if A divorces, O may reenter.”
    - **Future Interest:** O always has a right of reentry.
  + Fee Simple Subject to an Executory Limitation: May be cut short or divested at a transferee’s election when a condition occurs. May be subject to a shifting or springing executory interest.
    - **Identification:** Looks like fee simple subject to a condition subsequent, but third party has right of entry.
    - **Ex.** O conveys Blueacre “to A, but if A divorces, B may reenter.”
    - Note: B has a shifting executory interest. If A divorces, B will have to reenter to get the property. Some study aids will say otherwise, so don’t get confused.
    - **Ex.** O conveys Blueacre “to A when a woman becomes President of the United States.” O owns Blueacre in fee simple subject to a springing executory interest.

**II. Classification of Future Interests**

**Future Interests in a Grantor/Transferor**

* **Possibility of Reverter:** Shifts from a fee simple determinable
  + **Ex.** O conveys Blueacre “to A and her heirs as long as A does not divorce.” A holds a present possessory estate in fee simple determinable, O has a possibility of reverter.
* **Right of Reentry:** O’s right associated with a fee simple subject to a condition subsequent
  + **Ex.** “To A and her heirs, but if A divorces, O may reenter.” O has a right of reentry.
* **Reversion:** Catch-all. A future interest that arises when the property owner grants an estate to another, but does not dispose of the entire interest, and where there is not a possibility of reverter or a right of reentry.
  + **Ex.** O conveys Blueacre “to A for life.” O has a reversion.
  + **Ex.** O conveys Blueacre “to A for life, then to B when B turns 21.” B is 18 at the time of the conveyance. O has a reversion.

**Future Interests in Transferees/Grantee**

* **Vested Remainders**
  + **Indefeasibly Vested Remainders:** (1) property is given to an ascertained person and (2) property is not subject to any conditions other than the natural termination of the preceding estate (typically death or a term of years).
    - **Ex.** O conveys Blueacre “to A for life, then to B.” A has a life estate, B has an indefeasibly vested remainder in fee simple. B is ascertained and her interest isn’t subject to any conditions other than the natural determination of A’s estate.
  + **Vested Remainders Subject to Open (Partial Divestment):** (1) property is given to an ascertained person, and (2) property is not subject to any conditions under than natural termination of the preceding estate, but (3) later-born children entitled to share in the gift.
    - **SUBJECT TO RULE AGAINST PERPETUITIES**
    - **Ex.** O conveys Blueacre “to A for life, then to B’s children and their heirs.” B has one child, C. Class has a vested remainder subject to open because one member of the class, C, has been ascertained, the property isn’t subject to any conditions other than A dying, but B’s later-born children can share in the gift.
  + **Vested Remainders Subject to (Complete) Divestment:** (1) property is given to an ascertained person, but (2) property is subject to a condition that does not involve the natural termination of the preceding estate.
    - **Important:** For VR subject to divestment, a comma will always separate the grant from the condition.
    - Third party with a future interest following a FS subject to complete divestment has a shifting executory interest.
    - **Ex.** “To A for life, then to B and her heirs, but if B divorces, then to C.” B has a vested remainder subject to divestment. C has a shifting executory interest.
* **Contingent Remainders:** Property given where no member of the class has been born or ascertained; OR where the remainder is subject to a condition precedent. O always has a reversion.
  + **SUBJECT TO THE RULE AGAINST PERPETUITIES**
  + **Ex. of no born class member.** “To A for life, then to the children of B and their heirs.” B has no children when interest is created. The unborn children have a future interest, but have not been identified. They therefore have a contingent remainder.
  + **Ex. of no ascertained class member.** “To A for life, then to the heirs of B.” B is alive at the time of conveyance.
    - B’s heirs cannot be ascertained until B dies. The class therefore has a contingent remainder.
    - If A dies and B is still alive, property will temporarily go back to O until B dies and her heirs are ascertained.
  + **Ex. of condition precedent.** “To A for life, then to B and her heirs if B gets married.”
    - A has a life estate and B has a contingent remainder subject to a condition precedent.
      * If B gets married, B does not cut short A’s life estate. Rather, marriage causes B’s remainder to be vested.
      * If A dies before B gets married, the property goes back to O. If B later marries, the property will go to B.
    - Note that there is no comma separating the grant to B and the condition. This distinguishes a contingent remainder subject to a condition precedent from a vested remainder subject to complete divestment.
  + **Alternate contingent remainders:** “To X for life, then to Y and her heirs if Y graduates from college before the age of 25, if not then to Z and her heirs.” Y and Z have alternate contingent remainders.
    - Note: Suppose Y graduates from college before the age of 25 while X is still alive.
      * X still has a life estate.
      * Y now an indefeasibly vested remainder, because the condition has been met.
      * Z has nothing, because Z’s condition has failed.
* **Executory Interests:** Future interest held by a transferee that either (1) divests or cuts short some interest in another transferee or (2) divests the transferor in the future. This interest *is* *not* held by the grantor. EIs *do not* follow a naturally ending estate.
  + **SUBJECT TO THE RULE AGAINST PERPETUITIES**
  + **Shifting vs. Spring Executory Interests**
    - Shifting Executory Interest: Executory interest that cuts short an interest in another transferee
      * **Ex.** O conveys Blueacre “to A and her heirs, but if A stops farming the land, then B may enter.”
        + A owns the estate in fee simple subject to an executive limitation.
        + B has a shifting executory interest, because B’s interest cuts short another transferee—A.
        + B must enter the land to get title if A stops farming. Analogous to a fee simple subject to condition subsequent.
      * **Ex.** O conveys Blueacre “to A so long as A farms the land, then to B.”
        + A has a fee simple determinable.
        + B has a shifting executory interest.
        + Title will pass to B if the condition is broken.
    - Springing Executory Interest: Cuts short the transferor’s interest in the property at some future point.
      * **Ex.** O conveys Blueacre “to A and her heirs in one year.” O has fee simple subject to a springing executory interest. A has a springing executory interest, because it cuts short the grantor O’s interest in the future.
      * **Ex.** O conveys Blueacre “to A for life, then one week after A dies, to B and his heirs. A has a life estate, O has a reversion for one week, B has a springing executory interest that divests O.
  + **Executory interests follow a fee simple subject to an executory limitation**
    - O conveys Blueacre “to A and her heirs, but if A sells alcohol on the property, then B may enter and take the property.”
      * A has a fee simple subject to an executory interest
      * B has a shifting executory interest. If A sells alcohol on the property, then B can enter and take the property.
    - Note that like fee simple subject to a condition subsequent, a comma separates the grant to A and the condition.
  + **Executory interests can follow a fee simple determinable estate.**
    - O conveys Blueacre “to A and her heirs as long as A does not sell alcohol on the property, then to B and her heirs.”
      * A has a fee simple determinable.
      * B has a shifting executory interest.
    - Note that no comma separates the grant to A and the condition.
  + **Executory interests always follow a vested remainder subject to complete divestment.**
    - O conveys Blueacre “To A for life, then to B, but if B pierces her nose, to C and her heirs.
      * A has a life estate
      * B has an indefeasibly vested remainder subject to complete divestment
      * C has a shifting executory interest.