Property Law Outline

1. **Concept of Property**
	1. relationships among people with regard to things
		1. 2 kinds:
			1. Among people regarding things
			2. Between people and things
	2. Property Ownership Relationship
		1. Bundle of rights (simultaneous and non-exclusive):
			1. Right to transfer
			2. Right to exclude
				1. Shack- but not against people that don’t have malicious intent who may have right to be there
			3. Right to Use
				1. The use of something is where most of the value lies
				2. In intellectual property
				3. Expect something less than complete autonomy when using land- never has been absolute right. Have to look out for people who your land use effects

Sundowner v. King- spite fence?

 Cause of action **abatement**- remedy for nuisance- has to do with removing the nuisance

Rule: no right to air and light on property line

Here though- this is stupid, wasteful and malicious! Sole purpose of harming and devaluing neighbor. Rule: Cannot harm neighbor.

In nuisance cases, court balancing right to use of both parties. Balance of social utility.

Rule here: If just malice and no other purpose, it is nuisance

Prah v. Maretti- shadow on solar panels. Not trespassory because not physical on land. Nuisance is non-tresspassory.

**Reasonable use doctrine**: Whether or not nuisance depends on whether the use was reasonable or not. Plaintiff harm vs. Defendant’s utility. Also about public interest as well.

* + - 1. Right to Destroy
	1. Property Theories
		1. First possession
			1. Being earlier is better- If you are earlier in terms of time, your claim is most likely to be better (rule of temporal priority)- a nice rule of certainty
		2. Encourage labor
		3. Economic Maximation of utility (human happiness)
		4. Democracy- 99%, occupy movement
		5. Personal Development- people get interested in the things that they use
	2. Pierson v. Post- Tompkins Rule: Pursuit alone is not enough for ownership. Need possession. Need to have clear possession of the fox. Post only had pursuit, so he loses.
		1. Case is about wild animals, and gives the catergory a name: ferae naturae “of a wild nature”
		2. Manucaption- physically taking possession with hands
	3. White v. Samsung Electronics
		1. Right of publicity- about what that person has created- a persona
		2. Right to own other people’s minds- reaction/reminder: a property right
		3. A common law ownership for that set of attributes that calls you up in people’s minds (if you are famous)
		4. Dissent Kozinsky- harmful to overprotect IP, stifles creative forces
			1. “public domain”- ideas/thoughts/names/facts that everyone can use and manipulate as they want to. The more Vanna White owns, the less we own (ex-less parody) Parody (poking fun) vs. satire (commenting on material culture- on some issue of public importance)
	4. Johnson v. M’Intosh
		1. **Ejectment**- to recover title/physical possession of land. Only applies to land. Not about damages. Will get specific performance.
		2. **Quiet title**- asking which person has the better claim to the land
		3. Competing claims for title here. M’Intosh wins because transaction between Indian and father was illegal. Indians were not allowed to transfer title back then. (right to transfer)
		4. Rule of discovery (right to exclude): first sighting (by a European govt) has the right to claim it first. And all other nations must stand back. Though- discovery not enough in Pierson v. Post- have to capture, put in your hands
		5. Conquest: original inhabitants may have had chance at title- fought, but lost.So they become subject to same sovereign. (right to exclude) Problem: might makes right, encourages land grabs
	5. Moore v. Regents
		1. Right to not transfer
		2. Right to exclude- doctors from using cells to their advantage
		3. **Conversion** cause of action- that they took personal property that he owned (spleen) and made mo cell line patent. Taking possession of a person’s property. A damage action (in contrast to ejectment). Not about repossessing the spleen! Seeking the value he was deprived of.
		4. Moore loses on the conversion action. Owned spleen while in body. Do not own spleen once out of body. Health/safety code says how they should be destroyed. Ownership relationship severed after it was physically removed from him.
	6. Right to Exclude
		1. Jacque v. Steenberg Homes, Inc.
			1. Cause of action trespass, no actual harm done
			2. A willful trespass- knew it was wrong and did it anyway
		2. State v. Shack
			1. For criminal trespass, entering without permission
			2. Narrows right to exclude
				1. Can’t exclude social workers to provide services to occupants- people bringing legal/medical services
	7. Types of Property Transfer- Da BIG Picture

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| **Voluntary**

|  |  |
| --- | --- |
| Commercial | Donative Transfer |
| Sales of goods, land sales | Gifts Inter vivos, Gifts Causa Mortis, Testament Transfers (wills) |

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| **Involuntary**Adverse possession, eminent domain, execution of judgments |
| **Transfers by Operation of Law**When a property owner dies, inheritance, escheat |

1. **Owning Real Property**
	1. Real property: consists of rights in land and things attached to land
	2. Ownership > Possession > Uses
	3. Rule of Capture: first claim to resources on, under, over that line of land
	4. **Tacking**: adverse possession periods of 2 or more occupants can be added together
	5. **Privity**: tech term for relationship. There is privity between successors in ownership or possession of land. Privity can be established by handing over the keys
	6. Airspace ownership rule: you own airspace you might “reasonably use”- Cosby rule. You don’t own airspace up to the heavens.
	7. Subsurface: rule of reasonable use of subsurface
	8. Adverse Possession
		1. Justifications:
			1. Preventing frivolous claims. Punish indolent owners of land.
			2. Correcting Title Defects- so title reflects reality
			3. Encouraging Development- rewarding industrious use of land
			4. Protecting personhood- expectations both of possessor/user and community
		2. Adverse Possessor has burden of proof for the following Elements:
			1. Actual possession- must use in some manner as owner would. Acts of dominion over property. Don’t need to live there. Use of land for recreation not enough.
			2. Exclusive possession- not shared with owner or public.
			3. Open and notorious- Visible and obvious (upon inspection of owner). Acts could be seen. What people in neighborhood think. Person in woods that hikers noticed one day not open.
			4. “Adverse and Hostile”
				1. Claiming land against anyone else’s claim.
				2. In Van Valkenburgh v. Lutz, words and conduct show not occupying “under a claim of title”
				3. What kind of attitude should an adverse possessor have?

In Fulkerson v. Van Buren (church in swamp case)- Church loses because did not have bad intent required.

In Tioga Coal Co. v. Supermarket, hostility is defined as intent to hold title against title holder. Hostility is found to be implied in the mind of trespasser- don’t need to actually picture in mind the actual owner.

Varies from state to state

* + - * 1. True owner’s consent does not meet the standard
				2. Some states- need good faith that person is owner
				3. Some states- need bad faith to take title
				4. Others- irrelevant
			1. Continuous- as a reasonable owner would be. Doesn’t need continuous occupation and use. As is suitable for the kind of property.
			2. For the Statutory period- **statute of limitation**: statutory deadline for bringing cause of action. Time starts over if there is visit by owner.
		1. Many states provide enhanced protection for adverse possessor whose claim is based on **color of title**- An appearance of title (on paper). A deed, will, judgment, or other written doc that may be invalid for some reason. An appearance of title, tangible (usually paper). Tangible, written basis for claim (written instrument).
			1. Functions:
				1. Evidence of basis for claim of right, but APs can have claim of right without color of title
				2. Easier possession requirement for some states because area claimed more definite
				3. Basis for constructive possession of land- results in Adverse Possessor of land not actually occupied by Adverse Possessor
		2. Constructive Adverse Possession
			1. Based on color of title
			2. Entitles adverse possessor to what is in title. So if AP only occupies little section of land, will be awarded all the land in the title, not just that section.
		3. Causes of Action to Vindicate Possession of Land
			1. Ejectment (repossession)
			2. Trespass (damages or crime)
			3. Quiet Title Action
1. **Owning Personal Property**
	1. Personal property: rights in moveable items and intangible things
	2. 4 Ways to Acquire Rights in **Chattels** (tangible personal property):
		1. Capture
			1. Rule of Capture- possession of unowned personal property (**res nullius**), abandoned tangible property (**chattels**)
			2. Rule: To acquire animals **ferae naturae**, the pursuer must bring them under his power and control, as to show he does not intend to abandon them again
				1. State v. Shaw (fishes)- the fish did not need to be completely confined
			3. Popov v. Hayashi- First person to pick up baseball, or the one to finally stop and possess it? Need complete control, and neither had it.
			4. What counts as possession varies enormously
		2. Find
			1. Finder may either be First possessor (new owner) of abandoned property OR
			2. Finders may be in subcategory of **bailments**- a type of transfer of possession of personal property. There can be involuntary bailees and implied bailments. Implied bailment: involuntary bailee
				1. Bailor transfers to Bailee just the possessor right. Not the owner right.
				2. Bailor: often an owner of personal property
				3. Bailee: in possession of someone else’s tangible personal property
			3. Does a finder always prevail or lose?
				1. Rule- finding things on public vs. private land. Who has possession of property when it is leased- the tenant
				2. Rule- do not have rights to something found by trespassing
				3. Circumstances matter. You want to be a finder, but may need to give back.
				4. Hannah v. Peel- no connection to house- doesn’t “possess,” so no connection to the brooch found inside by someone. Need constructive possession- something more than legal title. Have to set foot on property to possess it.
				5. McAvoy v. Medina- true owner placed pocketbook on a table in a barbershop. Shopowner wins- better suited to get property back to the owner, who may come back to store (concern for court: getting it back to owner)
				6. Haslem v. Lockwood
				7. Benjamin v. Linder Aviation- tech Benjamin finds money in plain. Money is mislaid- because how it was hid
				8. Finders are proxies to the true owners
			4. 4 Categories of “found” chattels
				1. Lost

Money found on floor

* + - * 1. Mislaid

Rare book found on table

* + - * 1. Abandoned
				2. Treasure Trove- ancient property

Tends to belong to the state rather than landowner

* + 1. Adverse Possession
			1. Can have adverse possession apply to missing personal property
		2. Gift
			1. Immediate transfer of property rights from the donor to the donee, without any payment or consideration
			2. General rule: no conditional or revocable gifts
				1. Exception- Albinger v. Harris (dissent says ring is conditional)
			3. **Inter vivos gift**-usual type of gift made during the donor’s lifetime
				1. Donative intent

Albinger v. Harris- engagement ring case. Ring was unconditional gift and Harris can keep it.

MidtermQ: No donative intent when guy hands over keys and says “You drive the car better than I do”- it is not enough

* + - * 1. Delivery

For a gift to be valid, need to deliver it

Never enough to just say. Need to deliver something.

Needs to be a present transfer. Not in future.

Manual- physically transfers

Constructive- requires the donor physically transfer to the done an object that provides access to the gifted item (ex- keys)

Symbolic- donor physically transfers to the done an object that represents or symbolizes gifted item

Rule is that no gift occurs until a check is cashed

May not have to be physical according to Gruen v. Gruen (painting)

GIFT DELIVERY HYPOS p217

* + - * 1. Acceptance
				2. Can’t be revoked
				3. A gift intended to take effect in the future is invalid
			1. **Testamentary gift**- effective only after donor dies, made by will
			2. **Gift Causa Mortis**- gift of personal property made by a living person in contemplation of death
				1. Elements:

Donative intent

Delivery

Acceptance

Donor’s anticipation of imminent death

* + - * 1. Immediately effective when made
				2. This is revocable
				3. Case Brind v. International Trust Co.- Jewelry given to Trust upon her death because of upcoming operation. Operation goes fine, but she dies of unrelated illness. Court says gift causa mortis not established here.
			1. Bailment- getting a gift and letting person hold it
	1. Causes of Action to Vindicate Possession of Personal Property
		1. Replevin- recover possession of the items (Repossession)
		2. Trover- recover the value of the item (damages)
		3. Conversion (modern conversion actions can seek both remedies)
		4. Larceny (crime)
1. **Owning Intangible Property (Intellectual Property)**
	1. Remember da Big Pic

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| Property |
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| --- | --- | --- | --- | --- |
| Real | Personal

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| --- | --- | --- |
| Tangible | Intangible

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| IP |

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* 1. **IP**
		1. 3 forms of federally registerable IP rights
			1. Copyrights- use of expression. Monopoly for life + 70 years. Monopoly on the creative expression and the use of it
			2. Patents- monopoly on use for 20 years from filing. Monopoly on the use of idea.
			3. Trademarks- monopoly on use as long as distinguishes origin/brand. Monopoly on the use of the brand.
		2. All arise under first-in-time system for allocating entitlements
		3. All governed by federal statutes
		4. Most IP is a public good
		5. Common law approach: IP rights were not recognized- basic rule
		6. Generally, fashion designs not recognized as IP (Cheney Bros v. Doris Silk Corp)
		7. Ownership acquired by creating it
		8. Limited monopolies on use as reward/incentive
		9. Regulation usually necessary to enforce exclusion of others from use
		10. Mostly non-rivalrous goods (many can use at the same time)(vs. land and cars as rivalrous goods)
		11. Public Domain
			1. IP- whether you can take things out of the public domain-
			2. Public domain- available for anyone to use- most info, ideas here
	2. **Copyrights**
		1. From Article 1 Sec 8, clause 3- Patent/copyright clause
		2. Article 1, Sec 8- Commerce Clause
		3. 8 types of copyrightable subject matter
		4. to promote the progress of science and the arts, giving authors an incentive to produce works that will benefit public
		5. Copyright law protects the manner in which an idea is expressed- not the idea itself
		6. Copyright happens automatically
		7. Concepts, principles, discoveries, facts, and other ideas not covered by copyright (the idea-expression dichotomy)
		8. Owner of copyright holds a right to exclude
		9. Author’s life + 50 years
			1. CTEA Act in 1998 extended terms by 20 years
			2. Any work published in US before 1923 is now in public domain
		10. 1976 Copyright Act
			1. Protects “original works of authorship fixed in any tangible medium of expression”
			2. 3 requirements
				1. Originality
				2. Work of authorship (creativity, rather than labor)
				3. Fixation
			3. Extremely long term
			4. Not required- registration or notice
		11. Feist Publs Inc v. Rural Telephone Service - Facts not copyrightable. But compilations of facts are
			1. Because copyright is about originality. Need creative original expression.
			2. Originality need not be novel (2 poets can copyright same poem)
			3. Fact compilations may have originality. Here, none though
		12. Infringement
			1. To win infringement suit, plaintiff must prove:
				1. Plaintiff owns valid copyright
				2. Defendant actually copied plaintiff’s work

Hard to prove. Can prove through proof of access, or without that, through similarity- “striking” meaning so similar it could not have been a coincidence (Selle v. Gibb)

* + - * 1. Ordinary observer would say defendan’t work was substantially similar to plaintiff’s

Defendant knowledge and intent irrelevant

* + - 1. A defense would be “fair use”- fair use doctrine:
				1. Allows minor use of a copyrighted work where the use does not materially affect the rights of the owner
				2. Factors:

Purpose and character of use, whether commercial or non-profit in nature

Nature of copyrighted work

Amount and substantiality of the portion used in relation to the copyrighted work as a whole

Effect of the use upon the potential market for or value of the copyrighted work

* + - * 1. Harper and Row Publishers v. Nation Enterprises- Nation publishes Ford article. Holding: not fair use. Nation in the wrong. Court says no need to expand fair use doctrine to make a public figure exception
	1. Patents
		1. Right to exclude
		2. Patent term is 20 years
		3. No fair use defense under patent law
		4. Issuance of a patent does not guaranty that it is valid
		5. 5 elements for a valid patent:
			1. Patentable subject matter
				1. Abstract concepts, math algorithms, scientific principles, and physical phenomena cannot be patented
			2. Utility
				1. Must be a useful invention- one which offers actual benefit to humans
			3. Novelty
				1. Doctrine of equivalents:

Performs substantially the same overall function or work (form)

In substantially the same way (way)

To obtain substantially the same result (result)

* + - 1. Nonobviousness
				1. Scope and content of the prior art
				2. Diffs between prior art and claims at issue
				3. Level of ordinary skill in the pertinent art
				4. Secondary considerations
			2. Enablement- the patent application must describe the invention in detail to enable skilled person to use
		1. Cases
			1. Diamond v. Chakrabarty- whether microorganism is patentable. Conclusion: Patentable. Product of nature, living thing not patentable. But here, this is not a natural phenomenon.
			2. Association for Molecular Pathology v. Myriad Genetics- Can’t patent isolated human genes- can’t just “put a fence” around something natural. But you can patent the process of isolating a gene.
			3. Perpetual motion machine working with gravity NOT patentable subject matter because law of nature
		2. HYPOS p279
			1. Dog with human brain- patentable. If too close to human though, not patentable.
			2. New golfing technique- patentable
			3. Surgeon placing patient on all-fruit diet before surgery that shortens recovery time- ?
	1. Trademarks
		1. Any word, name, symbol, or device which is used to identify and distinguish the goods sold by one person from those of others
		2. Service mark- word, name, symbol, or device so used in connection with services
		3. Trademarks always FOR a particular product or service
		4. Trademark owner has right to exclude
		5. Purpose: protect consumers from being deceived
		6. To trademark, need:
			1. Distinctiveness (spectrum)
				1. Generic – descriptive – suggestive – arbitrary (fanciful)
				2. Must distinguish source of goods
			2. Non-functionality
			3. First use in trade
		7. Federal registration not required, an unregistered trademark is valid
		8. Have to earn trademark by creating secondary meaning
			1. When in the minds of the public, the primary significance of a product feature is to identify the source of the product rather than the product itself
			2. You can register, but you get secondary meaning later and that is when it is valid.
			3. Thermos lost its meaning- because generic. Kleenex, bandaid also. No magic percent/age.
		9. Kinds of marks
			1. Arbitrary/fanciful mark “Exxon”
			2. Suggestive mark “Roach motel”
			3. Descriptive Mark “Coca-Cola”- must have secondary meaning (public associates the mark with good or service)
			4. Generic- not eligible for protection “yo-yo”
		10. Cases
			1. Qualitex Co. v. Jacobson Products Co.- Can trademark color, because it has secondary meaning here
		11. Infringement
			1. Plaintiff must prove:
				1. Holds a trademark
				2. Defendant used mark in a manner likely to cause confusion or deceive consumers
			2. Dilution- damages famous trademarks. Whittles away value of trademark. No confusion. Blurring injury.
1. **Leasing Real Property**
	1. Modern Landlord/Tenant law

|  |
| --- |
| Statutes and Regulations-anti-discr. Laws, housing codes |
| Contractual Agreements in Lease-duty of good faith and fair dealing |
| Common Law-leasehold structure and automatic legal reqs, consequences/duty, implied covenants, warranties |

* 1. Creating the Tenancy
		1. Selecting the Tenant
			1. Law traditionally permitted a landlord to refuse rent to anyone for any reason
			2. Now-
				1. Civil Rights Act of 1966- Additional protection against racial discrimination. Says: All citizens of US shall have same right as white citizens to inherit, purchase, lease, sell, hold and convey real and personal property
				2. Fair Housing Act of 1968 prohibits discrimination on race, color, religion, sex, familial status, or national origin. And handicapped. Includes refusing to sell/negotiate, discrimination in the terms of agreement, and discrimination by indicating preference in an ad.

Does not apply to dwellings with no more than 4 families living there, if the owner occupies one of the living quarters as his residence

Does not apply to single family homes (if he owns less than 3 houses and does not use real estate broker or agent in the rental)

* + - * 1. Tenant must show prima facie case for discrimination under Fair Housing Act. Then Landlord has burden of proof that she did not discriminate. Prima facie case:

Plaintiff is member of protected class and defendants knew or suspected that he was

That he applied for and was qualified to rent the property in question

That defendant’s rejected his application

That the property remained available thereafter

* + - 1. HYPOS p446
				1. Prefer tenant who can speak German- would violate ad provision of Fair Housing Act. Stating a preference states a non-preference for someone else.
				2. Won’t rent home to lady because black and female. Violates Civil Rights Act because racial discrimination. Fair housing Act would apply, but does not because single family house.
				3. Won’t rent out apartment to lady with “too many children”- Not violation of civil rights act. Violation though of the Fair Housing Act- familial status.
				4. “female roommate wanted to share 2 bedroom apt.”- allowing someone into “personal residence” and therefore fair housing act does NOT apply
				5. Won’t rent out because person is vegetarian. Fair housing act does NOT cover this.
				6. Hispanic with good credit applies for apt and is rejected. Place is still vacant.- Could violate Fair Housing Act, but landlord could give non-discr. reason
		1. Selecting the Estate
			1. Types of leases:
				1. Term of Years tenancy (traditional)

Fixed duration/start and end point. Oral or written. Created voluntarily by lease. Notice irrelevant- it just ends.

Note- continued payment after end of term of years creates a new periodic tenancy

* + - * 1. Periodic Tenancy

Indefinite, self-renewing. Oral or written. Created voluntarily by lease. Need notice to end (common law says this needs to be for time of whatever the period was)

Automatically renews for successive periods unless advance notice (ex- month to month)

* + - * 1. Tenancy at will

No fixed ending point

No advanced notice needed

* + - * 1. Tenancy at Sufferance

When a person who rightfully took possession of land continues to stay after right ends

Created by operation of law from wrongful conduct of tenant that continues past term

At the landlord’s tolerance

* + - 1. **License**- personal privilege to use the land of another for some specific purpose
			2. Lease = Split into Exclusive Possession (tenant) and Ownership (Landlord)
				1. L and T have diff types of simultaneous rights regarding the same land
				2. Both L and T can transfer what they own
			3. 2 sets of rights
				1. Privity of Estate

Relationship carries with it legal rights and responsibilities

Status rights and responsibilities (relationship like this- bailment)

abstract

* + - * 1. Contract
			1. Cases
				1. Tenancy for life? No. It is a tenancy at will. (Kajo church square v. Walker)
		1. Negotiating the lease
			1. SoF- must be in writing if over a year. Doesn’t have to be in writing to be enforceable if less than a year.
			2. Standard forms
			3. Rent control
		2. Delivering Possession
			1. Who has responsibility for holdover tenants (tenants at sufferance)?
				1. American rule- landlord merely covenants possession, legal right. Tenant has legal right to possession. Securing actual possession is tenant’s problem.
				2. English rule (most US jxs including CA)- landlord needs to deliver actual possession, physical (court adopts this in Keydata Corp v. US). Implied covenant from landlord to provide tenant with initial actual possession. The tenant, however, must defend the possession during the tenancy.
		3. Condition of the Premises
			1. Common Law doctrine of permissive waste- tenant still responsible for making repairs if contract was silent
			2. Common law doctrine of **constructive eviction**- wrongful conduct by the landlord that substantially interfered with the tenant’s beneficial use and enjoyment of leased premises
				1. Once a leasehold has started, for the tenant, it is all about practical possession- more than just bare possession- enjoyment.

American rule- tenant has bare legal right to possession, but securing actual enjoyment is tenant’s problem- at the beginning and during the tenancy

English rule (most US jxs)- it’s the landlord’s problem

* + - * 1. Tenant could vacate premises and end lease
				2. Functional equivalent of actual eviction. Legal fiction. “As If” eviction.
				3. Talking about quality the landlord is responsible for

Old way- leave tenant alone

New way- affirmative duty of landlord to protect tenant to enjoy

* + - * 1. Tenant’s affirmative defense against landlord’s suit for rent (NOT a cause of action. Can’t “sue” for constructive eviction)
				2. Elements:

Landlord’s wrongful conduct

“Wrongful conduct” can be satisfied by omission

Fails to perform obligation in lease

Fails to adequately maintain and control common area

Breaches statutory duty owed to tenant

Fails to perform promised repairs

Allows nuisance-like behavior

Substantially interfered with tenant’s use and enjoyment

Forces tenant to leave (need actual move out)

Tenant relinquishes possession

* + - * 1. Terminates the lease- no further rent owed by T, relationship is over
				2. General rule: tenant can’t assert constructive eviction due to the acts of 3rd parties. Exception where landlord has legal right to control the 3rd party conduct.
				3. Must notify landlord of problem, give reasonable time to fix problem, then vacate premises
			1. Cases
				1. Landlord found to be in the wrong for not dealing with protesters outside leased abortion clinic. Deprived of use and enjoyment for leased purpose. (fidelity mutual life insurance co. v. Keminsky)
				2. Jewelry store leaves mall after 5 years. Says contructively evicted by noise that it had complained about. Court says constructive eviction can’t happen when tenant doesn’t surrender property within “reasonable time.” 5 years too long.
			2. Implied Warranty of Habitability
				1. Rejecting rule of caveat emptor- where tenant has duty to inspect premises to determine their safety and suitability before leasing
				2. Unwritten “status” right of residential tenants and obligation of residential landlords based on residential leasehold relationship
				3. Warranty- a promise
				4. Can’t be disclaimed
				5. Doesn’t need to be in lease
				6. “Habitability”

Doesn’t require perfection

Standards vary. CA- housing codes and civil code

Requires “bare living requirements” and fit for human occupation

ASK: Is this decent, safe, and sanitary? Up to the housing codes or common law?

* + - * 1. In order to use implied warranty of habitability, must notify landlord of defects and allow for reasonable time for repairs
				2. Remedies for breach:

Withhold rent- incentive for landlord to fix

Repair and deduct

Sue for damages

* + - * 1. In most states, doesn’t apply to commercial leases
				2. HYPOS p481

Strike causes garbage to pile up. Cockroaches and vermin infest apartment unit- Violation. Landlord has duty to pick up garbage.

Apt in high crime area. 4/52 apts have been burglarized. Lock, but no deadbolt lock. Not violation.

Can smell the smoke from a smoker in another apt. Not covered.

Dishwasher broken and landlord can’t seem to fix. Not covered.

Lead paint falling off walls in unit. Violation.

* + 1. Transferring the Tenant’s Interest
			1. General rule: both tenant and landlord entitled to transfer their interest to 3rd parties
				1. Tenant can do this through either an assignment or sublease
			2. Assignment
				1. Where you transfer remaining term. All the time left.
				2. Privity of estate between new tenant and landlord, even though no contract between them.
				3. New tenant takes place of old tenant. Old tenant no longer has privity of estate with landlord. New tenant now has the obligation to pay rent.
				4. IF lease calls for consent of lessor for assignment, consent can only be withheld for reasonable objection to assignee or proposed use (Kendall v. Ernest Pestana Inc.)
			3. Sublease
				1. Transfer less than entire term
				2. Landlord and tenant still have privity of contract and estate
				3. New landlord-tenant relationship
				4. No legal duty of subleaser to pay landlord
				5. IF contract requires landlord’s consent for sublease, options

Sole discretion clause

Reasonableness clause

No standard in lease

* + - 1. Some jx- based on intent of the parties to determine whether assignment or sublease
			2. HYPOS- Who owes rent? p491
				1. T assigns to B, B assigns to C, C subleases to D. T and C owe rent.
				2. T “assigns, subleases and transfers all my interest in the lease” to A. T and A owe rent
				3. T transfers all of his rights in leased premises to E for a period of 5 years. T owes.
		1. Ending the Tenancy
			1. Landlord can terminate T’s possession early by:
				1. Eviction
				2. Accept T’s surrender of possession
			2. Tenant can terminate T’s possession early by:
				1. Abandonment
				2. Offer Surrender (doesn’t have to be in writing)
			3. Surrender- when T and L mutually agree to terminate the lease early
				1. Voluntary for both T and L
				2. Ends leasehold
			4. Abandonment- when T vacates property without justification and without intention of returning and defaults in payment of rent
				1. Voluntary for tenant. Involuntary for Landlord.
				2. Leasehold continues. T remains liable for rent.
				3. 3 options for Landlord in case of abandonment:

Sue for all rent

Terminate the lease

Mitigate damages and then sue for rent

Must use reasonable effort to re-let apartment (Sommer v. Kridel)

* + - 1. Eviction
				1. Involuntary for tenant. Voluntary for Landlord.
				2. Ends leasehold
				3. A statutory landlord choice (alternative is common law ejectment)

Statutory procedure that returns possession of real property to owner/landlord

forceable entry and unlawful detainer statutes- alternative to ejectment cause of action

forceable entry- Can’t

unlawful detainer- provides a summary (quick) court action for landlord to recover possession from a tenant in default

Restricting landlord’s ability to remove tenants

* + - * 1. Can’t evict in retaliation for joining tenant association (HIllview Assoc. v. Bloomquist)
				2. End of lease is not good cause for eviction (AIMCO Prop v. Dziewisz)

Need a good cause like:

Fail to pay rent

Damaging property

Breach of material lease provision

Health or safety hazard

* + - * 1. If entitled to evict, landlord can use two ways:

Self-help- physically, with reasonable amount of force

Must be peaceable. Changing locks when there is animosity between parties not peaceable. That is forceable entry, which is not allowed. (Berg v. Wiley)

Sue the tenant- and secure judgment ordering T’s eviction, and enforced by law enforcement officer

* + - 1. Security deposits- for default, repair, cleaning, future default
1. **Concurrent Ownership and Marital Property**
	1. Concurrent Ownership- 3 types
		1. Tenancy in Common (presumed)
			1. Each tenant in common has an undivided, fractional interest in the property
			2. Undivided possession
			3. Each may transfer his interest to another person
			4. Each can use and possess whole parcel, even if only a fraction (ex- 1/3)
		2. Joint Tenancy
			1. Each tenant in common has an undivided, fractional interest in the property
			2. Right of survivorship- if A dies, his portion goes to B, who is now sole owner
				1. Designed to keep property in a single family
			3. Created when:
				1. Time- All joint tenants must acquire interest at the same time
				2. Title- Must acquire title by same instrument (can’t be different deeds)
				3. Interest- Must have same shares in estate, equal in size and duration (No- 1/3, 2/3)
			4. If any of these elements are missing, it is tenancy in common
			5. If one joint tenant transfers interest, joint tenancy is severed- grantee becomes tenant in common. The other 2 joint tenants are still joint tenants.
			6. Straw person to create joint tenancy
			7. Severing joint tenancy:
				1. When one tenant conveys interest to 3rd party (then tenancy in common)
				2. Not severed by lease. Also, lease dies when leasor dies. (Tenhet v. Boswell)
				3. Severed by mortgage?

Title theory: severs joint tenant because destroys unities of time and title

Lien theory: looks at it as a lien to secure repayment of the debt- no end to joint tenancy

Debate though on whether mortgage survives death of cotenant

Secret severance- joint tenancy to tenancy in common

* + 1. Tenancy by the Entirety
			1. Only married couples
			2. Right to use/possess whole property
			3. Right of survivorship
			4. UNseverable survivorship (no partition either)
			5. Indivisible ownership by marriage
			6. 5 unities (4 + marriage)
			7. But: can only be ended by death (guaranteed survivorship in the other spouse) or when marriage ends
				1. Neither spouse can transfer
			8. Common law: every conveyance to married couple created tenancy by entirety
			9. Today: only ½ of states recognize this
			10. Rule: not subject to claims of individual creditors during the joint lives of the spouses. Can’t create tenancy by the entirety to defraud creditors. Not in fraud here. (Sawada v. Endo)
	1. Legal rights and wrongs among co-owners
		1. Possession (Right)
		2. Partition (Right) (Cause of action)
			1. Ends cotenancy and distributes its assets
			2. Division of undivided interests into separated, divided interests
				1. In kind (preferred) OR
				2. By sale (to be used sparingly)
				3. Determine by the factors below:

Convenience of physical partition

Interest of at least one co-owner will be enhanced by the sale

Economic value or property not exclusive test for partition in kind or by sale

Other parties’ interests will not be prejudiced by the sale

Also- will look to long standing family ownership and emotional desire to keep family home (Ark Land Co. v. Harper)

* + - * 1. Agreements by joint tenants not to partition generally allowed by courts if reasonable in duration and purpose. Can partition by agreement.
			1. A cause of action
		1. Accounting (Cause of action)
			1. “Account for profits”
			2. Always for profits/benefits received from the property
			3. Usually, accounting is only granted with an ouster. Esteves case is weird for granting accounting without an ouster.
		2. Contribution (Cause of action)
			1. For expenses to preserce property
			2. You contribute what I’ve paid
			3. General rule: moving out 🡪 contribution only
		3. Ouster (Wrong)
			1. A legal conclusion. Not a cause of action.
			2. Situation: sole possession by 1 co-owner when other co-owners not in possession. May or may not constitute an ouster.
			3. For purposes of accounting liability
				1. Sole possession by 1 co-owner, other co-owners not in possession (often non-aggressive, hogging)
				2. Liability = reasonable rental value of the sole-possessing co-owner’s sole possession
			4. For purposes of adverse possession
				1. Diff concept: repudiation of possession. Starts SOL
				2. Usually requires more than physical aggression/exclusion
				3. Unequivocal denial of other co-owner right to undivided possession
				4. Passage of the SOL’s period for recovery of possession
			5. NOT ouster
				1. Just fact that person not living there
				2. Also- just hogging all the space. Needs a refusal! Lockout/shove out
			6. Typical ouster is changing locks
			7. General rule: ouster 🡪 contribution + accounting
		4. Waste (Wrong) (Cause of action)
			1. Damages for destructive changes in co-owned property
		5. Cases
			1. James v. Taylor- ambiguity within 4 corners. Therefore, tenancy in common, even when intent is known (she wanted to keep in family). Saying “jointly” was not enough.
		6. HYPO p380-1
	1. Cotenant Rights and Duties
		1. Rule: Upon sale, co-owner who has paid less than his share must account to co-owner who has contributed more than her share (Esteves v. Esteves)
		2. Rule: one tenant occupying property while the other doesn’t imposes no obligation for the former to contribute
			1. No “occupancy charge” allowed. Because co-tenants have right to occupy the property.
		3. Rule: Upon sale, person occupying house can demand $ toward operation and maintenance and allow a credit (rental value) for his sole occupancy
		4. Rule: A cotenant in possession does not owe any rent to a cotenant out of possession, absent an ouster
		5. Ouster: When a cotenant in possession refuses to allow another cotenant to occupy property
			1. Makes ouster tenant responsible for fair rental value
		6. Each cotenant entitled to proportionate share of all rents and profits derived from the land
		7. Cotenant must pay his proportionate share of expenses
	2. Marital Property
		1. Not all property co-owner by married persons is marital property
		2. Not all marital property involves co-ownership
		3. 2 US marital property systems: common law/separate property jxs and community property jxs
			1. Which system applies depends on the jx (state) where the marriage domiciled- place that you return to (evidence- voting, car titles)
		4. Common law- lack of rights for women
			1. Jure uxoris- by right of the wife
			2. Dower
			3. Life estate in 1/3 land owned by husband and inheritable by his issue
		5. Common Law- Separate Property Systems
			1. During marriage
				1. Property is separately owned by spouse who acquires it
				2. She who earns it, owns it (separately owned)

Owned by name on title (dower may apply)

* + - * 1. Unless tenancy by entirety

No severance and no partition allowed

* + - 1. Divorce
				1. Tenancy by entireties usually becomes tenancy in common
				2. Equitable distribution of the property owned by each spouse (Guy v. Guy)
				3. Property to be divided: any property acquired with the earnings of either spouse during the marriage
				4. Case: Guy v. Guy- what counts as marital property? Nursing degree? Nope. But alimony- spousal support of living expenses by other spouse.
			2. Death
				1. Tenancy by the entirety- survivorship
				2. Either

Dower (rarely these days) OR

Statutory spousal share of property that deceased spouse owned at death

* + - * 1. Spouse gets a forced share (or elective share) of estate
				2. Survivor has choice: take under the will OR receive a defined proportion of decedent’s estate (usually 1/3 or ½ share)
		1. Community Property System
			1. No tenancy by entireties
			2. No dower/curtesy
			3. During Marriage
				1. Property owned by a married person is either: separate property (owned before marriage, plus gifts, etc) OR community property (earned or acquired during marriage- each spouse owns ½)
				2. Usually either spouse can manage, sell, etc community property, although proceeds of sale remain community property
				3. Transmuted- cabin can become community property. Got to keep separate property separate. (separate bank account)
				4. “Never marry a rich man”
				5. Note: CA statute makes marital residence community property (no matter who bought it before the marriage)
				6. All earnings during the marriage owned by both spouses equally
				7. Cannot transfer share of property
				8. No right of survivorship
				9. Property acquired before or after marriage remains the separate property of the individual spouse
			4. Divorce
				1. Community property divided between spouses

Some state- equal share

Other states- bring in equitable distribution factors

* + - 1. Death
				1. Deceased spouse’s ½ share or community property passes through his probate estate under his will/inheritance
				2. Surviving spouse retains ½ share of community property
				3. Unless in TX or CA, optional “survivorship community property”
				4. Decedent may devise her half of the common property (and all her separate property) as she desires
				5. Other half of common property goes to surviving spouse
				6. No forced share
		1. Guy v. Guy- professional degree is NOT marital property. However, need for equitable reimbursement of the surviving spouse
		2. In re Estate of Roccamonte- Unmarried adult partners have the right to live together, and if one is induced to do so by promise of support, that will be enforced by court
1. **Selling Real Property**
	1. 3 steps in transaction:
		1. Purchase contract- parties negotiate and sign written purchase contract
			1. 4 common legal issues:
				1. SoF- need essential terms (ID of parties, price, prop description), writing (formal or informal), and signature by party sought to be bound

Can describe property by govt survey, metes and bounds, subdivision map

Exception to SoF: part performance. Oral contract can be enforced if takes possession, pays at least part of the purchase price, makes improvements to property

Exception to SoF: equitable estoppel. Enforced if:

1 party acts to his detriment in reasonable reliance of another’s oral promise (ex- selling other property or refusing other offers)

Serious injury would result if enforcement is refused

UETA/E-sign- an electronic doc and signature can satisfy SoF

* + - * 1. Marketable Title

Title reasonably free from doubt as to its validity

Concerns title, not physical condition of the property

Unmarketable if:

Seller’s prop interest is less than one she purports to sell

Seller’s title is subject to encumbrance (ex- right of way to cross land, and includes private violations of city regulations that expose it to litigation – Lohmeyer v. Bower) OR

there is reasonable doubt about 1 and 2

Disagreement by the courts on whether a person saying “I have adverse possession” is marketable or not. Some courts say need a quiet title action.

Seller’s responsibility AT CLOSING. That’s why need a date for closing- may take a long time for seller to make deed marketable.

Clearing title: buy out adverse interest (cloud on title), quiet title actions- in rem, quasi in rem

HYPOS p544

* + - * 1. Insurable title- one which a title insurance company would be willing to insure at normal rates
				2. Record title- title that appears in the public land records
				3. Equitable conversion

When a purchase contract is signed, land ownership automatically changes by operation of law so that risk of los moves to the purchaser even though they are not yet in possession of property (unless purchase contract provides otherwise, or the uniform lendor purchaser risk act has been adopted in the jx)

Once sales contract signed, seller has legal interest (land) and equitable interest ($). Buyer has legal interest ($) and equitable interest (land, risk of loss). At closing, these merge together again.

During executory period (between signing and closing), prop might be destroyed

Risk placed on BUYER through equitable conversion (buyer as equitable owner of prop and seller as equitable owner of purchase price)

We read one case that went against this rule and held that person in possession bears the loss Brush Grocery Kart Inc. v. Sure Fine Market

* + - * 1. Note- If die before closing, contract still valid
		1. Closing- contract fully performed- pays, lender advances loan funds, seller transfers title
			1. Point when purchase contract is performed
			2. Delivery of deed in exchange for $ (usually provided by a lender in exchange for a mortgage or other security interest in the purchased land)
			3. The focus of land sale contract, which disappears and merges into deed. The seller has no continuing liabilities.
			4. Supervised by escrow agent- neutral 3rd party who receives the purchase price, deed, mortgage, promissory note, and other docs to consummate the transaction. Then distributes funds and docs as directed by written escrow instructions signed by the parties.
			5. Other states have a “table” closing
			6. Secured land transactions- 2 documents:
				1. Note- promise to repay indebtedness (loan)
				2. Security Interest- mortgage

Say that if I don’t pay, you can take my deed and pay my debt

* + - 1. At a closing:
				1. Buyer pays and executes a mortgage and prom. Note for lender
				2. Lender advances loan funds
				3. Seller transferstitle to buyer by delivering deed
			2. The deed
				1. Is a conveyance (not contract)
				2. Mechanism/vehicle for voluntary transfer of land ownership
				3. Memorial that transfer took place, evidence
				4. Related to title. But deed is NOT title. Rather, it is evidence of title. “color of title”
				5. Types of Deeds

General warranty deed- broadest

Grantor warrants against title against all defects, whether they arose before or after he obtained title

Special warranty deeds- When you hear the word “I grant”

Grantor warrants title defects that arose AFTER he obtained title

Quitclaim deed- most common “I convey all of my right title and interest”

Grantor makes no warranties about title, so the grantee receives only what grantor has, if anything

* + - * 1. Looking at the deed

Premises- date, names, recitation of consideration to show it was a purchase, prop description

Habendum- habendum and tenendum. IF there are exceptions (ex- a reserved easement, a reddendum clause)

Warranties of title- look for: present and future tenses, scope in time. Present warranties first, and then future.

Execution – signed by grantor

Acknowledgement

* + - * 1. Only effective when delivered

Must manifest intention to immediately transfer title to the grantee

Case: Rosengrant v. Rosengrant- physically handing over deed was not enough because the intention was not to make a present transfer- onle a future one after death. This was because they hadn’t completely turned loose of the deed- they could go back at any point.

Case: Vasquez v. Vasquez- giving deed to lawyer to give to person upon death. This was a valid transfer, because she did not have the right to recall the deed from the lawyer. Delivery effective.

Delivery is a matter of intention

* + - * 1. TO satisfy SoF, a deed must:

Be in writing

Contain essential terms (ID of parties, descript of prop, and words showing intent to convey title) Bare minimum needed: description of prop and signature.

Signed by grantor

* + - * 1. Only effective when delivered AND accepted

Acceptance usually presumed even if grantee is unaware of the gift

* + - * 1. HYPO p562- deed needs to be delivered either at closing, OR with donative intent. None here.
				2. HYPO p568 delivery?
				3. Bad deeds

Forged deeds and stolen undelivered deeds are VOID (no bona fide purchasers of stolen deeds)

Deed procured by fraud, but actually delivered, are VOIDABLE, not void

Must act in time to cancel a fraudulently procured deed

* + - 1. The mortgage
				1. Promissory note- contract by which the buyer promises to repay loan on certain terms and conditions
				2. Mortgage- gives lender the right to use a special remedy if borrower defaults- foreclosure (sell property and use $ to pay off loan)
				3. Mortgagor- borrower
				4. Mortgagee- lender
				5. Deficiency judgment- lender suing to get difference between foreclosure $ and remaining loan balance
				6. Minority: Title theory of mortgage

Mortgage viewed as a transfer of title to the mortgagee. Mortgager has possession of property and mortgagee hold title until loan repaid

* + - * 1. Majority: Lien theory

Mortgage conveys only security interest

Title and possession remain with mortgagor until foreclosure

* + - * 1. Mortgage involves 2 parties.
				2. Deed of trust involves 3 parties

Trustor- borrower

Trustee- 3rd party- will sell prop if trustor defaults and give $ to beneficiary

Beneficiary- lender

* + - * 1. Installment land contract- land contract- alternative to Mortgage- buyer pays purchase price in installments over a period of time. Buyer has possession of the property, but seller has title until all payments are made.
			1. Secured borrowing/lending exchange

|  |  |
| --- | --- |
| lender | borrower |
| $ | Note + security interest (mortgage or deed of trust) |

|  |  |
| --- | --- |
| Mortgage | Deed of Trust |
| Mortgager/borrower 🡨 $ mortgagee 🡪 Note + mortgage |  Borrower 🡨 $ lender Borrower note 🡪lenderDeed of trust/security interest 🡪 trustee |
|  |  |

* + 1. Duty to disclose
			1. Minority view: caveat emptor “buyer beware”- common law doctrine
				1. Seller of real property has no duty to disclose defects to buyer
				2. Buyer has responsibility to assess the condition of the premises
				3. Seller liable only if:

Affirmatively misrepresented the condition of the property

Actively concealed its defects

Owed a fiduciary duty to the buyer

* + - * 1. Exception: implied warranty of quality
			1. Majority vew: Seller of residential property obligated to disclose defects he knows that:
				1. Materially effect the value of the prop AND
				2. Are not known to or readily discoverable by a buyer
			2. Note- prospective buyer has no duty to disclose facts that materially effect the valueof the property
			3. Cases
				1. Stambovsky v. Ackley- ghost in house for sale. Buyer wants to rescind. Court says an exception to caveat emptor. Here, should have disclosed. New rule here: when a condition has been created by the seller that materially effects the value of the contract, within knowledge of the seller, and unlikely to be discovered by prudent purchaser, nondisclosure is a basis for rescission
				2. Strawn v. Canuso- homes near hazardous waste dump. Issue: whether precedent would require disclosure of off-site conditions that materially effect the value of the property. Holding: Yes, need disclosure of off-site physical conditions known to it and unknown and not readily observable by the buyer if the conditions materially affect habitability, use or enjoyment of prop, and therefore less valuable. Because superior knowledge, better position.
			4. HYPOS p555
				1. If you are unsure if there was lead paint, you would have to disclose that you were unsure.
		1. Post-closing seller liabilities
			1. Physical quality
			2. Title protection- buyer protects her title through title covenants, a title opinion based on a search of public land records, and/or title insurance policy
		2. All about TITLE
			1. Land title transfers without deeds? Sure! By- adverse possession, inheritance, devise under will
			2. The story- a timeline here
				1. Sale- seller clears title
				2. Before closing- Buyer conducts title search
				3. Before closing- buyer may refuse deed for defective title
				4. After closing- new owner may quiet title
				5. After closing- New owner may sue grantor on title warranties
			3. Deeds usually classified by- nature of title warranties and extent of time covered by title warranties
			4. Title Assurance
				1. Sale of real property = sale of title
				2. 6 Tools

Refuse deed at closing

Warranties of title in deeds

Title searches

Title registration (if available)

Physical inspection (site visit)

Title insurance

* + - * 1. 3 methods of title assurance
				2. Title covenants

Grantor promises in the deed that he has good title to convey

Buyer’s rights depend upon 1) type of deed received and 2) promises in deed

Doctrine of merger- all prior promises extinguished. One in deed at closing remain.

3 types of deeds (above)

General and special deeds may contain 6 covenants

Present covenants (breached at time deed delivered)- present tense- representations about land title

Seisin- promise that grantor owns the estate he purports to convey

Note- in Brown v. Laber- could not bring action for this because SOL had passed

Right to convey- promise that the grantor has right to convey title

Against encumbrances- promise that there are no encumbrances on the title, other than those expressly listed in the deed

Future covenants (breached after closing)- future tense- promises against disturbance of possession by someone with better title

Warranty- promise that the grantor will defend grantee against any claim of superior title

Quiet enjoyment- promise that grantee’s possession of the property will not be disturbed by anyone holding superior title

Court in Brown v. Laber said this was only breached when there is an actual or constructive eviction

Further Assurances- promise that grantor will take all future steps reasonably necessary to cure title defects that existed at closing

* + - 1. Title Opinion
				1. Based on search of public records- an attorney or other professional renders an opinion about the state of title after searching the public land records
				2. Grantor-grantee index- organizes by parties’ names
				3. Tract index- organizes by parcel involved
				4. Maybe separate probate records
				5. Records of liens and lis pendens
				6. Title company “title plant”
				7. Unrecorded deed is valid, but recordation important to protect grantee from third party title claims
				8. Court says an incorrectly indexed deed still provides constructive notice
				9. Marketable title acts- limit chain of title search to 30 or 40 years
			2. Title Insurance
				1. Method of title protection in US
				2. 2 types of ALTA American Land Title Association policied- owner’s policy and lender’s policy
				3. ALTA owner’s policy has 5 sections

Cover page- scope of coverage

Schedule A- name, max amount insured, the estate

Schedule B- specific items excepted from this group

Exclusions- specific items excluded

Conditions- procedural reg’s

* + - * 1. Coverage broad

But exclusion: potential risk company unwilling to cover in any policy

But exception: problem with this particular parcel

* + - * 1. Imposes obligations on insurance company:

Duty to defend- pay cost necessary to protect title

Duty to indemnify- compensate owner if loss occurs

* + - * 1. Doesn’t cover market value of land
				2. “the big print giveth and the small print taketh away”
			1. Disputed Title
				1. General rule- first in time

Person whose interest was created first prevails

Exception- bona fide purhasers

* + - * 1. 3 types of acts

Race (minority of states)- purchaser who records first has priority

Notice (1/2 of states)- the subsequent bona fide purchaser who takes without notice or a prior interest has priority

Race-notice (1/2 of states)- the subsequent bona fide purchaser who both takes without notice AND records first has priority

* + - * 1. Recording

An effective recording must be acknowledged- notary public says grantor’s signature is genuine and seals/stamps doc.

Rule: Recording of deed that doesn’t meet statutory requirements affords no constructive notice

Rule: unacknowledged deed that is entered into records not considered “recorded” and therefore doesn’t provide constructive notice

If hidden flaw and acknowledgement looks valid, most states treat as validly recorded

* + - * 1. Alternative approach: title registration

Torrens system

Title can only be passed by registration in gov’t agency, after court determines state of title

Lost favor in US

* + - * 1. Case- Luthi v. Evans

Same prop sold twice? 1st sale had mother hubbard clause that generally described prop. 2nd sale was then a bona fide purchaser and wins. Moral of story- if you receive deed with mother hubbard clause, must go check land records. Otherwise, bona fide purchaser could get it. Tours should have made records more precise.

* + - * 1. Bona fide purchaser often wins

Deed by fraud is voidable by grantor, but if grantee conveys to a bona fide purchaser, the subsequent purchaser prevails

* + - * 1. Bona fide purchaser requirements

Purchase interest in land for valuable consideration

Meet qualifications specified in the State recording act (ex- recorded first, no notice of earlier claim)

* + - * 1. Shelter rule

A bona fide purchaser is allowed to transfer his protection to a later grantee ex. P623

* + - * 1. Recording Act HYPOS p623-24
		1. Foreclosure
			1. Process (special form of civ pro)
			2. Borrower defaults on note or security agreement
			3. Creditor serves notice of default
			4. Judicial foreclosure- special kind of lawsuit. Judgment authorizes foreclosure
			5. Nonjudicial foreclosure- notify mortgagor loan in default and allow time to pay. After certain time, mortgagor entitled to hold foreclosure sale.
			6. To try and stop foreclosure:
				1. Equitable right of redemption- Reinstatement- quickly pay missed payments to avoid foreclosure
				2. Statutory right of redemption- (some states have) can get property back if you have the money to pay back loan after foreclosure
		2. Breach
			1. Before closing
				1. Actions for breach of land sale contract. Not after closing because of rule of merger
			2. After closing
				1. Actions for breach of quality warranties
				2. Tort actions for nondisclosure
				3. Action for breach of title warranties in deeds
			3. Remedies for breach
				1. Specific performance- only if monetary damages inadequate
				2. Since land is unique, $ damages thought to be not enough
				3. Other remedies

Damages- difference between contract price and fair market value

Rescission- restitution- restores parties to original position

* + - 1. Remedies for a seller’s breach:
				1. Specific performance is the default remedy (Giannini- condos specific, unique and so court uses special performance here)
				2. But when reason for breach is failure of marketable title, usually rescission- return parties to position before the agreement (ex ante)
			2. Remedies for buyer’s breach:
				1. Depends on reason for failure to close. If contingencies (ex, financing, termite inspection, etc) may be no breach
				2. Compensatory damages

Deposit, not punitive

Different money damages for covering sale

* + - * 1. Rescission- give back deposit (opportunity to sell to another buyer)
				2. Specific performance- buyer forced to take title and pay agreed price
1. **Private Land Use Planning**
	1. Servitudes: Nonpossessory interest in land, related to uses of land
		1. easements and profits (land use rights), real covenants and equitable servitudes (land use obligations)
	2. **Easements**
		1. A nonpossessory right to use the land of another person
		2. Types:
			1. Express(most common)
			2. Implied by prior existing use

Imposed by law

* + - 1. By necessity
			2. Prescriptive
			3. By estoppel (or irrevocable license)
		1. Terms
			1. Dominant tenement/land- benefited by easement
			2. Servient tenement/land- burdened by easement
			3. Dominant owner- easement holder
			4. Servient owner- owner of servient tenement
			5. Appurtenant easement- benefits dominant tenement. Presumed if there is eligible dominant estate.
			6. Easement in gross- not connected to holder’s use of the land. No dominant estate involved. Benefits a legal person, not land. (corporations)
			7. Positive (Affirmative) easement- allows holder to perform an act on the servient land. Right to directly use servient estate.
			8. Negative easement- allows holder to prevent servient owner from performing an act on the servient land. To restrain use of servient estate.
				1. English common law categories- windows/light, air flow, support, water flow
				2. In US, no “novel easements”
				3. No prescription of negative easements
				4. No negative easements in gross
				5. Some express negative easements are allowed, usually by statute (ex- views easements ok in CA)
				6. Most commin is conservation easement- restricts the development and use of the servient land in order to preserve open space, farm land, historical sites, or wild and undeveloped land
			9. The default easement: Is Appurtenant and Positive
		2. Creating easements
			1. By grant- when servient owner grants an easement to dominant owner
			2. By reservation- when dominant owner grants the servient land to servient owner, but retains or reserves an easement over that property
				1. Usually created in deed
			3. Must be in writing and satisfy the SoF
				1. ID parties
				2. Describe servient land and dom land (if any)
				3. Describe exact location of easement
				4. State purposes for which easement may be used
				5. Exceptions:

Implied from prior use

Implied from necessity

Prescription

Estoppel

* + - 1. Can reserve in favor of 3rd party, not just dominant owner
			2. If an interest looks like an easement but it is not in writing, and no exception applies, often still enforceable as a license (revocable at will, not a permanent right)
			3. Case: In Millbrook Hunt v. Smith, a hunting agreement for 75 years (too permanent) and written was considered an easement.
		1. Easement characteristics
			1. Scope- multi-dimensional- including time, type of use, place
			2. Continues indefinitely (unless specifically time limited or terminated)
			3. An easement ALWAYS has a servient estate
		2. Easement vs. Revocable license
			1. Revocable license- no interest in land- personal priv to act on land
			2. License- informal permission that allos holder to use the land for particular purpose
				1. Not interest in land, so can be revoked anytime
				2. No succession, so NOT a servitude
				3. Don’t attach to land title (parking permits, fastrack)
			3. Profit- right to enter the land of another to remove minerals, gravel, timber, game, or other natural resources
		3. Prescriptive Easement
			1. Elements:
				1. Adverse use of another’s land

Wrongful use of property as owner himself would exercise, with no permission

Restatement- presumes the use is adverse if not express

* + - * 1. Continuous and uninterrupted for statutory period
				2. Known or open and notorious
				3. Reasonably identify location and size

Scope of easement- pattern of use sets it

* + 1. Easement by estoppel
			1. If an owner misleads or causes another in any way to change his or her position to that party’s prejudice, the owner is estopped from denying the existence of an easement
			2. Elements:
				1. A landowner allows another to use his land, thus creating a license
				2. The licensee relies in good faith on the license, usually by making physical improvements or by incurring significant costs AND
				3. The licensor knows or reasonably should expect such reliance will occur
		2. Easement by necessity
			1. Ex- Berge v. State of Vermont. P can’t access except by boat.
				1. General rule- grantee of landlocked title entitled to right of way
				2. Requirements for easement by necessity:

Division of commonly owned land (creating a landlocked parcel here)

Strict necessity for the easement at the time of severance

* + - * 1. Easement remains in effect so long as necessity exists’
				2. Here, necessity because no reasonably consistent, practical means of reaching property. Also, interferes with “reasonable enjoyment of his land”
				3. Note- extremely inconvienent or expensive not enough for strict necessity
				4. RS- only requires reasonable necessity- must be beneficial or convenient for the use of the dominant parcel
		1. Interpretation of Easement Scope
			1. Particular details of easement holder’s specific use of servient estate
			2. How much burden does the servient estate have to tolerate?
			3. Restatement: manner, frequency, and intensity of an easement’s use may change over time to accommodate tech. developments. But- changes must fall within the purposes for which the easement was created.
			4. Location of an easement can be changed only if both servient and dominant owners agree
			5. For positive easements appurtenant, look to text
			6. For negative easements,
				1. Nature and extent of non-use of a servient estate??
				2. How do you measure what land is not being used for?
			7. Case example- Marcus Cable
				1. Scope of the utility pole easement? Depends on the purpose of the easement
				2. Restatement encourages expansion and modification of scope (not all states follow this expansion)
			8. Case example- Presault v. US
				1. Railroad to hiking trail. Use of the easement as a hiking trail within scope of the easement? No. We look to the intent of the parties when they established an easement. Also- did easement end by being abandoned? Yes. Non-use isn’t enough. Need intention to never come back.
			9. HYPOS p692
		2. Easement- interest in land by grant, permanent in nature, definite period
			1. Remains attached to land, and so will be conveyed to a new owner unless the grantee is a bona fide purchaser
			2. The transfer of the dominant land transfers the benefit of the easement to the grantee
		3. Implied easement by prior existing use- 3 elements required
			1. Severance of title to land held in common ownership
			2. Existing, apparent, and continuous use of one parcel for the benefit of another at the time of severance
			3. Reasonable necessity for that use
		4. Easement termination
			1. Often affected by the intended terms of an easement’s scope
			2. Result: Servient estate no longer burdened by the use right (returns right to exclude to servient owner)
			3. 7 ways to end
				1. Merger

If one obtains title to both easement and servient land

* + - * 1. Self-limitations (easement’s own terms)

Ex- limited purpose or specified duration

* + - * 1. Formal written actions by owner of easement (merger, release) (recordable in land records)
				2. Informal, unwritten, unrecorded actions (abandonment, prescription)

Abandonment: Non-use isn’t enough. Need intention to never come back. (Presault v. US Rails to Trails case)

* + - * 1. Destruction of the servient estate
				2. Misuse and statutory standards
				3. By prescription- if servient owner blocks use of the easement in an open and notorious adverse and hostile and continuous manner for the prescriptive period.
	1. **Land Use restrictions- Covenants, Conditions and Restrictions (CC&Rs)**
		1. Covenants
		2. Land use obligations/promises
		3. Real covenant- a promise concerning the use of land that benefits and burdens both the original parties to the promise and their successors
		4. Has burden and benefit
		5. Alternative systems of covenants law- modern RS or Traditional
			1. Modern RS Covenants
				1. Combines real covenants and equitable servitudes into one doctrine: the covenant that runs at law (a type of servitude)
				2. Arises when:

Owner of the prop to be burdened intends to create the servitude

Contract for conveyance that satisfies SoF

The serv. Is not arbitrary, unconstitutional, unconscionable or violative of certain public policies

* + - * 1. No touch and concern or horizontal privity
				2. Vertical privity only required for an affirmative covenant in certain states
				3. Notice not required, but lack of notice is a defense to enforcement
				4. Easy to create, but vulnerable to unenforceability over time
			1. Traditional Law
				1. For real covenants:

Mutual intent in writing and signed (SoF)

Intent to bind successors

Touch and concern (if it is connected to the enjoyment, occupation, or use of property)

Example- promise to refrain from doing act on land (restricting weight, size, location)

Notice of Successor

Horizontal and vertical Privity

Damage and injunctive servitudes

* + - * 1. For equitable servitudes

Intent and notice

* + - * 1. Only injunctive remedies
				2. Creation difficult. Impermanent, unenforceable over time under doctrine of changed circumstances.
		1. The Good
			1. Legal structures for building neighborhoods
			2. Private land use arrangements (consensual, voluntary)
		2. The Bad
			1. Can use for segregation, discrimination
		3. The Terminated
			1. These arrangements do not last forever
			2. Yesterday’s desires become tomorrow’s regrets
			3. Ended by end of duration/purpose or changed circumstance
		4. Language of covenants
			1. Instead of “servient estate” – burdened land
			2. Instead of “dominant estate” – benefited land
			3. If in gross, looks for problems with enforcement
		5. Privity
			1. Horizontal privity- relationship between original parties to the promise
				1. Some states- require orig parties to have mutual interests in the affected land (landlord/tenant, cotenants, owners of dom/serv land)
				2. Other states- must be grantor-grantee relationship so they have successive interests in the affected land
				3. Other states- no req.
			2. Vertical privity- relationship between orig party and his successor
				1. Exists only if successor receives the entire estate that the original party had
				2. CHART p704
		6. Common reasons why covenants may not be unforceable
			1. Not validly created
			2. Substantive problems
				1. Unreasonable, inappropriate to attach to land title or against public policy
				2. Enforcement would include unconstitutional state action
		7. Equitable Servitude
			1. Non-possessory right associated with use of land that attaches to land owenership, so that it burdens or benefits successive landowners
			2. Promise concerning the use of the land that benefits and burdens both the original parties and their successors
			3. Diff than real covenant: remedy for equitable servitude is injunction, whereas remedy for real covenant is damages
			4. Easier to make then covenant
			5. For a burden to run, need:
				1. SoF
				2. Intent to bind successors
				3. Touch and concern
				4. (No privity needed)
			6. For a benefit to run, just need:
				1. SoF
				2. Intent to bind successors
				3. (no touch and concern or privity needed
		8. When is a servitude unreasonable? (Cats v. Condo)
			1. Look at unreasonability in regards to the WHOLE common interest development
			2. Violates public policy
			3. Fails to relate to the burdened land
			4. Restriction on burdened land (unit) fails to benefit benefitted land (other units)
			5. HYPOS p714
			6. HYPOS p717
			7. Restatement Approach: Servitude is valid unless
				1. Arbitrary, spiteful
				2. Unreasonably burdens a fundamental constitutional right
				3. Unreasonable restraint on alienation
				4. Unreasonable restraint on trade or competition
				5. Is unconscionable
		9. Common Interest Communities, and their regulations
			1. Planned residential development where all the props are subject to private land use restrictions and which is regulated by homeowner’s association
			2. Created by a declaration with 4 parts
				1. Homeowner’s association
				2. CC&Rs
				3. Assessments
				4. Ownership rights
			3. Subdivision, Condominium, Cooperative
			4. Separately owned unit (title in deed) + reciprocal servitudes attached to title
				1. Usually there is a homeowner’s association

Corporate entity or LLC or nonprofit

Established by declaration and charter (from state)

Grant association

Power to enforce original convenants in declaration, and by-laws- structure of the association

Power to make and enforce further rules and regs and to assess association fees

* + - 1. When owner disagrees with decision of the board, split on what courts should do
				1. Some places treat homeowner’s assoc like a corp and apply the business judgment rule, which says association not liable if board made decision in good faith and rationally believed that it was appropriate
				2. Other places- RS reasonableness standard
				3. Case ex- Schaefer. Court says board was ok in closing ski area. Court looked at whether:

Board acted within scope of authority

Whether the action was reasoned or arbirtrary

* + - 1. Case- Fountain Valley
				1. Senior citizen with Hodkin’s disease told to clear interior rooms. Went too far. Unreasonable. The way in which this was enforced was unreasonable, but covenant itself ok.
			2. 3 defenses to enforcement of CC&Rs:
				1. Unreasonableness, abandonment, and changed conditions (also can be stopped by condemnation, estoppel, merger, prescription, or release)
				2. Nahrstedt (cat case) test: enforceable, unless unreasonable (wholly arbitrary, violate a fundamental public policy, or impose a burden on the use of land that dar outweighs and benefits)
			3. Abandonment Case- Fink, Wiid shingle roofs
				1. Abandonment standard: violations are so great as to lead the mind of the average person to reasonably conclude that the restriction in question has been abandoned

Factors: number, nature and severity of violations, any prior acts of enforcement, possible realization of benefits

In most jxs, a single violation would not constitute abandonment

* + - 1. Changed Conditions case- Vernon township, fire dept serving alcohol case
				1. Presence of 3 liquor-serving establishments outside subdivision not enough to show changed conditions
				2. To discharge covenant need to show:

Original purpose of the restriction has been materially altered or destroyed by changed conditions AND

That a substantial benefit no longer extends to appelants by enforcement of the restriction

1. **Nuisance Law**
	1. Private nuisance- a nontrespassory invasion of another’s interest in the use and enjoyment of land
	2. Public nuisance- improper interference with a right common to the public
	3. Need actual harm- can’t bring to court for harm you expect to happen
	4. Rs(2d) or torts
		1. Intentional (purpose of causing harm or know harm substantially certain to result and continuing with them)
		2. Nontrespassory- may not involve physical entry
			1. Note- throwing dirt is trespass, not nuisance.
		3. Substantial interference
		4. Use/enjoyment of P’s land harmed
			1. Ex- physical damage or personal injury
		5. Balance of reasonableness- Gravity of Harm test
			1. Gravity of P’s harm
				1. Extent of harm
				2. Character of harm
				3. Social value of harmed use
				4. Suitability of harmed use to ?
				5. Burden on P to avoid harm
			2. vs. utility of D’s use
				1. social value of use causing harm
				2. suitability of D use to are
				3. potential for preventing/avoiding harm
	5. Traditional Way
		1. Look at substantial harm and trace back (don’t weigh with utility)
		2. Substantial harm to use of P’s land caused by D’s use of the land that is found to be unreasonable
		3. Use to be easy- the person who was there first wins
		4. Injunction and damages was standard/automatic
	6. Case- Boomer v. Atlantic Cement- goes against general rule granting injunction where a nuisance results in continuing damage- gets permanent damages instead, because closing plant economically worse than nuisance
2. **Land Use Regulation by Government**
	1. Intended to foster stability, compatability, and change in land uses of whole community
	2. Proactive- control undesirable changes in land uses- prevent conflicting land uses
	3. All about status quo
	4. Zoning
		1. Plan then regulate land use
		2. General welfare purposes
		3. Police power
			1. State power (inherent in state- fed has no police power)
			2. States have inherent powers to tax, take (eminent domain) and regulate (police power)
		4. By local govts- zoning maps and ordinances
		5. Euclid v. Amber Realty- Supreme Court endorsement of zoning?
			1. Zoning is usually lawful unless clearly arbitrary and unreasonable or unrelated to the public health, safety, morals or general welfare
	5. It is difficult to overturn local land use decision. Presumption of legislative validity.
	6. Nonconformities
		1. NOT violations of the zoning ordinance
		2. Pre-existing uses that don’t conform to zoning regulations but are permitted to continue without permission or permit (built-in exceptions to uniform zoning district requirements)
		3. Must have been lawful use BEFORE change in zoning
		4. Temporary
			1. No major changes or rebuilding allowed. No major repairs.
			2. Eventually end- abandonment or amortization
		5. Case- AVR- cement plant surrounded by residences. 2 year amortization law. Court says amortization ok because good for general welfare and reasonable because has reasons.
		6. Most jxs- amortization permitted as long as a reasonable period is allowed
		7. Vested rights- owner of structure being built when zoning is changed is protected under nonconforming use doctrine if 1) has permits and 2) spent $ in reliance
		8. Can be terminated when: destroyed, abandoned or discontinued, use was a nuisance, municipality acquires the prop through eminent domain, paying fair market value, and amortization
	7. Case- Village of Euclid v. Amber Realty- Supreme Court says zoning ok here. Not arbitrary/unreasonable. Related to public health, safety, morals, gen. welfare. Uses rational basis test.
3. **Eminent Domain vs. Takings**
	1. Allows govt to take property from a private owner who refuses to sell voluntarily
		1. Also can mean higher level of govt taking prop from lower level
	2. 5th Amendment of Constitution limits in takings clause
		1. Gov’t must take prop for “public use”
		2. Private owner must receive “just compensation”
	3. Rationale: a landowner could doom an entire project, or demand a large purchase price
	4. Very political
	5. Just compensation = fair market value
	6. The price is a natural limitation on it
	7. Condemnation- the process through which govt expropriates (takes ownership of) private property using the power of eminent domain
	8. Inverse condemnation- Constitutional actions to force govt to pay just compensation, AFTER govt has already acquired private property. Lawsuit brought by property owner saying govt took property and didn’t pay. Difficult to prevail here though.
	9. 4 issues of eminent domain:
		1. Private property
		2. Taken
		3. Public use 🡪 public purpose
		4. Just compensation
	10. Scope of public use
		1. Case- Kelo v. City of New London general principles:
			1. Sovereign cant take property of A for sole purpose of transferring to B
			2. State may transfer property from one private party to another if future “use by the public” is the purpose of the taking
			3. Here, promoting economic development is a public purpose, so taking ok. Dissent worries.
	11. Takings. Pennsylvania Coal Co. v. Mahon
		1. Court says that this is NOT a taking: contracting to excavate coal under house, even though act in Penn saying you can’t do that.
		2. Dimunition in value test- to see if police power been exceeded, look at resulting dimunition in value
		3. The dissent becomes the law going forward.
		4. Reciprocity of advantage--- LOOK UP
		5. Related random case- Horn farmers and the govt taking their grapes
	12. So what is a taking?
		1. Penn Central v. City of New York
			1. Court holds that denial by landmark association of penn station offices above it NOT a taking. No interference with the parcel as a whole. Dimunition in prop value alone not enough for a taking. Dissent- huge cost, it was a taking.
			2. Penn Central TEST:
				1. Economic impact of the regulation on the claimant
				2. Extent to which the reg has interfered with reasonable distinct investment-backed expectations
				3. Character and extent of the govt action- taking will be more readily found when physical invasion by the govt
			3. Note: Usually, a regulation will be found to be ok because presumption of legislative validity
			4. Transferable development rights
		2. Lingle-
			1. “too far” Taking: where govt requires owner to suffer permanent physical invasion of property
			2. “too far” taking: where deprives of all econ beneficial use of property
			3. Rejects “substantially advances” test (whether advances legit state interests)
		3. Exactions- not takings
	13. Case- Hawaii Housing Authority v. Midkiff- state has scheme to take, with just compensation, title from lessors and transfer to lessees to reduce concentration of ownership in the State🡪 Court says this is ok and a valid public use
		1. Meaning of public use expands here. Govt not just keeping the property- but passing to another owner.
		2. Ok as long as you have any conceivable public welfare purpose
	14. Definition of public use- either narrow (physical use by member s of the public) or broad (project provides some public benefit)
	15. HYPOS eminent domain p896
	16. HYPOS zoning p779