

THE CONCEPT OF PROPERTY

1. Bundle of rights

- a. Transfer
- b. Exclude
- c. Use Destroy

2. Rights not absolute

- a. Defined: government
- b. Evolve as law changes

3. Policy Questions

- a. Define the policy
- b. How will it affect society in the future?
- c. What type of society do we want and why?

4. Abandoned Property – Elements of Occupancy (*Pierson v. Post*)

- a. Control
- b. Deprive: liberty
- c. Intention: appropriate
- d. Note – actor must retain control of ball after incidental contact with people and things

5. Right to Exclude

Trespass:

- Unprivileged
- Intentional
- Physical intrusion
- On other's property
- Sufficiently tangible
- Damage not required

Private Nuisance

- Intentional
- Nontrespassory
- Unreasonable
 - Gravity of harm vs. utility
- Substantial Interference
- With use and enjoyment of land

Conversion:

- Wrongful possession of another's rightful personal property
- Actual interference required
- Must have title

6. Five Theories of Property

a. First Possession

- i. First-come first-serve

b. Encourage Labor

- i. Each person is entitled to property to which he puts his labor

c. Maximize Societal Happiness (Wealth)

- i. Define and distribute as to promote welfare of all
- ii. Exists to ensure owners use resources in efficient manner

d. Ensure Democracy

- i. Facilitates democracy
- ii. Personal security/independence vs. government ownership rights protected through public institutions
- iii. Gives person stake in society

e. Facilitate Personal Development

- i. Necessary for individuals' personal development (emotional connection)

ADVERSE POSSESSION

1. Policies

- a. Efficiency
- b. Correct errors in conveyance
- c. Reliance and fairness
- d. Penalize negligent true owners

2. Title transfer – automatic when all elements met for statutory period

- a. Do not need judgment for title
- b. Can bring quiet title action to get declaratory judgment in order to have marketable title
- c. Can use as affirmative defense to claim for ejection or trespass

3. Standard of Proof

- a. Clear and convincing evidence by adverse possessor
- b. Land is important/unique → we want to emphasize fairness and accuracy

4. Elements: Actual – Exclusive – Open & Notorious – Adverse & Hostile – Continuity/SOL

a. Actual

- i. Physically occupy land in the way true owner would
 - 1. Seasonal ok
- ii. **Color of Title** – faulty instrument gives you right to expand what title includes, not what's just occupied
 - 1. If successfully proves adverse possession based on actual possession of part of the tract described in the document constituting color of title is deemed to be in constructive possession of the whole tract
 - 2. Exception
 - a. True owner's actual possession of a part of land negates constructive possession so land limited to what is actually is possessed
- iii. Gives notice to true owner that AP is using property
 - 1. And that AP has ousted all other persons

b. Open & Notorious

- i. So visible and apparent that it gives notice to true owner if he made reasonable inspection of land that someone may be asserting adverse claim to land
 - 1. Even true owner has actual knowledge → still O&N even though no one else has reason to know of adverse claim
- ii. Unfurling flag – clearing land, driveway, using for parking, storage, garbage removal, planting and harvesting, picnicking

c. Exclusive

- i. No sharing with true owner or public at large

e. Adverse & Hostile (Can't switch intents)

i. No permission → Inconsistent with true owner's legal rights

ii. **Objective/Majority:** State of mind irrelevant.

1. Possessor lacked permission from the owner → Just look at the acts, if they meet the other reqs, then they have also met this

2. Claim of right, without permission (requires AP to act toward land the way an owner could act)

a. Collapses w/ actual possession test. So if actual possession shown, claim of right is too.

iii. **Subjective: Good faith** – Thought he had a right to property

Policy For Good Faith

- Protects property owners
- Does not encourage stealing and infringing on others' prop
- Without it: reward trespasser and decrease incentive to plan correctly

Policy Against Good Faith

- Rewards innocent possessors who mistakenly occupied;
- Promotes efficient land use
- Encourages use or prop and to care/inspect it
- Looks at totality of circumstances

1. Policy: see arguments under PE's for presumption

iv. **Subjective: Bad Faith/Intentional dispossession**

1. Intend to take it from the true owner

a. If the person took land by mistake, then → no claim

b. **Policy:** rewards wrongdoers

f. Continuous for statutory

i. Current possessor alone

ii. **Tacking** with predecessor in interest

1. Requires privity – contract of sale, gift, will or other inheritance

iii. Previous possessor alone conveyed

g. Other

i. **Disability Statutes** – affecting tolling SOL but need medical evidence If disability exists at time of AP's entry, then SOL doesn't begin to run until disability ends (up to 20 years)...doesn't count if disability happens after

ii. Can't tack

iii. Insanity, infancy and imprisonment (possibly army)

iv. CA = color of title required and must pay property taxes for SOL

CONCURRENT OWNERSHIP

1. Tenants In Common

- a. Unity of possession – undivided fractional interest in property
 - i. Don't need equal proportions but share applies where there's a sale
- b. NO right of survivorship
- c. May transfer to another person – freely alienable, devisable and descendible
- d. Upon death
 - i. When TC dies → devisees
 - ii. Liens do not expire upon death but cannot be avoided by transferring real property
- e. *Presumption if not explicitly stated otherwise even if 4 unities are present*

2. Joint Tenancy

- a. Creation
 - i. Created by deed or will
 1. No intestate succession
 - a. Become TC
 - ii. Right of survivorship
 1. Upon death of one JT → interest absorbed by remaining JTs
 2. Liens on one joint tenant's interest expire with his death (why banks require all joint tenants to sign)
 - iii. Four Unities
 1. **Time** – all must acquire interest at same time
 2. **Title** – via same instrument
 3. **Interest** – same shares in estate (equal size and duration)
 4. **Possession** – equal right to possess, use, enjoy whole property
 - iv. Any of four unities missing → creates TC
 1. Every interest shall be tenancy in common unless expressly declared in grant or devise to be JT
 2. **Straw man** – creates JT when one JT already had share
 - a. Whole property to one party then redistributes

b. Severance

i. Partition

1. Judicial – When suit filed → court divides property among co-owners
2. Voluntary – Owners agree among themselves to partition
 - a. JT can sue for partition to end co-tenancy
 - i. Distributes assets according to terms

3. In Kind Preferred in theory	4. By Sale Preferred in actuality, fair
Physically divides property – gives parcels	Property sold and proceeds divided

ii. Various Acts of Tenants

1. By Agreement

2. Judgment Liens

- a. Severs only if enforced by foreclosure

3. Conveyance

- a. Can secretly and unilaterally convey his interest to himself or 3rd party → destroy unities = TC

4. Mortgages

- a. **Title Theory** – if mortgage = title (transfer → severance)
- b. **Lien Theory** – if mortgage = lien (transfer → no severance) (K)
 - i. Severance only if foreclosure

5. Leases

- a. Some say leases sever because no unity of possession
- b. A lease between one of the JT and the lessee does not sever the JT, but expires upon the death of the lessor JT.
 - i. Rule: A JT may, during his lifetime, grant certain rights in the JT property w/o severing
 1. But when the JT dies, his interest dies w/ him, and any encumbrances placed by him on the prop become unenforceable against the surviving JT.

3. Rights and Obligations Between Co-Tenants

- a. Possession, Ouster, Payment of Rent
 - i. Right to possess entire property
 - ii. CT using whole property does not owe rent UNLESS ouster
 - 1. **Ouster** – occupying acts to prevent other CTs from using property
 - a. Other must make demand for access then deny before ouster action
 - iii. Ousted can collect pro-rata share of rental (50%)
 - 1. **Actual** where on co-owner physically excludes others (ex. change locks)
 - 2. **Constructive** if:
 - a. Too small to be physically occupied by all or
 - b. Intolerable situation like divorce where non-possessor is not at fault for hostility (*Olivas* = husband **abandoned** his interest when he moved out to live with mistress. No rent b/c pulled, not pushed)
 - 3. Adverse Possession (must be affirmative act)
 - a. Possessing CT cannot obtain AP against other unless possessing has **ousted** by making clear that he is asserting full ownership rights of other tenants
- b. Mortgage, Tax, Property Insurance
 - i. Duty to share basic expenses
 - ii. If one doesn't pay → offset amount owned when property partitioned
 - iii. If co-owner exclusively possesses premises, must bear entire burden of expense if value of her occupation exceeds payments
- c. Repairs and Improvements
 - i. Duty to share basic maintenance and necessary repairs
 - ii. **NO** duty to share costs of major improvements
 - 1. **BUT** CT who pays for improvement gets the increased value of improvement upon sale

LANDLORD & TENANT

1. Creating Tenancy

a. Selecting Estate

Term of Years	Periodic Tenancy	Tenancy at Will	Tenancy at Sufferance
<ul style="list-style-type: none"> • Fixed time period • LL's future interest: reversion • Alienable, devisable and inheritable • T does <u>not</u> need to provide notice that she will vacate premises at end of term <ul style="list-style-type: none"> ○ LL does <u>not</u> need to give T notice to vacate • T make retake upon renewal 	<ul style="list-style-type: none"> • No defined ending date • T possesses for indefinite term → paying month-to-month etc. • Conforms to frequency of payments • Endures until one party gives notice to end it • Express notice • May be created by express agreement <u>or</u> implied 	<ul style="list-style-type: none"> • Endures only as long as parties agree • Continues by mutual agreement • Ends when one party wants it to • Informal –friend on couch • Express or implied • Ex: “so long as he wishes” 	<ul style="list-style-type: none"> • <u>Not</u> true estate • Wrongful occupancy • T enters valid lease and then holds over past end of lease term <ul style="list-style-type: none"> ○ Entry rightful but continuing is <u>not</u>

b. Selecting Tenant

i. Fair Housing Act

1. LL may not refuse to Rent to T because of race, gender, or national origin
2. If π does not show direct evidence of discrimination → burden shifting
 - a. Member of protected class
 - i. Δ knew/suspected π was
 - b. π applied and was qualified to rent
 - c. Δ rejected application AND
 - d. Property thereafter available
 - i. THEN
 1. Burden Δ : legit, non-discriminatory reason for rejection
 - ii. THEN if Δ succeeds:
 1. Π must show pretext or material facts disputed

ii. FHA Exemptions – shared living

1. Room or unit in dwellings contained living quarters occupied by no more than 4 families living independently *if* the owner occupies one such living quarter AND
2. Single family house sold or rented by owner if he owns less than 3 houses AND no broker/agent in sale or rental
3. Roommates – should choose who they live with

c. Negotiating Lease

- i. Statute of Frauds – lease of real property for more than 1 year must be in writing
 - 1. Must contain key terms: parties, property, duration, rent and signed by party against whom enforcement is sought
- ii. Standard Forms
- iii. Rent Control

d. Delivering Possession

- i. When lease term begins LL only needs to deliver right to possession not actual
- ii. LL cannot give T-B possession when T-A legally has possession
 - 1. B cannot move in
 - 2. LL did not have right to give B legal right until A left

	Implied Warranty of Habitability	Implied Covenant of Quiet Enjoyment
Applies to:	Residential	Residential and Commercial
Breach (after notice and opportunity to fix):	Health/safety defect not caused by T with notice and reasonable opportunity to fix	Actual <u>or</u> constructive eviction (substantial permanent interference by LL or someone under LL's control)
Remedy:	Stay and not pay rent	Prompt abandonment and not pay rent

Landlord’s Duties – Conditions (CQE & IWH)

2. Covenant of Quiet Enjoyment – implied in all leases that LL/agents cannot interfere with T’s lawful possession

- a. **Actual Eviction** – excludes or locks T out of premises (T may sue for damages)
 - i. Physical bar to entrance to T
 - ii. Obligation to pay rent ends upon eviction

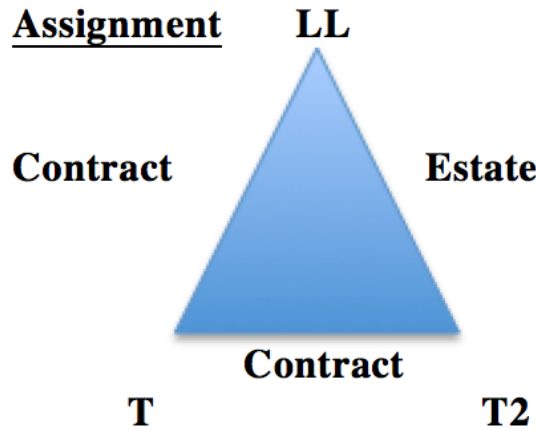
- b. **Constructive Eviction** – LL so substantially interferes with T’s use and enjoyment or causes or allows inhospitable conditions to persist causing T to vacate premises even though not explicitly actual eviction (residential and commercial)
 - i. T leaves because LL’s conduct materially interferes with T’s beneficial use
 - ii. Relieves T of K-liability for any remaining rentals due under lease
 - iii. Elements
 - 1. **Substantial Interference** – permanently deprive use/enjoyment
 - a. Wrongful conduct or omission by LL/agent/3rd LL has legal control
 - i. Fails: perform obligation in lease
 - ii. Fails: adequately maintain and control common area
 - iii. Breaches statutory duty owed to tenant
 - iv. Fails to perform promised repairs OR
 - v. Allows nuisance-like behavior
 - 2. **Notice/Time to fix**
 - 3. **Prompt abandonment** –reasonable period of time after act/omission
 - 4. **Recurring/Permanent**
 - iv. Remedies
 - 1. Vacate/abandon so they can stop paying rent

3. **Implied Warranty of Habitability** – residential rental premises offered and maintained in physical condition that provides safe, decent, and habitable housing → *reasonable T-standard*
- a. Also: LL maintain and repair premises so they remain in same condition throughout term of lease
 - b. *Bare living requirements* –heat, hot water, plumbing, safe kitchen appliances, safe/sound structural conditions
 - c. Waiver is **against** public policy
 - d. Breach of Warranty
 - i. Substantial health/safety/welfare defect not caused by tenant:
 1. Violation of housing code → good indication
 2. Effect on health or safety
 3. Length of tie existed
 4. Seriousness
 - ii. LL has notice
 - iii. Reasonable time to repair defect but doesn't
 - e. Enforcement Remedies (LL cannot retaliatory evict)
 - i. Injunction
 - ii. Move out
 - iii. Rent abatement –withhold rent until necessary repairs made
 - iv. Sue landlord to collect damages
 1. Fair rental value (As warranted –unrepaired condition)
 2. Reserved K rent – unrepaired fair value
 3. Percent - K rent amount \times % use/enjoyment of the premises reduced
 - v. Repair and deduct

4. Transferring Tenant's Interests (ee = 3rd party) – Dumpor's Case – consent to 1 consent to all

- a. **Assignment** – transfer of whole unexpired term of lease
 - i. T2 is thus responsible directly to LL for all covenants in original lease (including implied warranty of habitability and covenant of quiet enjoyment)

Privity of Estate
Covenants run
with land



Last in line has
PE with LL
Ex: T3

- b. **Sublease** – transfer less than full remaining term → original T retains interest in premises
 - i. Creates new and distinct LL-T relationship between T1 and T2
 - ii. No effect on original lease
 - iii. T2 not bound by covenant to pay rent in original lease
 - 1. Just by provisions in sublease provided by T1
 - iv. Since lease covenants do not run with the land, T2 is not in privity with LL (LL can't sue T2)
 - 1. But can enforce through injunction since equitable servitude (inquiry notice present)
 - 2. So is payment of rent damages or an injunction? Depends on Jx
 - v. LL can still sue original T under contract, then T can sue T2

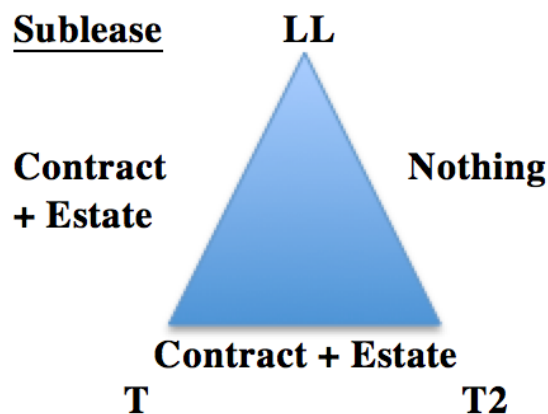
Commercially
reasonable
objections

1. S would
compete with
another T

2. Alterations to
building

3. Odors travel
through vent

4. Deliveries
interfere



T1 : T3 // LL : T2

5. Ending Tenancy

- a. Surrender – LL and T mutually agree to terminate early
 - i. Landlord Remedies
 1. Can accept offer of surrender
 - a. Terminates lease
 2. Sue
- b. Abandonment – vacates without (justification + intention to return) and stops paying rent
 - i. **Accept the T's surrender** – means the LL agrees that T will not be legally obligated to pay the future rent.
 1. By moving out b4 end of lease term and ceasing pymts, T makes implied offer to the LL to end the term of yrs.
 2. Not relieved of all responsibility, LL can still sue for *back* rent. Or due immediately w/o waiting till end of lease term for damages for breach of lease (different from *future* rent).
 3. Damages measured in amt LL lost, which is the *agreed-upon rental price minus the fair mrkt price*, not the remaining rent. If the rental price is the same or below the mrkt price, damages are zero.
 - ii. **Re-let on the T's account.** If LL refuses to accept T's surrender, LL may look for new T and re-let the apt on T's account.
 1. When new T is found, LL may sue former T for difference btwn old rental price and new rent received, if the (reas) new rent is lower than the orig rent.
 2. **Wait and sue for the rent at the end of the lease term vs. mitigate damages**
 - iii. Landlord Remedies
 1. Treat lease as continuing, do nothing, and sue the tenant on the covenant to pay rent as the rent falls due
 - a. Majority = duty to mitigate
 2. Treat lease as continuing and relet the premises for the tenant's account, reserving the right to sue the tenant for any unpaid balance of the rent.
 - a. Mitigate
 3. Accept the surrender of the lease, and relet on the landlord's own account.
 4. The landlord can treat the abandonment of the lease as an anticipatory repudiation, suing the tenant for either
 - a. Damages— the difference between the reasonable rental value of the unexpired term and the present value of future rent— or
 - b. Unpaid future rent— the difference between the contract rent and the amount received from a new tenant, both damages and future unpaid rent being recoverable in one judicial proceeding
 5. Mitigate damages and then sue for rent
 - a. Can recover the rest of the rent for the term, but **trend = duty to mitigate** b/c a K (*Sommer* = each apartment is unique, so have to show all available apartments and just treat this one as all the rest)

- b. LL has duty to mitigate damages where he seeks to recover rents from defaulting T
 - i. All reasonable efforts to re-let apartment
 - ii. Treat it as open stock
- c. Consider factors
 - i. Whether offered to show apartment to prospective T
 - ii. T may attempt to rebut by showing proffered suitable T rejected
- d. BUT No standard formula for measuring whether LL has BUT no standard formula for measuring whether LL has utilized satisfactory efforts in attempting to mitigate damages and each case must be judged on own facts Higher burden on LL in residential b/c in commercial T always has right to find reasonable sub-lessees/assignees (better position than residential T to find one)

c. Eviction

- i. Actual
- ii. Constructive
 - 1. IWH + QE
- iii. Rule Against Retaliation → 6 month rebut presumption s
 - 1. Burden on LL to show it's not retaliation for previous exercise of legal right
 - a. Presumption if eviction within X days of protected conduct
 - b. Must it be related to tenancy? (*Hillview Associates* = participation in tenants union related to LL is incidental to tenancy)
 - i. Ex. policy arguments for not evicting for exercising free speech
 - 2. Need a non-retaliatory business reason to evict (*Robinson* = mere desire to take the unit off the market is not by itself a legitimate business reason to justify eviction...need to know subjective intent!)
 - 3. LL shall not retaliate by increasing/decreasing services or bringing action for or fail to renew rental agreement
 - 4. 6 month presumption that if something happens eviction following is retaliatory
 - 5. LL may not evict for T bringing complaints about housing codes and stuff
- iv. NO Self-help
 - 1. Must resort to judicial process

LL's remedies	T's remedies
Breach of K = damages <ul style="list-style-type: none"> • Past rent • If acceleration clause then future rent - mitigation 	Breach of K = damages (abatement) <ul style="list-style-type: none"> • Rent paid - market price • CD
Eviction (terminates the lease) = possession	
Injunction	Injunction

EASEMENTS

Non-possessory interest one person has in the property that another person possesses

1. Terminology

- a. **Easement in Appurtenant**- implicitly conveyed with property its benefits whether or not conveyance expressly mentions the matter
 - i. 2 tracts of land
 - ii. Owner may not create undue burden on estate
- b. **Servient Estate** – property burdened by easement
 - i. Easement in gross and appurtenant
- c. **Dominant Estate** – land benefited by easement
 - i. Appurtenant
 1. Gross has no dominant estate because benefits specific person

Easements in Appurtenant

2. Express Easement

- a. By Grant – servient owner grants easement to dominant owner
 - i. Writing
 - ii. Signed by grantor
- b. By Reservation – owner conveys title but reserves right to continue use of tract for special purpose after conveyance
- c. Burden to run with the land
 - i. **Writing** –
 1. ID grantor and grantee
 2. Describe servient and dominant land
 3. Describe location of easement
 4. Purpose
 - ii. **Intent** - grantor must have intended for the easement to run with the land.
 1. Grantee must have intended for the benefit to run with the land.
 - iii. **Notice** – easements are binding on subsequent owners only if they have notice
 1. Actual – in fact know about existence
 2. Inquiry – visible signs of use by non-owners to put owner on notice
 3. Constructive – reference to it in chain of title
 - a. If deed conveying easement recorded it's revealed in title search
- d. Benefit to run with the land
 - i. Presumption for appurtenant easement
 - ii. Policy: people presumed to take property with all benefits

3. By Implication/Implied from Prior Use

- a. Use was in place at time single parcel of land was severed or divided into two adjoining parcels, leaving one parcel benefitting the other in some way even though the seller and the purchase did not discuss or even think about it when they bought and sold the land
 - i. Prior to time tract divided, use exists on servient tract that is reasonably necessary for enjoyment of dominant tract and intent deduced for use to continue after

b. Requirements → ICCAN

- i. **Common owner** – subsequent transfer severed title
- ii. **Continuous (permanent) use prior to and at time of severance**
 1. Not sporadic so use would be known to parties at time of grant
- iii. **Apparent and obvious use at time of severance**
 1. Apparent does not mean visible (not required)
 2. If a grantee could, by reasonable inspection of premises, discover existence of the use
- iv. **Necessity for that use (reasonable but some say stricter – boat/helicopter)**
 1. Easement must be beneficial or convenient for dominant tenement but need not be essential
 2. Alternative access or utilities cannot be obtained without substantial expenditure or money or labor
 3. Grant – reasonable necessity or convenience
 - a. More common
 4. Reservation – stricter necessity

4. Easement by Necessity/Right of Way

- a. Usually landlocked parcel
- b. Only lasts as long as necessity itself lasts
- c. Requirements → NCSU
 - i. Common owner severed (subsequent transfer) property → grantor conveys with no way out except over part of G's remaining land
 - ii. Strict necessity for easement at time of severance
 1. Owner legal right access land - parcel must be surrounded by privately owned land and owner must not have right to cross land to reach public road
 - iii. Use/existed at time of severance

5. Easement by Estoppel/Irrevocable License

- a. Created when a owner is estopped from terminating express or implied license by user's reasonable reliance (owner must know or have reason to know that reliance will occur)
 - i. **License** = nontransferable informal permission that allows licensee to use owner's land for a narrow purpose (revocable and not an interest in land)
- b. Requirements
 - i. Landowner allows another to use his land
 - 1. Creates license
 - ii. Licensee relies in good faith on license
 - 1. Improvements
 - 2. Costs
 - iii. Reliance on license
 - 1. Licensor knows or reasonably should expect such reliance will occur

6. Prescriptive Easement (Clear and Convincing Evidence) A-ECHO

- a. Requirements – *begins at the time of severance*
 - i. Actual Use – physical presence on servient state
 - 1. If began as permissive will NOT become adverse UNLESS license is repudiated
 - ii. Exclusive – not shared with owner or public at large
 - iii. Continuous for statutory period
 - iv. Hostile & Adverse (Objective vs. Subjective Standards)
 - 1. No permission
 - 2. Owner could have done it by resorting to law
 - 3. Acquiesce (some)
 - v. Open & Notorious – sufficiently visible to an owner → should notice it (Inspect)

7. Interpreting Easements

- a. Scope: Manner, frequency and intensity may change over time to accommodate technological development (*Marcus Cable*)
 - i. Must fall within purpose for which easement created (terms)
- b. Location generally may be changed by agreement of both parties
 - i. But may relocate as long as it does not significantly lessen utility, increase burdens on easement holder or frustrate purpose of easement

8. Terminating Easements

- a. Written release of easement through re-conveyance
- b. Its terms
- c. **Merger**
 - i. Where common owner same quality of title to both estates
- d. **** Abandonment**
 - i. Non-use + acts showing intent to relinquish or purpose inconsistent with future existence **Adverse possession** or prescription by servient owner
- e. **Frustration of purpose** (ex. necessity ends when road is built, estoppel ends when house built using right of way in reliance burns down)
- f. **Misuse** (i.e. not within the scope, see above)
 - i. Remedy is normally injunction, but when that is ineffective the easement is terminated
- g. **Condemnation** - easement holder entitled to just compensation
- h. **Estoppel** - easement ends if servient owner substantially changes position in reasonable reliance on holder's statement that easement will not be used in future
- i. **Merger** - if one person obtains title to both the easement and servient land
- j. **Release** - may release to servient owner by executing and delivering writing that complies with SOF

Express	<u>Runs with servient estate only if:</u> 1. Original grantor intended and 2. Subsequent owners of servient estate had notice at time of purchase: <ul style="list-style-type: none"> a. Actual b. Inquiry = visible signs of use by non-owners to warrant investigation c. Constructive = dominant deed has easement properly recorded somewhere in chain of title
Estoppel, Prior Use and Necessity	<u>Runs with servient estate only if:</u> 1. Intended to do so (no notice required!) and 2. Reasonably necessary for enjoyment of dominant estate

REAL COVENANTS → CASH

1. General

- a. Promise concerning use of land → benefits and burdens original parties and successors
- b. **Benefit** – right to enforce promise
- c. **Burden** – duty to perform promise
- d. Remedy = damages
- e. If between original parties → do NOT need covenant or equitable servitude
- f. Burden your property

2. Elements

a. Statute of Frauds

b. Intent to bind successors

- i. In some general way, must be intent that a running covenant bind successors
 - 1. Usually found in express language
 - 2. Sometimes inferred from nature of restriction, situation of parties
- ii. Intent may be drawn from all the language, including the nature of the covenant.

c. Touch & Concern – relate to enjoyment, occupation, or use of property (just money nope!)

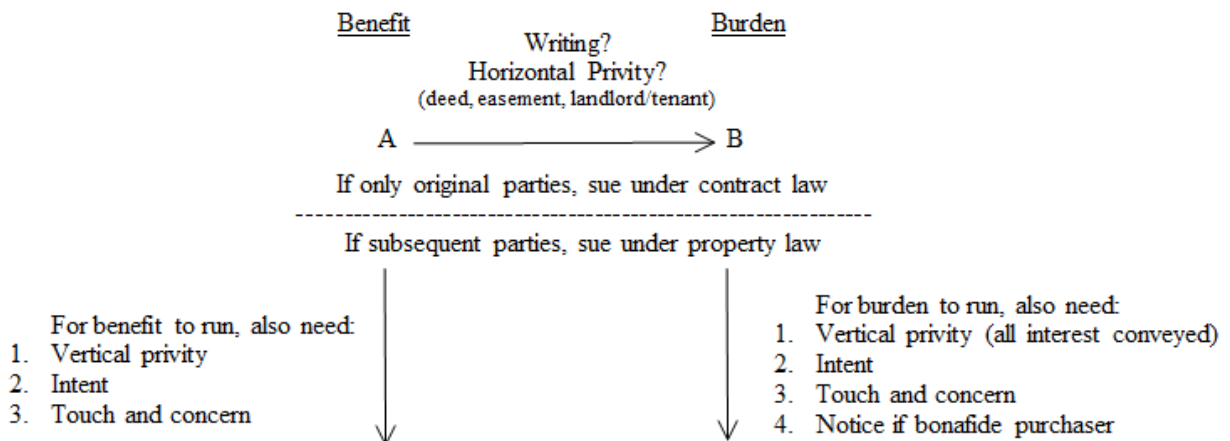
- i. Strict – must physically restrict use of/increase or somehow benefit land
- ii. Relaxed – must reduce/increase use, value or utility of land
 - 1. Anti-competition/exclusivity usually count if reasonable

d. Notice

- i. Actual
- ii. Inquiry – visible sign that reasonable owner would look
- iii. Constructive – chain of title if recorded

e. Privity

- i. Horizontal – between original – shared some interest in the land independent of covenant
 - 1. Deed
 - 2. Easement
 - 3. Landlord-Tenant
- ii. Vertical – original party
 - 1. Assignees
 - a. But not leases



EQUITABLE SERVITUDES → INJUNCTION/ENFORCE

1. General

- a. Regardless of whether it runs with land, equity will enforce against assignees of burdened land who have notice of covenant
- b. Remedy = injunction

2. Requirements → no privity required

a. Writing or implied from a common plan

i. Exception to SOF, but not in CA

- ii. If developer manifests common plan for uniform restrictions on subdivision, then a promise is implied to buyers with express covenants that their neighbors will be covered, too

1. Ok because inquiry notice (*Sanborn* = 53 of 91 had restrictive covenants for residential purpose, but none in the chain of title. But look around! Obviously residential)

- iii. All about intent (*Evans* = intent for restrictions to only apply along lake as evidenced by voting rights—don't need to apply to all of subdivision)

1. Proof = # of lots covered, oral and sales representation, recorded maps/declarations/plats, not piecemeal development

iv. Exception: Common Plan

1. Where developer manifested common plan to impose uniform restrictions on subdivision, all lots burdened and benefited by restrictions even if they do not appear in chain of title to every lot

b. Intent

c. Notice

d. Touch & Concern

Restatement:

1. Arbitrary, spiteful, capricious
2. Unreasonably burden fundamental const right
3. Unreasonable restraint alienation
4. Unreasonable restraint trade/competition
5. Unconscionable

3. Common Interest Communities

- a. Can benefit and burden all lots in a subdivision by recording a **declaration** with **CC&Rs** (covenants, conditions and restrictions)

- i. If declaration says it is amendable, then amendments can be applied to previous purchasers because on notice

ii. **CC&Rs in declaration and subsequently recorded are presumptively valid unless:**

1. Arbitrary (no legitimate purpose/unreasonable), violates fundamental policy, or burden > benefit

Reciprocal = benefit and burden each other
Implied = from common plan (always need writing)

- b. Created by declaration comprised of:
 - i. Homeowners association
 - ii. CC&Rs
 - iii. Assessments
 - iv. Ownership Rights

- c. Types:
 - i. Homeowners Association**
 - 1. Each owner is a member and can vote per property interest
 - 2. Empowered to enforce CC&Rs and make bylaws and rules

 - ii. Condominiums**
 - 1. Each owner is a member and can vote per % of building owned
 - 2. Own common areas as **tenants in common**

- d. Implied Reciprocal Covenant**
 - i. Common Plan or Scheme
 - 1. Implied promise by the developer to impose the same restrictions on all retained lots.
 - 2. Every lot is both burdened and benefited
 - ii. Majority Approach:
 - 1. The common plan is an implied promise from the developer.
 - iii. California refuses to imply equitable servitudes from a common plan because it would violate statute of frauds.
 - iv. Prof's Suggestion
 - 1. Go through requirements for equitable servitude, and use common plan or scheme to meet the notice and intent requirements → inquiry or even actual

- e. Defenses to Enforcement**
 - i. Unreasonableness
 - 1. Based on common interest of subdivision
 - a. Reasonable relationship to legitimate purpose?
 - b. Arbitrary?
 - c. Violate fundamental public policy?
 - d. Burden imposed outweigh benefit?
 - e. Rational relationship to the protection, preservation, operation or purpose of affected land
 - f. Ex: architectural review committees – reasonableness

- ii. ** Abandonment
 - 1. Are violations so great as to lead mind of average person to reasonably conclude restriction abandoned?
 - a. Number, nature, and severity (important)
 - 2. Average person upon inspection and knowing of certain restriction will readily observe sufficient violations so that he will logically infer owners neither adhere or enforce
- iii. Changed Conditions (tight)
 - 1. Original purpose materially altered or destroyed and
 - 2. Substantial benefit no longer exists by enforcement
- iv. Condemnation
- v. Others
 - 1. Unclean hands (π stopped) Estoppel, Merger, Prescription, Release

4. Governing the Development

- a. Maintain common area of CIC
- b. Enforce CC&Rs
- c. Adopt and enforce rules to supplement CC&Rs
- d. Collect assessment from unit owners and
- e. Take such other actions as necessary to administer CIC

5. Private Nuisance - Non-trespassory invasion of another's interest in use and enjoyment of land

- a. **Intentional** – purpose of causing harm
 - i. Knows harm resulting
 - ii. Substantially certain to result from conduct
- b. **Nontrespassory** –must not involve physical entry onto land of another
- c. **Unreasonable** - Gravity of harm causes substantial harm regardless of social utility
 - i. Restatement - gravity of harm outweighs utility of conduct
- d. **Substantial Interference** – Real and appreciable invasion of Π 's interest
- e. **Use and Enjoyment** – Causing physical damage to property or perusal injury to occupants

	Real Covenants	Equitable servitudes
Remedy	Damages	Injunction (preferred remedy)
Requirements	1. Writing 2. Notice of burden 3. Intent 4. Touch and concern 5. Privity (horizontal and vertical)	1. Writing (ok implied from plan, but not CA) 2. Notice of burden 3. Intent 4. Touch and concern
Standard	More strict (encompasses equitable servitudes)	Less strict

SELLING REAL PROPERTY

1. Steps

- a. Purchase Contract
 - i. **Listing Agent** - one with listing
 - ii. **Selling Agent** - one who brings in the buyer
- b. Closing
- c. Title Protection

2. Purchase Contract

- a. Statute of Frauds
- b. Price, method of payment, time for performance, various conditions and other terms
- c. Exceptions to SOF
 - i. Part Performance
 1. Takes possession
 2. Pays at least part of purchase price and
 3. Makes improvements to property
 - ii. Equitable Estoppel (Oral K)
 1. One party acts to detriment in reasonable reliance on oral promise AND
 2. Serious injury results if no enforcement
- d. Marketable Title
 - i. There is an implied covenant in **every** land sale contract that at closing the seller will provide the buyer with a title that is “marketable.”
 1. It need not be a “perfect” title, but the title must be free from questions that might present an unreasonable risk of litigation
 - ii. Reasonably prudent purchaser would pay fair market value for property
 - iii. Unmarketable
 1. Seller’s property interest is less than she purports to sell
 - a. Ex: adverse possession
 2. Seller’s title subject to encumbrance
 - a. Private agreements = unmarketable
 - i. Easements
 - ii. Covenants
 - b. Public – statutes, ordinances ok
 - i. Zoning restrictions do not affect the marketability of title; they are not considered encumbrances.
 1. An **existing violation** of a zoning ordinance, however, does render title unmarketable.
 3. Reasonable doubt about 1 or 2

- e. Duty to Disclose
 - i. *Caveat Emptor* - buyer beware (not all use it)
 - 1. Exception
 - a. Confidential or fiduciary relationship between parties
 - b. Active concealment (cover up cracks)
 - c. Affirmatively misrepresents property condition
 - ii. Non-disclosure is basis for rescission where
 - 1. Condition created by seller materially impairs value or desirability of K and is peculiarly within knowledge of seller
 - 2. Unlikely to be discovered by prudent purchaser exercising due care with respect to subject transaction
 - 3. Seller has duty to disclose defeats that materially affect value of property and not readily discoverable by buyer
 - iii. Implied warranty of quality
 - 1. Developer newly constructed property impliedly warrants: fit for intended use
 - 2. May be libel even if he has no actual knowledge of defects in houses he sells

3. Closing/Escrow

- a. Process
 - i. Buyer provides cash
 - ii. Buyer executes mortgage and promissory note to lender
 - iii. Lender provides remaining funds
 - iv. Seller delivers deed to buyer
 - v. Deed recorded
- b. Delivery
 - i. Only effective when delivered unless grantor provides right of retrieval
 - 1. Undelivered deed conveys nothing
 - ii. Valid where
 - 1. Deed placed with neutral 3rd party
 - 2. Grantor relinquishes control over deed
 - iii. Requires
 - 1. Actual or constructive delivery of deed to grantee or third party AND
 - 2. Intention by grant to divest itself of conveyed interest
 - iv. Valid Presumptions (Rebuttable)
 - 1. Manual transfer
 - 2. Record deed

4. Title Protection/Assurance

- a. Title Covenants - grant promises that deed is good title to convey
 - i. After close of escrow / after delivery of deed
 - 1. Because they're in the deed
 - ii. Doctrine of merger - once grantee accepted deed all prior promises were extinguished
 - 1. K merged into deed
 - 2. No longer relevant once you've closed
 - iii. Types of Deeds
 - 1. General warranty - grantor warrants title vs. all defects whether they arose before or after he obtained title
 - 2. Special Warranty - grantor warrants title against all defects that arose after he obtained title
 - 3. Quitclaim - I give you what I have if anything
 - a. No warranties that I have anything
 - iv. Standard Covenants
 - 1. Present – breach when deed is delivered
 - a. **Seisin** – grantor owns estate he purports to convey
 - b. **Right to Convey** – grantor has right to convey title
 - i. If $\sim S \rightarrow \sim RTC$
 - 1. If $RTC \rightarrow S$
 - c. **Against Encumbrances** – no encumbrances on the title other than those expressly listed in deed
 - 2. Future – breach when deed delivered
 - a. **Warranty** – grantor will defend grantee against any claim of superior title
 - b. **Quiet Enjoyment** – promise that grantee's possession will not be disturbed by anyone holding superior title
 - c. **Future Assurances** – promise that grantor will take all future steps reasonably necessary to cure title defects that existed at closing
- b. Title Insurance - issues policy that insures grantee's title

5. Recording System

- a. Terms
 - i. **Bona Fide Purchasers**
 1. Purchaser
 2. Take without notice of prior instrument and
 3. Pay valuable consideration
 4. Therefore if these requirements are not met, the person is not protected by the recording acts, so that the common law rule of first in time prevails.
- b. Without Notice
 - i. Purchaser had no actual, record, or inquiry notice of the prior conveyance at the time she paid the consideration and received her interest in the land.
 1. While ***no one has a legal duty to perform a title search***, a subsequent purchaser will be charged with the notice that such a search **would** provide, whether or not she actually searches.
 - a. However, the fact that the purchaser obtains knowledge of the adverse claim after the conveyance but before she records it is immaterial; she only has to be “without notice” ***at the time of the conveyance***
- c. Types
 - i. **First in Time** – first person gets it
 - ii. **Race** – whoever records first wins
 - iii. **Notice** – subsequent BFP has priority → whoever purchases without notice
 1. *Note: always look to the very last subsequent purchaser*
 - iv. **Race-Notice** – subsequent BFP who records first
 - v. Exceptions and Rules
 1. **Gift** – only way gift is valid is if you’re first in line and gifted without notice of any type
 - a. But if you’re anywhere else, you’re subsequent donee and you don’t get anything
 - b. Donees, heirs, and devisees are not protected because they do not give value for their interests
 2. **Shelter Rule** – bona fide purchaser is allowed to transfer his protection to later grantee even though later grantee has notice
 - a. A person who takes from a BFP will prevail against any interest that the transferor-BFP would have prevailed against.
 - i. This is true even where the transferee had ***actual knowledge*** of the prior unrecorded interest
- d. Supersedes first in time if you can’t make others apply