I. AN INTRODUCTION TO SOME FUNDAMENTALS

A. What is Property

1. In legal discourse, property is what the law defines as property. If a claim to a resource is not recognized by law, it is not property in a legal sense. Once recognized by law, a claim becomes a legal right.
   a. A person may be said to hold a property interest if he has any right which the law will protect against infringement by others. There is tangible and intangible property. Perhaps the most important distinction is the distinction between title (roughly what the lay person thinks of as “ownership”) and possession (dominion and control). A unique feature of Anglo-American property law is that title to a parcel of real estate can be spread among numerous owners and in several different ways (see, possessor estates, infra).
   b. Modern analysis insists that an estate is a bundle of rights, what rights are in the bundle is a matter of public policy.
      1.) Example: restraints on alienation.
   c. Ownership consists of a number of different rights called a “bundle”: the right to possess, the right to use, the right to exclude, the right to transfer (gift and sale). These rights are not absolute (zoning laws, see, for e.g., Moore v. Regents of UC, State v. Shack, holding even the right to exclude others is subject to limits imposed upon by society.
      1.) Rationale: property rights serve basic human values. Property rights are not absolute.
         Basic to the social welfare
         Resource utilization

2. What should be recognized as a property right depends on considerations of
   a. Fairness and
   b. Economic Efficiency

3. Defined: the legal relationships among people in regard to a thing. For e.g., Joe owns this watch, it is his property. The words “own” and “property” refer to the legal relationship Joe has with other persons in regard to the watch.

4. Legal Process
   a. How do judges make rules?
      1.) Analogy
      2.) Custom
      3.) History
      4.) Precedent

5. Jeremy Bentham: property is la legally protected expectation ... of being able to draw some advantage from a thing in question, according to the nature of the case.

6. Felix Cohen: That is property to which the following label can be attached: To the world: keep off unless you have my permission, which I may grant or withhold. Signed: private citizen. Endorsed: the state.

7. Five theories advanced to justify the institution of private property
   a. The Occupation Theory – the simple fact of occupation or possession justifies legal protection of the possessor’s claim to the thing
   b. The Labor Theory – a person has a moral right to ownership and control of things he produces or acquires through his or her labor
   c. The Contract Theory – private property is the result of contract between individuals and the community
   d. The Natural Rights theory – the natural law dictates the recognition of private property
e. The Social Utility Theory – the law should promote the maximum fulfillment of human needs and aspirations, and that legal protection of private property does promote such fulfillment.

f. Economic Theory – the legal protection of property rights has an important economic function: to create incentives to use resources efficiently.

g. Equality Rights: the institution of private property really protected man’s natural equality of rights. Equality of rights means that every man has the right to grab. The institution pf property was an agreement among men legalizing what each had already grabbed.

II. CHAPTER 1. FIRST POSSESSION: ACQUISITION OF PROPERTY BY DISCOVERY, CAPTURE, AND CREATION: RIGHTS OF POSSESSORS: TITLE FROM POSSESSION – (1) WILD ANIMALS (2) FINDING LOST ARTICLES (3) ADVERSE POSSESSION.

Normally one gains title to something by acquiring it from another with the others consent. There are a few ways to gain title from possession, (1) wild animals, (2) finding lost articles, and (3) adverse possession are the best examples of this. Keep in mind that the concept of possession is important because once a person has gained possession she has rights superior to the rest of the world. The problems below revolve around the question of What constitutes possession? For the finder to acquire these special rights he must take the property into his possession (intent to assume dominion and physical control over the goods.)
A. Acquisition by Discovery – FIRST IN TIME

1. Land -- The US government traces its title back to the original discovery and conquest of America by white European explorers. Obviously, Native Americans were here before the white man arrived. However, American courts have held that although Indians had “possession” of the land on which they lived, they did not have “title” to it, and could not convey title. Therefore, a title derived from the federal government, or from one of the states or colonies, has priority over an earlier purported “grant” from one Indian Tribe. Johnson v. McIntosh, 21 U.S. (8 Wheat) 543 (1832).
   a. Note: Discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest. The first “discoverer” had a preemptive right to deal with the Indians as against subsequent discoverers.
   b. Note: the European settlers had to impose a point of view on the Indians, to privilege an ideology and the use the privilege to justify the power. Property confers and rests upon power.
   c. Note: the discovery of the Indian occupied lands vested absolute title in the discoverers and rendered the Indian inhabitants incapable of transferring absolute title in others.

B. Acquisition by Capture

1. Rule of Capture: Wild Animals are not owned by anyone, but once a person has gained possession of such an animal, he has rights in that animal superior to those of the rest of the world. Capture is sufficient. The mere fact that one has spotted or chased an animal is not sufficient to constitute possession. Property in wild animals is only acquired by occupancy, pursuit alone does not constitute occupancy or vest any right on the pursuer.
   a. The concern here is when did possession occur? Physical control and intent to assume dominion.
   b. Rationale: Society’s objective is to capture foxes (to destroy them) or ducks (to eat them). To foster competition, resulting in more wild animals being captured, society does not reward the pursuer, only the captor. It is assumed that this brings more persons into pursuit, resulting in more capture. Also, rewarding capture is an objective act, is an easier rule to administer than protecting pursuit, which is hard to define and can take any forms. Thus, the rule of capture promotes certainty and efficiency of administration in a situation where the stakes are not high and worth judicial time. Competition and ease of administration but today the rule of capture leads to overutilization and overcapture.
   c. Note: Peirson v. Post was a wasteland

2. Example: A is on a horse pursuing a fox, and B spots the fox and shoots it, killing it. Held, “mere pursuit” gave A no legal right to the fox, and that B thus had the right to interfere and is entitled to it. Pierson v. Post
   a. The concern here is when did possession occur? Physical control and intent to assume dominion.
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3. Business competition: Courts are more likely to be sympathetic to the interfering defendant if he acts out of business competition with the plaintiff as opposed to spite or malice. The Court may also look to custom or usage prevailing in the activity involved.
   a. Example: Plaintiff had set some decoys on his own pond to lure ducks in order to hunt them and defendant fired guns to drive

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1 A fundamental property rule is the first person to take possession of a thing owns it. A corollary is that a prior possessor prevails over a subsequent one. The two contexts in which this rule becomes important in property is “wild animals” and “finders.” The FIT rules implement important social policies relating to rewarding labor, protecting investment in resources, and encouraging people to bargain rather than fight.

1.) Note: that if D was luring the ducks away for his own business then this would have been okay. But, a person who does not want to capture the animals cannot interfere because society wants the animal caught.

b. Custom may indicate a different result. When all that is practicable has been done in order to secure a wild animal it becomes the property of the securer who has exercised sufficient personal control over the wild animal. No one would engage in this activity if he could not be guaranteed the fruits of his labor. Two considerations have modified the rule

1.) All that was practicable was done
2.) Trade usage was industry wide
   (a) Economic interests were certainly important

c. Example: In the whaling industry it is customary that the ship that lanced and killed the whale was the owner, even though it sank and floated to the surface and found by someone else. Therefore, a ship that kills the whale recovered against defendant who bought it at an auction from the person who found it on the beach. Ghen v. Rich, 8 F. 159 (1881).

1.) Rules are designed to achieve ends → the instrumental nature of law
2.) A person who does not want to capture cannot interfere

4. The Rule of Capture and Other Fugitive Resources
   a. Definition: Resources that move from one place to another under their own power like oil and gas and water. Possession of the land is not necessarily possession of the fugitive resource.

5. Harold Demsetz, Toward a Theory of Property Rights
   a. Note: “EXTERNALITIES” → failure to consider the effects (costs and benefits) on others of your decisions regarding resource allocation.

C. Acquisition by Creation – “Ideas”

1. Introduction: the assertion is that if you create something then that something is yours to exploit. The underlying idea derives from Locke, who reasoned that you own the fruits of your labor in consequence of having a property in your person.

2. General Rule - - No protection against imitation - - In the absence of some recognized right at C/L, or under the statutes, a man’s property is limited to the chattels which embody his invention. Others ay imitate these at their pleasure. There is no property rights in ideas, but there may be a statutory one conferred by Congress in the area of trademark or copyright – none here. Cheney Bros. v. Doris Silk Corp. Compare International News Service v. Associated Press, holding that AP had a “quasi- property” interest in the news it had gathered and could stop competitors from using it until its commercial value as new had passed away.


4. In Smith v. Chanel, Inc., a case that involved a perfume company’s right to claim in advertisements that its product was “the equivalent of the more expensive Chanel No. 5,” the Court upheld the perfume company’s right to copy the unpatented Chanel No. 5. In rejecting the district court’s reasoning that the values in the Chanel trademark required great expenditures of money, effort and ability, the court found Chanel was not entitled to a monopoly even though it created the product. The copyist
serves and important public interest by offering comparable goods at lower prices.

5. **Ownership of Body Parts** -- There exists no property right or ownership interest in spleen *after* it’s taken out of body, only before. To extend conversion liability to bodily tissues that have been removed from a patient would “threaten with disabling civil liability innocent parties who are engaged in socially useful activities, such as researchers who have no reason to believe that their use of a particular cell sample is, or may be, against the donor’s wishes. The dissents felt that D should have been found to “own” his cells and at least had the right to do with them whatever the defendant’s did with it, even if society properly prevents the sale of organs for transplantation. *Moore v. Regents of U.C.*

a. A person whose tissue is used for profitable research and development without his knowledge does not have an action for conversion P had no right to possession and to maintain such action one must prove interference with ownership or right of possession.

b. **Relevance of a Bundle of Rights:** Recall the ownership of property is not really an “all-or-nothing” concept, but rather a “bundle of rights,” including the right to possess, the right to use, the right to exclude and the right to transfer. The Court in *Moore*, could have reached the same result by holding that plaintiff had certain ownership rights in his spleen at the time of removal, such as the right to stop defendants from commercially exploiting his cells. The Court could then have gone on to say that plaintiff did not have the right to transfer his organ by sale. That way, plaintiff could have received compensation but would not have been able to sell body parts to researchers.

c. **Notes:** If you lack the right to informed consent this sounds like slavery. The historical horrors w/ out IC with respect to use of body tape MPR. To allow a person to economically benefit from the nonconsensual use of another’s tissue can be considered a modern version of slavery or Indenture Servitude.

1.)*Property is power*, powerless groups were used for experimentation w/o knowledge or consent (Jews & Blacks).

2.) Should the court have found a property right in the body?


#### III. CHAPTER 2 – SUBSEQUENT POSSESSION: ACQUISITION OF PROPERTY BY FIND, ADVERSE POSSESSION, AND GIFT

**A. Acquisition by Find**

1. **Perspective:** up to now we have been talking about the “first” owner. From now on it’s the second, third, etc. owner. The true owner lurks in the background but we do not know who she is. (Law is a mess – look for rules and factors). Finder is like an involuntary bailee.

2. **Note:** for the finder to gain these special rights, he must do more than discover the property, he must possess it (dominion and control).

3. **General Rule:** An owner of property does not lose title by losing the property. O’s rights persist even if the article has been lost or mislaid. As a general rule, however, a finder has rights superior to everyone but the true owner – but there are exceptions to this rule. A corollary is that a possessor who loses the property after finding it or otherwise acquiring it may nonetheless recover it from the third person who subsequently finds or takes it.

   a. **Problem 1:** legal fiction that Owner has right to the animal. Constructive possession of the animal. As between O and T we like
O better, so we come up with a rule that favors O. Between T and T1, T wins. Social policy do not favor trespassers. This illustrates relativity of title. We are a society of laws and we do not favor self-help. Different judx come to different conclusions. Societal peace and non-violence or reasonable self-help and non-violence.

b. **Example:** Armory finds a jewel in the home of employer and takes it to the jeweler to have it appraised. The jeweler refuses to give the jewel back to Armory saying that Armory does not own it. Armory is entitled to recover from the jeweler either the jewel (replevin) or the full money value of the jewel (trover). As between Armory and the jeweler, the prior possessor (Armory) has superior rights. The finder of the object, although he does not by finding acquire absolute ownership, is entitled to possess it against anyone but the true owner. *Armory v. Delamirie.*

1.) *The fact pattern is:* Jewel passes from owner to finder to thief.

Bailment is the rightful possession of goods by one who is not the true owner. Drycleaner example. In general, the bailee is required to use reasonable care during her possession of the property.

2.) *Hypo:* In the owner v. thief scenario the owner wins. The thief had to pay money to the chimney thief and now has to return it to the owner. So, thief had to pay twice. If thief can find the finder we can have a suit to give him the money back. This puts everyone in the status quo. Otherwise, thief loses twice. Same thing for a BFP. What about O v. Thief v. Thief2. Thief wins, relativity of title. Simply by virtue of being first possessor, Thief has better title. Suppose chimney sweep is a thief and the goldsmith finds it. Who wins? Again, as between the two, the thief had it first so the thief should win. Under the GR, the thief should win, but courts don’t like that so courts will try to find reasons to reward the finder in that case.

4. **Reasons for the Rule**
   a. *Protecting the owner:* Protecting prior possession also protects an owner who has no indicia of ownership
   b. *Entrustment theory:* entrusting goods to another is an efficient practice and ought to be encouraged. The jeweler is a bailee, who must surrender the goods. Forcing owner to prove ownership before he can get his entrusted goods back will lead to all kinds of problems.
   c. *Expectation:* prior parties expect to get their goods back, and by giving them their expectations, the law reinforces the belief that the law is just.

5. **Relativity of title:** Title is relative. The meaning of the phrase true owner depends on who the other claimants are.
   a. **Problem 1 page 105:** Title to the jewel is relative to who the claimants are. The owner prevails over A, the finder. A, the finder, prevails over a subsequent possessor. If A, after finding the jewel, lost it and B thereafter found it, A would prevail over B a subsequent possessor. A’s rights are not lost by losing the Article.
   b. **Same result in cases of theft and trespass:** The “prior possessor wins” rule applies to objects acquired through theft or trespass. Thus, if A steals a jewel and hands it to B, who refuses to return it, B is liable to A. B cannot question A’s title or rightful prior possession if B is merely a subsequent possessor.
1.) **Rationale:** to rule in favor of B would not likely to *deter crime*, but would result in costly litigation because owners and prior possessors would have to prove they are not thieves.

6. **New wrinkle** – landowners who never take possession: Land Owner v. Finders: Usually, if the stuff is found on owner’s private premises then O wins. But, the “finders keepers” rule does not cleanly resolve the dispute so we need to make some refinements - - Objects found in private homes:

- **Rationale:** the owner has an intent to exclude everyone and to admit persons only for specific limited purposes that do not include finding property. Also, the homeowner has strong expectations that all objects inside the home of which he is “unaware” of are his. Examples →
  a. **Servants and Employees:** master/employer wins
  b. **Trespassers** always lose
  c. **Buried property** belongs to O.
  d. **Absentee Owner** - -

1.) **Example:** O (Peel) owns a large house requisitioned by the government to quarter soldiers. O bought the house two years earlier and never moved in. A soldier finds a brooch hidden on a window ledge. After a couple of months, the soldier reports the find. *Held*, for soldier. O never moved into the house and took physical possession of it. *Hannah v. Peel*.

2.) Note, that in this case the court’s decision on the lost/mislaid distinction was influenced by the court’s perhaps unconscious sense of the equities. It simply seemed fairer to award the brooch to the soldier because the owner never lived in the house.

3.) **Bridges v. Hawksworth:** P found a parcel of banknotes on the floor of D’s shop. The court awarded possession to P, on the grounds that the note had not been intentionally deposited in the shop, and therefore never came into D’s custody or possession. Finder finds small parcel on the floor of a shop and finder wins.

4.) **South Staffordshire Water Co. v. Sharman:** The classic example of property found on private premises. The Ps, Landowners, hired D’s to clean their pool. Ds found two gold rings at the bottom of the pool. The court awarded property to the Ps on the grounds that they had the right to say how the pool should be cleaned out and the possessor of land should be presumed to have an intent to exercise control over any object found in or on it. Owner wins. If a servant or agent finds something, he finds it for the master. A person can constructively possess something of which she is unaware if she is in possession of the premises where the article rests. If so, she is entitled to the prior possessor rule.

  (b) **Note:** the finder usually prevails if the property was found on public parts of the premises (*open to the public*).

5.) **Elwes v. Brigg Gas Co.:** a boat was discovered buried on the leasehold. Finder loses, lessor/owner wins. If things are embedded in the land we are going to give it to owner.

  (c) **Note:** the house was involuntarily taken from O by the state, depriving him the possibility of possession, a fact that was ignored by the court. Rewarding honesty is a social good.
6.) **Hypo:** guy was taking a stroll and wandered onto land.
   Landowner v. trespasser: landowner almost always wins
7.) Peels arguments: he has constructive possession even if unaware, loyal soldier (equity), it may have been mislaid. Finders: first finder prevails, Peel has no control even if sacrificing the wartime effort, he did the right things (equity arg) and the O could not be found.
   c. An owner is in constructive possession of objects located under the surface of her land even though she is unaware of the objects. (South Staffordshire). However, if the owner has never moved into the house he is not in constructive possession. If A finds ring in B's home B is in constructive prior possession of the ring.
7. **Objects found in public places:** In dealing with objects found in public places, courts have generally resolved the issue by resorting to the lost-mislaid distinction. Mislaid objects are thought to be in the custody of the landowner and the finder does not obtain the right of possession. **See, McAvoy v. Medina,** infra.
   a. **Lost property:** property the owner accidentally and casually lost. Lost property goes to the finder not the owner.
   b. **Mislaid property:** property intentionally placed somewhere and then forgotten. Mislaid property goes to the owner. Mislaid goods are deemed in the bailment of the owner of the property on which they are found for the true owner.
1. **Example:** Defendant owned a barber-shop. A customer found a pocketbook lying on the table of the shop. P told D to keep the money until the true owner came, otherwise to advertise that the money was found. The true owner was never found, and P wants the money back. D refused. P sued and judgment went to D. P appeals. Held, for D. Since the property was voluntarily placed in the shop by its owner, P did not have the right to take it from the shop. Rather, it was his duty to use reasonable care for its safekeeping. **McAvoy v. Medina.**
2.) **Distinguish this case from Bridges.** This court said that in DcAvoy this was mislaid property, it was not lost. On the floor is unintentional (lost), by the cash register is probably mislaid. If we truly know its lost we can reward the finder, otherwise give it to the owner. The true owner can retrace the property. Also, the owner is the bailee. Think back to major Peel, he should argue the brooch is mislaid.
8. **Abandoned Property:** goes to the finder
9. **Treasure Trove:** goes to the state (old) now goes to the finder.
   a. **Handout:** driveway. $25K found buried in glass jars. The property went to landowner and rejected treasure trove. Most states have adopted the finders keepers rule. This must have been mislaid property. Equitable factors influence the courts.
    a. **True owner never relinquishes his rights:** the finder holds the property as bailee for the true owner; in trust for the benefit of the true owner.
    b. Only applies to **first finders**
    c. Only **applies to lost,** not mislaid property
11. **Handout:** Note that in MI, we do not have these distinctions. There is one category of “unclaimed” property. In general, we look for the true owner, and if we cannot it goes to the finder if the police are satisfied the true
owner cannot be located. If we cannot give it to the finder it goes to the state.

B. Acquisition By Adverse Possession Pneumonic ACHOC
1. Introduction: Keep in mind first possession, which counts in land as well as property. You are first possessor and have a good faith belief the land belongs to me. You can prove you are in possession of the property, there in a way that counted: no trespass signs, improving property, paying taxes, to say that I was actually in the house. It was open and notorious, on a continuous basis, etc.
   a. The elements give us confidence that the first person was in possession of the land before someone else. You need these elements for the statutory time period. You can then bring an action to quit title. Also, if there is an action for an ejectment you would as an affirmative defense say that you are the adverse possessor.
2. Elements
   a. Open, Notorious & Visible: If the adverse possessor can prove actual knowledge than this will suffice to satisfy the open, notorious and visible requirement. Usually actual knowledge is not required, so the burden is on O. Where actual knowledge cannot be shown, the open, notorious and visible test is met if the adverse possessor’s use of the property is similar to that which a typical owner of similar property would make of it. True owner should have reasonable notice.
      1.)The best test is the reasonable owner test – acting as a reasonable owner would act.
         (d) Note 1: the nature of the land is taken into account
         (e) Note 2: Conduct towards persons other than the owner may also help satisfy the open & notorious requirement
            (i) Look for acts of “public ownership”
   b. Actual: at least a reasonable percentage of land claimed by the adverse possessor must be actually used. The word “actual” signifies that possession must be of such a character that the community would reasonably regard the adverse possessor as the owner. It cannot be constructive.
      1.)Constructive possession: in some judxs if A has color of title to some part of the land, some courts will award actual title to the entire tracts under this theory. Actual notice to true owner is not required.
      2.)The innocent improver doctrine: If A has been on land and built house and O has not bothered to look, and A is not awarded the land, some courts think this is harsh and if A acted in mistaken good faith the Owner must buy the improvements that were innocently made: a forced sale.
   c. Continuous possession that is consistent with the nature of the property, does not necessarily mean every minute. Tacking can also satisfy the continuous element. We can tack to equal the statutory time period.
   d. Exclusive does not mean that she cannot have a party, only that possession is not shared with the true owner, A is keeping O off the land.
   e. Hostile or claim of right or claim of title: the possession is inconsistent with owner’s rights or without his permission or consent.
1.) Note: that putting up a ‘No Trespassing’ sign makes A’s claim stronger because she can argue it was against A’s permission. For hostility the majority rule is that mental state is irrelevant for practical reasons. This is the better rule, see infra.

3. The theory and elements of adverse possession: functions as a method of transferring interests in land without the consent of the prior owner, and even in spite of the dissent of such owner. It rests upon social judgments that there should be a restricted duration for the assertion of “aging claims,” and that the elapse of a reasonable time should assure security to a person claiming to be an owner.
   a. The law of adverse possession is a composite of statutory and decisional law.
   b. Purpose: to quit all titles which are openly and consistently asserted, to provide proof of meritorious titles, and correct errors in conveyancing.
   c. Oliver Wendell Holmes: The Path of the Law: a thing which you have enjoyed and used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of an. If someone knows that another person is doing acts inconsistent with that person’s ownership then in justice to that other he is bound to find out whether the other had permission, to see that he was warned, etc., and if necessary stopped.
   d. Effect: bars an action by the owner and also vests new title, created by operation of law, in the adverse possessor. This new title relates back to the date of the event that started the SoL running, and the law acts as though the adverse possessor were the owner from that date.
   e. Purpose of Doctrine:
      1.) Protects Title: Protects owner because title may be difficult to prove
      2.) To bar stale claims: requires law suits to be brought when witnesses memories are fresh.
      3.) To reward those who use land productively (social)
      4.) Giving effect to expectations, which is a policy running throughout property law
      5.) Protects Ds reliance interest in not having to face suit, which becomes stronger as time goes by.

4. Possessor’s rights before the running of the statute: Before the expiration of the statutory period, the adverse possessor has no interest in the property valid against the true owner. The true owner may retake possession at any time. Note, however that the adverse possessor, before the running of the statute, has all the rights of a possessor. This is another example of relativity of title.
   a. Application of the Elements: possessor must show
      1.) An actual entry giving exclusive possession: possession must be such that the community would reasonably regard the adverse possessor as the owner. Generally, it cannot be constructive, however if there is an actual entry on part of the land, the possessor may be deemed in constructive possession of the rest. The possession must be exclusive. The purpose is to trigger a C/A, which starts the statute running.
2.) **Open and notorious**: one’s acts must be such as will constitute reasonable notice to the owner that she is claiming dominion. These would be typical acts of ownership. Just what is open and notorious depends on the land, its size, condition and locality.

3.) **Hostile and under a ‘claim of right’**

   (f) **Statutory Requirements**: states have codified the requirements, and the statutes sometimes require specific types of acts. New York statutes, for e.g., provide that if the claimant does not enter with color of title, AP can be claimed only where the land has been protected by a substantial enclosure or has been usually cultivated or improved.

   (g) **Claim of title – Van Valkenburg v. Lutz**: Lutz purchased lots 14 & 15 of a subdivision in 1912. In 1937, Van Valkenburg purchased lots 31 & 32. Between this property was an unsold parcel of land composed of lots 19-22. At first, Lutz used the lots for access to his property, but later built a shed and chicken coop on the property. He also gardened and sold produce. Van Valkenburg purchased the lots at a tax sale and erected a fence across the access way that led to lots 14 & 15. Lutz sued, admitting that Van Valkenburg owned the lots (19-22) but claiming a right of access across them. Lutz won. Van Valkenburg then sued Lutz to have his removed from 19-22. Lutz asserts that he had acquired by adverse possession, title to the lots previous to Van Valkenburg buying them at the tax sale. The trial court found for Lutz, but this was reversed on appeal. Lutz appeals.

   (h) To acquire title by adverse possession not founded on a written instrument, it must be shown by clear and convincing evidence that for at least 15 years there was an actual occupation under a claim of title. The premises must have been enclosed or cultivated and improved. The cultivation incident to the gardening did not utilize the whole premises claimed. (note, the court could have held that the gardening constituted actual possession and then claimed constructive possession of the rest). Neither were the premises improved.

4.) **What does a ‘claim of title’ or ‘right’ or adverse mean?** The key question in determining whether a person is adverse and under a claim of right is: does the court apply an objective or subjective test?

   (i) **Objective Test**: state of mind not important, it is the actions of the possessor. The possessor’s actions must look like they are claims of ownership. Under the objective test this amounts only to acting without permission.

      (i) **Note**: even if the AP says he will give up the land to the true owner if he appears, he can still be under a claim of rights if he does not have permission.

      (ii) **Note**: courts take account of one’s state of mind, even while claiming to be applying an objective test, when the adverse possessor was well aware he was trespassing
(j) **Subjective Test:** AP must have a bona fide or good faith belief that he has title. Claim of right means AP has a bona fide belief that he has title.

(i) **Note:** under the subjective test, non of the purposes underlying the doctrine of AP is fulfilled. See Gilbert’s pag. 24.

5.)**Note:** Lutz, supra, applied both tests because the court suggests that because he made a declaration against his interest that this went to his intent. Also, the fact that he did not enclose the land or make any substantial improvements suggested that they applied an objective test.

6.)**Modern View:** mental state is irrelevant for the hostility requirement. See *Manillo v. Gorski*

(k) **Note:** even if the statute does not claim these elements, courts have added them, making AP a blend of statutes and judicial decisions

5. **Boundary Disputes:** state of mind is especially relevant in boundary disputes

a. **Example:** A and B own adjacent lots. A erects a fence on what she mistakenly thinks is the boundary, but the fence is 10 feet over the boundary. A thereafter acts as the owner of all the land on her side of the fence for the statutory period. Subsequently, B learns of the truth and sues to eject. What result? Under the majority view, A owns 10 feet by adverse possession. Under Maine, state of mind is relevant and *it matters whether A would have claimed title had she known the land did not belong to her. If she would have claimed title anyway, then she is an adverse possessor.*

1.)**Note:** there is no requirement of good faith under the Maine Doctrine.

2.)**Note also:** that the Maine Doctrine has been criticized on the grounds that an action in ejectment lies against the possessor regardless of his actual intent, and the statute bars the action after the specified period.

b. **Boundary disputes may also be resolved by the doctrines of agreed boundaries, acquiescence and estoppel.**

c. **Modern Test:** Under the majority rule, mistake is not determinative. Possessor holds under claim of right if action’s appear to the community to be a claim of ownership and has no permission. This is an objective test.

1.)**Manillo v. Gorski:** mental state is irrelevant to the hostility element of adverse possession. Among neighbors, there was a mistake and she thought this was her land to build on. The Maine Doctrine: mistaken encroachments do not count to establish hostility for adverse possession. Hostility can only be established if you take the land in bad faith. P argues you need bad faith to have hostility. From a public policy perspective this is not a good thing. It is perverse to require bad faith and reward those. Under the sleeping theory it should not matter because O slept on his rights. The Court rejected the Maine Doctrine. The majority view: mental state for mistake is irrelevant. If the encroachment is under a claim of title this should satisfy the hostility requirement.

d. Only when the true owner has actual knowledge of the encroachment in a small area where the fact of an intrusion is not
clearly and self-evidently apparent is possession open and notorious.

1.) The court then looks at the open and notorious element. The court sets a difficult element for boundary disputes. Not really open b/c only a survey could find this out. This favors the O, while the new hostile reqt favors the D. Rule: no presumption of knowledge arises for a minor encroachment along a boundary, only when there is ... wrinkle: with mistaken boundary lines the true owner does need actual notice of this. IF we don’t give title other doctrines come into play. We can give a forced sale of the encroachment and have D continue to pay. Other alternatives: agreement → cts might enforce an oral agreement where the true boundary line is uncertain. Acquiescence → a presumption of an oral agreement. If the P acquires for a long time cts will presume there was an agreement. Estoppel → if P, by words or actions, indicates an agreement and D acts in reliance P is estopped from changing his mind.

e. Color of Title and Constructive Adverse Possession:
1.) Color of Title refers to a claim founded on a written instrument or a judgment or decree that is invalid or defective in some way. It is not a requirement for AP. It does however, have important advantages for the adverse possessor. Actual possession under color of title of only part of the land covered by the defective writing is constructive possession of all the writing describes.

6. The Mechanics of Adverse Possession
a. The possession must be continuous throughout the statutory period. If possessor abandons property for any period of time continuity is lost.

1.) Howard v. Kunto: P-appellee sought to sell half of his waterfront land to another party, and so had a survey performed to determine the exact lay of his property. When the survey was performed, however, it was found that the previous surveys, which were used for determining the deeds that were recorded for each plot in the neighborhood, were in error by 50ft.

2.) To establish continuity of possession, a person must only occupy the property for periods of time which are consistent with the nature of the property. The court reasoned that the rule of continuity was not one requiring absolute mathematical continuity, but rather if the land is occupied during the period of the year when it is capable of use, that is sufficient.

3.) Where there are several successive bona fide purchases and recordings of a deed to a tract of land adjacent to the tract of land occupied, and the cumulative possessions are longer than the statute of limitations for actions to recover property, there is sufficient privity to permit tacking and thus establish adverse possession. The requirement of "privity" is intended to keep chains of unrelated squatters from voiding the title of the original owner, and clearly those are not the facts in this case.

(i) Compare easements page 28.

(m) Each possessor was a bona fide purchaser from the previous one. Furthermore, where a person claims more than his deed describes, the question of privity is not defeated, so it should be the same for where the deed describes an adjacent parcel of land.
b. **Problems: Tacking:** done by conveyance (a term of art) or by delivery of possession. Privity of estate requires a voluntary transfer by a predecessor in interest. Two parties have continuity of interest established by a direct relationship between them. This is usually familial or economic.

1.) **Hypos:** In 1982, A enters adversely upon BA, owned by O. In 1989, B tells A to “get out.” A leaves and B enters into possession. In 1992, who owns possession? O. There is no privity, a voluntary transfer between possessors. Only O can eject B. Suppose in 1989, A leaves by threat of force, but 6 months later A recovers possession from B. If O does nothing, will A own BA? There are three views, the SoL begins running anew on A, the SoL continues uninterrupted, A can tack, but the statute is tolled during the time B is in possession. Therefore, A has to stay in possession the statutory period plus 6 months. This is the position adopted by 3 Am. Law Prop. § 15.10 and is theoretically sound. B cannot tack on A’s prior possession. Supposo in 1989 A abandons BA and B immediately goes into possession. If O does nothing, will B own BA in 1992? A variation on the theme. Abandoned property in 1989 B gets possession. There is no privity.

2.) **Problems: Disabilities:** Most legislatures think it unfair for a statute of limitations to run upon a person who is unable to bring a lawsuit (under a legal disability). However, theses provisions are strictly limited in two ways

1.) Only the disabilities specified in the statute can be considered; and

2.) Usually only disabilities of the owner at the time adverse possession begins count

3.) Generally, no tacking of disabilities.

4.) Examples: OH statute = 21 yr period but if under a disability then has an add’l 10 years. Disabilities are insanity and minority (majority=21). O owns BA on 1940, Able enters 1940, when does Able acquire adverse possession?

(n) O is insane in 1940 and dies intestate in 1950. Howard is his heir and has no disability in 1950? 1961.

(o) O is insane in 1940 and dies intestate in 1960. Howard is his heir and has no disability. 1970. Howard is in privity and can bring suit.

(p) O has no disability in 1940 and dies intestate in 1960, when Howard is 6 years old. 1961.

(q) O is insane in 1940 and dies intestate in 1960. Howard is 6 years old. 1970.

(r) O is 10 in 1940. In 1950 he is convicted of a felony and is jailed until 1965. 1961.

7. **Handout – Squatters:** Can they acquire by adverse possession? Continuous is the most difficult element that they would have to satisfy. Originally, it was aimed at squatters – they cannot tack. Also, if one is ousted they cannot add. There is no reasonable connection between the squatters. As a matter of social policy is this good? MI- innovative new statute: based on the Homestead Act. Detroit has passed an urban version of this. Families can live and improve them for up to 5 years. Deserving – children in school – no felony drug convictions. Then you can own the homes. The city and
8. **Adverse Possession of Chattels:** Generally, adverse possession of chattels and land are the same, but the SoL is shorter for chattels. There is one big difference. AP of land is open and notorious whereas AP of chattels seldom is. The statute of limitations begins to run not when the adverse possessor’s actions are deemed “open and notorious” but under *O’Keefe* adverse possession continues from the time of the theft unless the owner can show that she used due diligence and failed to locate the painting. If she used due diligence, adverse possession begins when owner located the painting. Tend to disfavor the true owner because they could not see who had the stuff. For land you need entry and satisfaction of all the elements.

a. **Modern Trend – Discovery Rule – O’Keefe v. Snyder:** O’Keefe is the painter who painted several paintings that she claims were stolen from her studio in 1946. She did not advertise that they were missing until 1972 when she registered them as stolen with an Art Dealers Association. Snyder bought the paintings in question in 1975 from a dealer who claims that they were in his family since perhaps as early as 1941-1943 (before the claimed theft). O’Keefe discovered the paintings in Snyder’s gallery in 1976 and instituted an action of replevin to recover them. Snyder claims both that the statute of limitations for replevin of chattels had run, and that he had held the paintings in adverse possession, through tacking with the dealer’s family, for over 30 years.

b. **Discovery Rule:** Unlike in real estate adverse possessions, in cases involving personal chattels, a cause of action will not accrue, and thus the statute of limitations will not begin to run, until the injured party discovers, or by reasonable diligence should have discovered, facts which form the basis of the action.

1. The expiration of the statute of limitations bars the remedy to recover, and also vests good title in the possessor. In establishing adverse possession of personal chattels, tacking of periods of possession between parties in privity with each other is permitted in the same way as with real estate.

2. The literal language of the statute of limitations results in harsh holdings when the property in question is one which is easily concealed, or its display is not visible broadly enough to put the owner on sufficient notice of the identity of the possessor (analogy to jewelry worn). It would encourage larceny to hold that the strict letter of the statute would prevent the owner from recovering an item of which he never knew the identity of the possessor.

3. Before the statute runs out, the possessor has a voidable title against all others but the true owner. To leave the title in the original owner after adverse possession would not put issues to rest that were deserving of resolution because of their age and action of the owner. 3. Not to permit tacking would enable the original owner to have rights much longer than the statute of limitations, and put a subsequent buyer in a worse position than the person who took it wrongfully in the first place.

4. **Note:** Adverse possession is an exception to the fact that a thief cannot acquire good title. With real property the rule has to do with the SoF – you need a written document to transfer title. The exception is adverse possession. Native American graves and
repatriation act – another category where adverse possession does not apply. Presumption that a NA artifact is stolen.

5.) The focus is on the due diligence of the owner and not on whether the possessor has met the requirements of AP.

6.) The burden is on the owner.

7.) Demand Rule – New York has a more friendly rule to owners. Whenever they get around to it then they have 6 years after that.

9. To what physical area does the Ap claim extend?
   a. Without color of title must be actually occupied or controlled in a manner consistent with ownership
   b. With color of title, it must be consistent with possession of property described in the deed.

10. Transferability
   a. Writing required
   b. Recordation of title. Title acquired by AP cannot be recorded because it does not arise from recordable documents. If the AP wishes to make his title appear on the public records he must file a quiet title action against the former owner. Title is good against the whole world but is not marketable until the title is evidenced by a public record.

C. Acquisition by Gift (NOTE THE FIFTH WAY IS SALE)

1. Introduction. A gift is a voluntary conveyance to another. No consideration is involved. In the case of deeds, there must be donative intent and delivery. Also, the donee must accept the gift. Delivery means that there is a transfer of possession. Manual delivery is not required if it is impractical. The intent to transfer must be present intent.

2. General Rule: If the object can be handed over, it must be. There are some types of personal property that, because of their nature, cannot be physically delivered (intangibles). Others, are inconvenient to deliver (heavy furniture). The courts permit symbolic or constructive delivery. The donor must be found to have departed with dominion and control of the property.
   a. Use of Key – Example – P alleges that intestate gave her as a gift causa mortis, furniture and other property in his house. There was an insurance policy and other papers in a bureau. The administrator sold the furniture and collected the insurance policy, and this suit is against the administrator. The handing over the property occurred when the intestate handed over some keys and told P to take them and keep them and everything in the house. The keys unlocked the bureau which contained the insurance policy. There was a judgment for the P and D appeals. Held, to make a gift causa mortis requires two things. An intention to make a gift and delivery of the thing given. Donative intent may be inferred, but it must be shown that the donor at all times knew what he was doing. The giving of the keys was held not to be constructive delivery value of the insurance proceeds because the policy could have been taken and handed to P. **Newman v. Bost**

3. General Rule: Most courts hold that a donor may make a valid gift of a future interest in personal property, subject to the donor’s life estate.
   Therefore, even though the donor does not immediately deliver the subject matter itself.

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2 Instead of the thing itself, some other object is handed over in its place
3 the donor delivers the means of obtaining possession and control of the subject matter rather than delivering the subject matter itself.
matter of the gift to the donee, the intent to make a present gift will usually be found to have been satisfied.

a. **Example:** P’s father wrote him a letter giving him the painting for his b-day, but wishing to keep it for the remainder of his life. P destroyed it on instructions from his father. Two other letters were received indicating that the painting was in fact a present gift to P, subject to his father’s lifetime possession. P never took possession of the painting. His father retained possession of the painting and when he died P requested it and D refused to hand it over. Victor intended to transfer ownership of the painting to P in 1963 but to retain a life estate in it. The acts of possession and paying insurance and not inconsistent with a life estate. As long as the evidence establishes an intent to make a present and irrevocable transfer of title or the right of ownership, there is a present transfer of some interest and the gift is effective immediately. Once an inter vivos gift is made, it is irrevocable and title vests immediately in the donee. *Gruen v. Gruen.*

### IV. POSSESSORY ESTATES

A. **What is an estate?** An interest in land that is or may become possessory in the future. It comes from the word ‘status.’ Under the feudal system, a person’s social status was derived from his land holdings. The modern equivalent is ‘property is power.’ The haves v. the have-nots, distinguished by landholdings.

B. **Possible Estates** –

1. O owns BA and wants to give it to A and B. O can cut it down the middle and give each half. A physical division. We won’t be concerned with this. We can divide the interests over time. The property can go from O → A → B and then back to O, etc.

C. **Measuring Point in Time**

1. Can rely on an event or condition
   a. To A and her heirs but if A divorces, ...

2. **Life**
   a. To A for Life, then to the kids

3. **Specific Period of Time**
   a. To A for 10 yrs

D. **How people pass their property from one to another**

1. **Life – inter vivos conveyance** (“among the living”)
   a. Sale
   b. Gift

2. **Death**
   a. Will – devise property by will; those that take under a will are devisee or legatee
   b. Intestate Succession – without a will
      1.) Those that take under a will you are a devisee, if there is no will only then are you an heir. A living person has no heirs, we have to wait until the moment of death, and then we see who is still around.

E. **Two Questions:** Who has the right to possess BA and How long – what is the duration of that estate?

1. To a for life then to B – A has the present or possessory estate, upon conveyance, A has the right to possess the property now, B has the future interest. Both have a present right, but A’s is to possession now, and B’s is in the future. Sometimes the future takers cause trouble bc they have certain rights they can enforce.
2. C/Ls answers are first handout The C/L required that we squeeze the estate into one of these boxes. We try to give honor to the intent of the grantor, but the intent is often vague. Thus, we have “magic words” which are the key to fitting into the box.

F. Non-freehold estates: where the possessor has the mere right of possession and not ownership. Modern day context is a tenant. You have a legal right to be in the apartment but you do not own in.
   1. Term of Years
   2. Period Tenancy
   3. Tenancy at will

G. Freehold:
   1. Fee Simple: duration is potentially infinite. The largest estate in terms of time. “To A and his heirs” (in modern times you can sometimes get away with To A.
      a. O → A and his heirs. To A is our words of purchase. This means WHO gets the estate: A. This is not the modern meaning of “purchase.” Just means who gets the estate. “and his heirs” are words of limitation. This tells us FOR HOW LONG.
        1.) Note: At C/L “To a in fee simple” created a life estate. The words “and his heirs” must have been used.
      b. Characteristics
         1.) No limitations on heritability
         2.) Cannot be divested
         3.) Will not end on the happening of any event
   2. Life Estate: lasts until the death of a particular person, usually the purchaser. “To A for life” Wrinkle, you can use another person as the life. Per autro vie – for other life. To A for the life of B. It lasts for the life of B.
      a. O → To A for life. What happens when A dies. The law will imply one of two things. In the grantor (reversion) or there may be a remainder and then the grantee. REMEMBER LIFE ESTATE ALWAYS follows a future interest. Most life estates today follow a trustee who manages it for a life tenant.
   3. Fee Tail: potential to last until the purchaser’s line of descendants runs out. “To A and the heirs of his body” OR “To A and his issue.” Both these mean descendants not just kids. Gets it first then the heirs, who have a present right to future possession. This is a restraint on alienation. The grantor, O, is trying to say who owns this property forever. A cannot dispose of the estate because his issue have a future right to possession. In most states, this has been abolished by statute. See Handout.
      a. In MI, fee tails are abolished despite Os intention. They are converted to fee simple. 554.3 3. Dead hand control. If a grantor creates a fee tail estate, I am controlling from the grace who will control the property forever. The courts do not like this, they like then market economy.
      b. Characteristics
         1.) Lasts as long as any of his descendants survive
         2.) Is inheritable only by the grantee’s descendants
         3.) Descendants can be “disentailed” and land can be conveyed in fee simple to a buyer.

H. Defeasible Estates: Qualified Estates
   1. Defined: a grant that is defeasible on the happening of some event and causes the owner to lose the land.
   2. Absolute:
   3. Subject to Executory limitation
   4. Subject to Condition subsequent
a. Does not automatically terminate but may be cut short at grantor’s election. When in doubt courts prefer this construction over a fee simple determinable. This is because forfeiture is optional at grantor’s election and not automatic.

5. Determinable

I. History

1. **Hereditary Succession.** Inheritability allows for infinite ownership within the family line. If I die without a will, we assume that it will go to our heirs. That was not always the case. After about 1200, the king would say, I am giving the land To A and his heirs. This was an important historical development. It was going to A and his family line forever. Do the heirs specifically get the property? At first they did. By about 1290, we have the statute Quia Emptoris: gave tenants the right to alienate their holdings without the lord’s consent. Land was not devisable until 1540 when the Statute of Wills was enacted. The fee simple then took on three characteristics: 1) free alienability; 2) disposal at death by will; 3) escheat of no will and no heirs. A could completely cut out or alienate A’s property.

This is called from contract to status. A 1906 book by Henry Maine. Everyday citizens have actual property rights. From an ind K with the King to status, an actual ownership. A is the land owner if the King gives the land away. A more that “mature” societies make. The final transition came in 1540, the statute of wills. Not only can A give away the property, A can make a will and decide who gets the property at my death.

   a. Rise of Heritability
   b. Rise of Alienability
   c. Rise of the Fee Simple Estate

2. **Problem 1:** To A for Life, then to B forever. In 1600, what are As and Bs interests? A has a Life Estate. B has a remainder in a Life Estate. Reverting back to O in fee simple absolute. Then goes to Os heirs or devisees (if there is a will). A for life, B foe life with a reversion in O. In modern times, what interests do we have. A has a Life Estate. B has a fee simple absolute. C/L if it says To A we read in for life. Modern times we read in to his heirs and give hi a fee simple absolute,

3. **Problem 3.** O → A and her heirs. A’s only child, B is a spendthrift. Can A cut B out of the conveyance? Yes. Remember who gets the estate (A) and for how long? A gets a fee simple absolute. The heirs get nothing, they have a mere expectation that they will be taken care of in the will. Is B the heir of A? No, not while a is alive. We don’t know if she is the heir and the words to his heirs don’t give anything to heirs. Thus, the heirs are cut off for two reasons.

J. The Life Estate

1. Courts prefer construing a conveyance as a fee rather than a life estate in an ambiguous situation. Also, restraints on alienation will be void, but the rest of the conveyance will stand.

   **Example:** T → “To Evelyn to live in and not to be sold.” The will is ambiguous and we are really not sure what she wanted. If she had a fee simple absolute then all the others are cut out. If she has a life estate, the remaindernen have a current interest to future possession. Where the will is unclear, the presumption is fee simple. To Evelyn and her heirs, presume a fee simple absolute. We don’t like restraints on alienation – the ability to sell or give away. As a matter of public policy, the court is going to read it out of the will. If the court found a life estate, the remaindernen, we would have partial intestacy. We know who gets the property now, but if she only had a life estate, we have
to look at the laws of intestate succession. Courts do not like this. One reading is she wanted to protect Evelyn and give her a place to live. Out of caution she threw in this non-legal stuff that could have backfired. Good result in this case. White v. Brown

2. Baker v. Weendon: john gives to Anna “all his property real and personal ... during her ... life” is a life estate. If kids it goes to them if not ... Alternate contingent remainders. She needs money. The issue is whether a court may order the sale of property that is encumbered by a future interest? In the last case, Evelyn had not just a life estate, but the whole thing. Here it is clear that there is a life estate. Held, [on remand] Yes, but only if necessary if in the interests of both the life tenant and the remaindermen. Illustrate the problems for people trying to dispose of estate if they use the Life Estate. This rule is not likely to be implemented. The testator does not specifically say she could sell, lease, etc. the property. The Life Estate form is ambiguous as the rights of the life tenant. Today we use a modern alternative – a trust. Give the property in trust to a trustee who manages the property for life for Anna then the property passes to the kids in fee simple absolute. .7% return on investment. She worked hard and is only getting .7 return, is this fair? This should lead the court on remand to stretch and say sure she can sell the property.

K. Leasehold Estate

1. Freeholder has seisin. Leasehold estates are non- freehold possessory estates. Leases were considered personal property (“chattel real”). The landlord was still seised of the land even after granting a term of years and giving up persona possession.

L. Defeasible Estates

1. Fee Simple: An estate can be created so as to be defeasible upon the happening of a future event. The most common kind is a fee simple defeasible. A fee simple may be absolute 4 or defeasible 5.

2. Determinable: A fee simple determinable is so limited that it will end automatically when a stated event happens.
   a. Example: O → BA “to the Hartford School Board, its successors and assigns, so long as the premises are used for school purposes.” A fee simple will expire if this limitation occurs.
   b. Words with a durational aspect: “while used for,” “during the continuance,” “until,”
      1) Note: “To the school for school purposes” creates a fee simple absolute. These words merely state the grantor’s motive.
   c. A fee simple determinable is accompanied by a future interest, retained by the transferor and is called the possibility of reverter.

3. Fee Simple Subject to Condition Subsequent: does not automatically terminate but may be cut short or divested at the transferor’s election when a stated condition happens.
   a. Example: O conveys “to the Hartford School Board, but if the premises are not used for school purposes, the grantor has the right to reenter and take the premises.” But if states a condition subsequent.
   b. Other language: “provided,” “however,” “on condition that,” or other words indicating that the estate may be cut short at the transferor’s election.

4 It cannot be divested nor will it end if any event happens in the future
5 It may last forever or may come to an end upon the happening of a future event
c. The future interest is a right of entry, which may be express or implied.

4. Condition subsequent distinguished from fee simple determinable: It may make a difference whether something is a fee simple determinable or a fee simple subject to a condition subsequent. In the former, the estate ends automatically on the happening of the stated event; in the case of the latter, a grantor or his heirs must actually re-enter or bring suit, which they may or may not do. Two reasons we care. On is the case below, the other is due to the SoL. The RoE favors O as against the AP bc the clock starts running later.

a. Mahrenholz v. County Board of School Trustees: In 1941, W.E. and Jenny Hutton executed a warranty deed in which they conveyed 11/2 acres to the trustees of School District 1. The deed provided that “this land to be used for school purposes only; otherwise to revert to grantors.” They both died intestate and left as heir, their son. In 1941 the Huttons conveyed to the Jacqmaisons 390 acres surrounding the school property, specifically excluding the tract conveyed to Ds. The Jacqmaisons conveyed to P in 1959 the 390 acres, including a reversionary interest in the school grounds. D held classes on the property until 1973 at which time it was used only for storage purposes. In 1977, Hutton conveyed to P all his interest in the school property. In 1977, Hutton disclaimed his interest in favor of D. The trial court held for D and P appeals. P claims that this was not a fee simple subject to condition subsequent, followed by a right of reentry for condition broken, rather it was a fee simple determinable followed by an automatic possibility of reverter. As such, title reverted to the son when the property stopped being used for school purposes. Issue: Whether the legal effect of the language was such as preclude P from acquiring any interest in the property? No.

1.) If the grantor had a possibility of reverter, he or his heirs become the owner of the property by operation of law as soon as the condition is broken. If he has a right of re-entry for condition broken, he or his heirs become the owner of the property only after they act to retake the property. In 1973, Harry did not act to retake the land, but conveyed his interest to Ps in 1977. If he only had the right of reentry then he could not be the owner until he had legally re-entered the land. If he had a possibility of reverter then he owned the land as soon as it ceased to be used as school premises. Here the word “only” demonstrates that the Huttons wanted to give the land only as long as it was needed and no longer.

2.) State law prevented the Huttons from converting their future interest while they were still alive. The future interest could only pass by intestate succession. The modern trend is that this is silly – MI follows this, you can give away a future interest in any of the ways you can transfer, see supra.

3.) The statute of limitations starts running on the possibility of reverter as soon as the determinable fee ends.

4.) A covenant is a promise by the grantee that a specified act will or will not be performed. If the covenant is breached, the promisee may sue for an injunction or damages.

b. Note 1: this case could have easily gone the other way. If durational then the Fl associated is an explicit right of entry, but a conditional clause would have given rise to a possibility of reverter. The Fl
looks like a right of re-entry but this is not the holding. There is almost words of duration. In the other case, the court really did not decide the issue. Also, in those circumstances, there were no practical consequences.

c. **Distinguish this from mere motive in grantor:** “To Board upon the understanding that the land conveyed is solely for the purpose of being used for the erection and maintenance of a public school,” created a fee simple absolute.

d. **No matter who holds the limitation is stays with the land.**

5. **Restraints on Alienation -- Mountain Brow Lodge v. Toscano:** The Toscanos deeded property to P. The deed contained a clause which provided that if the land failed to be used by Ps or P sold or transferred the land, the lot reverted back to them or their heirs. They died and P sued their heirs to quit title. P lost. The invalid restraint on alienation does not necessarily effect or nullify the condition on land use. This was a fee subject to condition subsequent with title to revert to the grantors if the land ceases to be used for lodge, fraternal and similar purposes.

a. **Analysis:** Fee Simple on condition subsequent, and the corresponding FI is the right of entry but the court said title to revert to the grantor. The court was being careless, but that’s okay this was only dicta. The case is here to illustrate how courts construe grantees as a matter of public policy. The sale restriction was struck out, the use restriction was left standing. This shows that restraints on alienation are disfavored by the courts. In this case, the court tools an odd approach in striking one restraint and not the other. Id the court really preserve the alienability of the land? What if the lodge gets strapped for cash and sells it to you? The courts try to preserve the alienability of property -- courts formally will strike down total restraints, but will tolerate incidental restrictions.

1. **Dead hand control** -- should they be able to control who owns and uses the land in the future. The court will tolerates some amount of dead hand control but total restraints will be struck down.

b. **Unreasonable restraints are void:** Any total restraint is void. The reason lies in public policy -- restraints on alienation take property out of the market making it unusable for the best use dictated by the market. They make property unmortgageable and unimproveable, to concentrate wealth in the class already rich, and to prevent creditors from reaching the property to pay the owner’s debts. Partial restraints were void at c/l modern courts will apply the reasonable test. The restraint must have a reasonable purpose and be limited in duration.

c. **Three types of restraints**

1.) Forfeiture  
2.) Promissory  
3.) disabling

6. **Determinable fee and right of partial reentry --** When the government exercises eminent domain, taking title to land where a fee simple determinable is owned by A and a possibility of reverter is owned by B, it is necessary to value the separate interests. The majority rule is that the entire condemnation award belongs to A unless the fee simple determinable would expire within a reasonably short period. A minority sets the value of the fee as the difference between the FMV of fee simple for all uses and the value of the land for the permitted uses. The difference
between the value of the determinable fee and the full FMV is the value of the possibility of reverter.

a. **Example** → Descendants of Ink gave 33 1/3 acres to City for use as a park and for no other use and purpose whatsoever. When the condition was not met, the land was to revert to the grantors. The park was also to be named after Ink. In 1961, the state instituted proceedings to appropriate perpetual easements for highway and related purposes over most of the property. The State deposited 130K in a fund and Ink’s descendants sued. Issue: Whether the owner should be paid if a condition on which the grant rests is not fulfilled through no fault of the person who must aid by the condition? Yes

1.) If the grantee takes the property then he would get a windfall and the grantor nothing. Here, the grantee paid nothing to the grantor for the determinable fee. Where the land is given to the grantee, the owner of the reverter is entitled to: the greater value of the land, less the value of the land with the restriction, which equals the amount due the owner of the reverter. The grantee gets that amount representing the value of the land with the restriction.

2.) The condition is not excused just because the land was taken. This still gives the grantee value for something he has not lost.

3.) D undertook the fiduciary obligation to use the land as a park named after Ink.

4.) The land is divided
   
   (s) D gets the value of the land taken
   (t) P gets the excess
   (u) D gets the money for the decreased value of the remaining land, but only to the extent such money is, or reasonably can be used for Ink Park purposes.
   (v) D gets the entire sum of money paid by the state for taking the structures D built on the park.

V. **FUTURE INTERESTS**

A. **Introduction**: future interests confer rights to the enjoyment of property at a future time. An existing non-possessory interest.

B. **Categories of Future Interests**

1. Interests retained by the *grantor*, known as
   
   a. Reversion
   b. Possibility of reverter
   c. Right of entry

2. Interests created in a *grantee*, known as
   
   a. Vested remainder
   b. Contingent remainder
   c. Executory interest

C. A future interest gives legal rights to its owner. It is a *presently existing* interest that may become possessory in the future.

D. **Future Interests in the Transferor**

1. **Reversion**: the interests remaining in the grantor, or in the successor in interest of a testator, who transfers a *vested estate of a lesser quantum* than that of the vested estate which he has. *I American Law of Property* δ 4.16.

   a. **Note 1**: because reversions result from the hierarchy of estates, they are thought of as the remnant of an estate that has not entirely passed away from the transferor. Hence, all reversions are retained interests, which remain vested in the transferor.
b. **Note 2:** A reversion is never a possibility of reverting which follows from a determinable fee.

2. **Possibility of Reverter:** arises when an owner carves out of his estate a *determinable* estate of the same quantum. For all practical purposes, a POR is a future interest remaining in the transferor or his heirs when a fee simple determinable is created.
   a. **Note 1:** This waits politely until the natural termination of the estate.

3. **ROE:** when an owner transfers an estate subject to condition subsequent and retains the power to cut short or terminate the estate, the transferor has a ROE.

E. **Future Interests in Transferees:** A remainder is a future interest that *is capable* (not necessarily certain) of becoming possessory at the termination of the prior estate.

1. A *vested remainder* is one where the transferor has decided at the outset who is to take the property upon the life tenant’s death.
   a. **Note 1:** the law prefers a vested remainder
   b. A remainder is vested if:
      1.) It is given to an ascertained person; AND
      2.) It is not subject to a condition precedent
   c. A remainder may be indefeasibly vested, meaning that the remainder is certain of becoming possessory in the future and cannot be divested
   d. **Note 2:** vested remainders are usually followed by an executory interest
   e. **Rule of thumb:** if the taker of the first future interest has a vested remainder subject to divestment then the next taker of the second future interest will have an executory interest.

2. A *contingent remainder* permits the transferor to let future events determine this question. A remainder is a future interest that waits politely until the termination of the preceding possessory estate, at which time the remainder moves into possession if it is then vested.
   a. A remainder is contingent if:
      1.) It is given to an unascertained person; OR
      2.) It is subject to a condition precedent
   b. **Note 1:** contingent remainders are usually followed by an alternative contingent remainder
   c. **Note well:** remainders must have the capability of becoming possessory immediately upon the termination of the prior possessory estate as a result of the happening of a limitation not a condition subject to one exception. The future interest following a fee simple determinable is a shifting executory interest, even though fee simple determinables end upon the happening of a limitation. Future interests incapable of becoming possessory immediately upon termination of the preceding estate as of the moment of their creation are springing executory interests.

3. An *executory interest* is a future interest in the transferee that can take effect only by divesting another interest. In order to become possessory it must
   a. Divest or cut short some interest in another *transferee* (this is shifting); OR
   b. Divest the *transferor* in the future (springing)
   c. **Note 1:** the label *executory interest* is applied in one situation where the future interest is not a divesting interest → where a future interest in a transferee follows a fee simple determinable. This will
not be “cut short.” If you do not have this type of estate, the
executory limitation cuts the preceding estate short.
1.) Example 1: O conveys “to Town Library so long as the premises
are used for library purposes, then to Children’s Hospital.” The
library has a determinable fee, Children’s Hospital has an
executory interest.
2.) Example 2: To A and his heirs, but if A divorces, then to B. This
is a shifting executory interest.
3.) Example 3: To A for life, and 1 year after A’s death, to B. A
springing interest divests the grantor instead if the grantee.
d. Two prohibitory Uses:
e. The Rise of the Use:
f. The Abolition of the Use: Statute of Uses. These types were
disfavored but the statute of Uses and ? allowed for these types of
interests to take hold.
4. Why does it matter if the remainder is vested or contingent?
a. A vested remainder accelerates into possession whenever and
however the preceding estate ends, a contingent remainder cannot
become possessory so long as it remains contingent.
b. A contingent remainder was not assignable at C/L during the
remainderman’s life and hence was unreachable by creditors
c. Contingent remainders were destroyed if they did not vest on
termination of the preceding life estate
d. Contingent remainders are subject to RAP.
e. The owner of a contingent remainder may not have standing to sue
for waste, etc at C/L.
5. John C. Gray, Restraints on the Alienation of Property: inalienable rights
of property are opposed to the fundamental principles of the common law;
that is, it is against public policy that a man “should have an estate to live
on, but not an estate to pay his debts with ...”
F. Rules Furthering Marketability by Destroying Contingent Future Interests
1. Judges did not like any limitation that made land inalienable and threw up
obstacles. Judges were most wary of contingent interests because they
made land unmarketable. For example, if O conveyed “To A for life and
then to A’s heirs,” the land could not be sold during A’s life because the
heirs could not be ascertained until A’s death. We want to limit dead hand
control because it restricts marketability of land. Suppose O conveys To A
for Life, remainder to B. If A and B agree, can they sell the property to C?
Yes. That’s everything. Suppose that O made the conveyance to A for Life,
then to B’s heirs. B’s heirs have a contingent remainder and they cannot sell
because we don’t even know who they are yet. The logical solution is to
manipulate the interest so that it’s certain. Contingent remainders
especially destroy marketability.
2. The Rule in Shelly’s Case: the rule furthers alienability and prevented
feudal tax evasion.
a. If (1) one instrument (2) creates a life estate in land A, and (3)
purports to create a remainder in persons described as A’s heirs (or
the heirs of his body), and (4) the life estate and remainder are both
legal or both equitable, the remainder becomes a remainder in fee
simple (or fee tail) in A.
b. Note 1 (well): This is all that the rule in Shelly’s Case does. The
doctrine of merger may then come into play. According to this
doctrine a life estate merges into a next vested remainder in fee (a
larger estate).
c. Interests Subject to the Rule in Shelly’s Case
1. The rule applies only to remainders
2. Rule of law not of construction
3. Merger may not always occur. For a merger, only the next vested estate will merge with a prior estate.
4. Only remainders in land
5. Only remainders in favor of the heirs (or heirs of the body)
6. Must be in the same instrument

3. The Doctrine of Worthier Title: when a transferor, by an inter-vivos conveyance, purports to create a future interest in the transferor’s heirs, the transferor is presumed to intend to retain the future interest rather than confer it on his or her heirs.
   a. This rule is a rule of construction – it is intent effecting
   b. Interests Subject to the Rule
      1.) Remainders
      2.) Executory Interests
      3.) There is no requirement the interest be a freehold
      4.) Inter-vivos transfers only
      5.) Future interests purportedly created in next of kin
   c. Rationale: taking title by descent was worthier than taking by purchase (by inter-vivos conveyance or by will)

4. The Destructibility of Contingent Remainders: a legal contingent remainder in land is destroyed if it does not vest by the time the preceding freehold estate terminates.
   a. Interests Subject to the Rule
      1.) Only contingent remainders
      2.) Prior estate must be a freehold
          (w) Note: the prior possessory estate will always be an estate of less quantum than a fee simple
   b. Destruction by Merger
      1.) The rule enables the life tenant and reversioner to join in effecting a transfer of the property in fee simple absolute.

5. The Rule against Perpetuities:
   a. “No interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest.”
   b. Strikes down contingent interests that might vest too remotely.
   c. It is a rule of logical proof. You must prove that the contingent interest will necessarily vest of fail within 21 years after some life in being at the creation of the interest. If you cannot prove this then the contingent interest is void from the outset. What you are looking for is a person who will enable you to prove that the contingent interest will vest within the life of, or at the death of, the person, or within 21 years after the death of the person. This person, if found, is called the validating life.
   d. Page 259 number 1: when does O have a reversion and when we do not need one? O retains a reversion unless he has a vested future interest in fee simple absolute that is ready to take when the prior estate expires; in b, c and d he has a reversion. Part c  what happens to Os reversion if B reaches 21 during A’s life. Os reversion is divested by the vesting of Bs contingent remainder. Page 261  B has a springing executory interest, it raises the issue that you cannot have someone die and have a funeral immediately. O steps in as placeholder in fee simple absolute subject to executory limitation. Page 271  involves a class gift to A’s children: [General Rule:] no class gift vests unless the class is closed and every members interest must vest indefeasibly. B has a vested remainder
VI. Co-Ownership and Marital Interests

A. Common Law Concurrent Interests

1. A cotenant can devise, sell or otherwise dispose of her undivided share in the same manner as if she were the sole owner. The presumption under modern law is that if there is a conveyance to two persons simultaneously then a tenancy in common is created. This means that heirs will take as tenants in common unless a joint tenancy is created. See, infra.

2. Types, Characteristics, Creation

   a. Tenancy in common: separate but undivided interests in the property.
      1.) Four elements
         (x) Unity of interest is no a req so that one can have an undivided 1/3 and ine 2/3.
         2.) Each has the right to possess the entire property.
         3.) Magic words: “To A and B”
         4.) No right of survivorship **
         5.) Partition is allowed

   b. Joint tenancy
      1.) the right of survivorship which allows to avoid probate and creditors; fiction that all tenants are seised as one
      2.) The right of the surviving joint tenant to the whole takes precedence over any devisees under the will of the dead joint tenant. Thus, a J/T cannot devise her share in the property. Similarly, the right of survivorship takes precedence over creditors of the dead J/T. If the creditors do not attach the property before death, they cannot reach the property after.

3. Four Unities: Pneumonic \( \Rightarrow \) PITT
   (y) Unity of time: vesting if their interests at the same time
   (z) Title: same instrument or joint adverse possession
      (aa) Interest: 2 comp
         (i) Equal shares
         (ii) Identical duration
   (bb) Possession: each must have the right to possess the undivided whole. They can agree that one person will have exclusive possession and this does not sever the unity of possession.

4. Language: “To A and B as joint tenants and not as tenants in common.” Or “To A and B as joint tenants with the right of survivorship.”

   (cc) Note: In some states, “To A & B as joint tenants” or “To A & B jointly” is insufficient to create a J/T.
   (dd) To A & B as joint tenants and to the survivor and his heirs. Here, there is an express gift, to the survivor and his heirs. It does not say “To A & B with the right of survivorship.” The cases are divided. Some courts hold this language creates a tenancy in common in A & B for life, with remainder to the survivor. Others hold a J/T is created. Either A or B can convey his interest to C, severing the unities of time and title and terminating the J/T. B & C would then hold as tenants in common. Hence, either joint tenant can destroy the right of survivorship. If A & B hold a co-tenancy for
their joint lives with remainder to survivor, neither A nor B acting alone can destroy the contingent remainder in their survivors. If A conveys to C, C takes As Life Estate & As interest in the contingent remainder, but Bs rights are not effected.

5.) Survivorship
6.) Rationale: by a c/l fiction, joint tenants were regarded as one entity
7.) Presumption that a tenancy was a joint tenancy
   (ee) This is because when one died the entire interest would be in the survivor. This meant that all the obligations were owed by one person as opposed to if there was a tenancy in common, where upon one person’s death his interest went to his heirs, thus dividing up the obligations.
   (ff) The presumption has been reversed
8.) Unilateral Destruction is possible
9.) Partition is allowed
   c. Tenancy by the entirety: same as joint except husband and wife are considered to hold as one person. Need all of the four unities. To A and B in tenants by the entirety. Cannot be unilaterally destroyed unless there is a divorce then Tin C. Partition but must be at the request of both parties, no unilateral partition.
   d. Hypo: Suppose you are going to buy a house with your friends. What kind of arrangement would you rather have? Tenancy in common so that your share goes to heirs. JT requires some kind of closer or familial relationship. Tenancy in common is what business partners would do.
   e. How do these relate to future interests? Now we are talking about sharing physically now. A different way of accommodating interests.
3. Severance of Joint Tenancies: a joint tenant may sever the right of survivorship by severing any of the four unities. The C/L viewed this strictly.
   a. One JT can eliminate the JT unilaterally and create a tenancy in common -- Elimination of c/l fictions -- Riddle v. Harmon: Wife attempts to unilaterally severe her joint tenancy in order to cut her husband’s interest out. Held, a joint tenant may terminate a joint tenancy by granting his one-half undivided interest to himself.
   1.) Four unities. Under the c/l, four unities were essential to the creation and existence of an estate in joint tenancy: interest, time, title and possession. If one was destroyed, a tenancy in common remained. Severance of the joint tenancy extinguishes the principle feature of the estate – the right of survivorship. The “right” is a mere expectancy that arises only on survival and then only if the unity of the estate has not been destroyed.
   2.) Note: this case contradicts some discourse regarding the considerations that go into recognizing a property right. For example, we usually think that considerations of fairness and economic efficiency are important. Bentham’s argument that property is a legally protected expectation and perhaps the Labor theory of property rights. Ps reliance interest was perhaps unfairly violated in this case.
   3.) Cannot give away your interest by will to prevent an inadvertent severing of the JT by will before both of them have died.
4.) *To protect yourself:* they could have set it up as tenants in the entirety. Could have set it up “To A and B for their joint lives with an alternative contingent remainder.

5.) *So What?* The fragility with right of survivor.

4. **Mortgages** — Is the mortgage enforceable if the mortgagor dies before the other tenant? In lien theory states the mortgage does not sever the joint tenancy. If the person dies, so does the lien interest. The other joint tenant holds sole title to the property. *Harms v. Sprague*
   a. They should have gotten both signatures because they knew that it was a joint tenancy. We really do not feel too sorry for the bank. Note that this is a policy issue: as between two innocent parties who should bear the loss.
   b. When one J/T gives a mortgage on the property does this sever the J/T because the unity of interest is destroyed? This depends on whether the jurisdiction is a lien or title theory state. See page 138. A mortgage does not sever a JT in a lien state as opposed to a title state.

5. **Avoidance of Probate:** With a joint tenancy there is no need to change the title at the joint tenants death, since the surviving joint tenant owns the whole by virtue of the right of survivorship. Hence, joint tenant avoids probate.

B. **Relations among concurrent owners**

1. **Partition:** concurrent owners may wish to terminate a co-tenancy. The action is available to any joint tenant or tenant in common (but not in the entirety). Partition is an equitable remedy where courts physically divide or sell the property. The remedy terminates the co-tenancy and divides the property. This remedy is not available to tenants in the entirety because neither spouse can unilaterally destroy the right of survivorship.
   a. **Example:** Ps and Ds own as tenants in common some real property. Ps own an *undivided 99/144* interest. D occupies a portion from which she operates a business. They came to a parting of the ways, and the Ps wanted to split it. Ps propose to develop the property. The trial court ordered the property to be sold at an auction and the proceeds be sold. There are two ways, partition in kind and partition by sale. Can be at the request of either party unless it is in a marriage. The Ps want the sale. They cannot just sell their share because as a practical matter no one would buy the place where they own an undivided interest. She could place her garbage cans on their property. They will probably be the highest bidder and out buy D. An action for a partition is an equitable action and the court considers fairness. *In theory, partitions in kind are favored over petitions by sale.* Courts do tend to order partition by sale, despite what this court says. In modern times, we like to make property marketable. *Delfino v. Vealencis*
      1.) Note that they all have unity of the whole and right to occupy the whole property. We do not divide this property into 99 little pieces.
      2.) An agreement not to partition the land is not a restraint on alienation unless unduly oppressive.

2. **Sharing the Benefits and Burdens of Co-ownership**
   a. The rights and duties of the cotenants are basically the same. Each cotenant is entitled to possession and enjoyment of the entire property; no cotenant may exclude another from any part of the property. **Major Rule:** if one cotenant is ousted by another, the other is entitled to use and occupy every part of the property.
without paying any amount to the cotenant. He cannot recover the rental value of the land unless he has been ousted. If one cotenant ousts another, she must pay the ousted cotenant the reasonable rental value of the property. Ouster is an act by one cotenant that deprives another of the right to possession. Rationale: The rule promotes the productive use of property. It rewards the cotenant who goes into possession and uses the property. It also follows from the premise that each cotenant has the right to possess all the property. The tenant in possession must bear ordinary expenses and upkeep. Third party rents must be shared in accordance with the proportional share.

b. Absent agreement, there is a need for independent property rule to determine how the benefits and burdens of ownership are to be shared by the co-owners.

1.) *Spiller v. Mackereth:* General Rule is that in the absence of an agreement to pay rent or an ouster of a cotenant, a cotenant in possession is not liable to his cotenants for the value of his use and occupation of the property. Whether a cotenant in exclusive possession owes rent to the other cotenants? No unless you have an ouster. Note that this case takes a strict view of what an ouster is. Should have demanded he let her in with a denial of entry. But he did change the locks. Court says that this did not deny her entry because she did not say to give her the keys. The locks were just placed there to protect his stuff. There is no evidence that the locks were meant as an exclusion. A and B owned a building as tenants in common. When a lessee, Auto-Rite, which had been renting the build. vacated, Spiller entered and began using it. B wrote a letter demanding Spiller to get out or pay half the rental value. Spiller appeals. Difficulty here is in the concept of “ouster.” Simply requesting the cotenant to vacate is not sufficient because the occupying cotenant holds title to the whole and may rightfully occupy the whole unless the other cotenants assert their possessory rights. Any activity of possession and occupancy of the building was consistent with his rights of ownership.

2.) **Disadvantages (missed this)**
   (gg) Cotenancies ignore human nature and presume that people are able to share.
   (hh) Lack of flexibility

3.) **Advantages**
   (ii) Sentiment
   (jj) Business investment

4.) **Court gets a C- in applying this rule to the facts.**

3. **General Rule:** the act of one joint tenant without express or implied authority from or the consent of his cotenant cannot bind or prejudicially effect the rights of the latter. The limitation arises when one joint tenant leases all of the property without consent of the other oint tenants, in which can the lessor be liable to the other cotenants for the reasonable rental value of their use and enjoyment of their share. Generally, a lessee under a lease cannot dispute the landlord’s title and cannot establish the property by adverse possession. There are exceptions that are not applicable in this case. *Swartzbaugh v. Sampson*

VII. **Tradition, Tension, and Change in Landlord Tenant Law**

   A. **Introduction**
1. To have a L/T relationship there must be a transfer of possession. This right to possession is what distinguishes the lessee’s interest from an easement, license or profit. Whether a lease has been created depends on the parties’ intent.
   a. The more the space is limited the more unlikely it is a lease
   b. The more specific is the description of the boundaries the more likely it is a lease
   c. Periodic rental payments more likely results in a lease. Easements are paid at once.
   d. Leases are limited in time whereas easements are not. Page 168-69.

2. Legal Differences Between Leases and Easements
   a. A lease can be oral but an easement is subject to the SoF
   b. Only a T has a possessory interest in land and can bring an action in ejectment, trespass or nuisance.

B. The Leasehold Estates
   1. Term of years: an estate that lasts for some fixed period or for a period of time computable by a formula that results in fixing calendar dates for beginning and ending, once the term is created or becomes possessory (e.g., “from the date of this lease until next Xmas”). Must be for a fixed period, but it can be terminable earlier upon the happening of an event or condition. A term of years expires automatically without the other party giving notice but it cannot be terminated unilaterally before the event fixing event. (A periodic tenancy or tenancy at will can be terminated prior to the event). The period of time does not have to be years.

   2. The Periodic Tenancy: a lease for a period of some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination. “To A from month to month.” If notice is not given the period is automatically extended for another period. All terms and conditions carry over and the same type of tenancy occurs not a new one. These can also be created by implication.
      a. C/L half a years notice is required to terminate a year-year tenancy; for any periodic tenancy less than 1 year, notice of termination must be given equal to the length of the period, but not to exceed six months. (e.g., month- to-month requires 1 months notice)
      b. Landlord or tenants death had no effect on either of these but did on the tenancy at will

3. Note: a leasehold estate is not a freehold, and the tenant does not have seizin but only possession.

4. Note: annual rental payments payable monthly is probably an estate from year to year. This matters because of the notice requirement. If T holds over for any period of time after expiration of the lease, L can hold T over for another year’s rent. If month to month L or T can terminate at a months notice.

5. Tenancy at will: no fixed period that endures so long as both landlord and tenant desire. Either can terminate at any time. If the lease provides it can be terminated by one party the other can terminate as well. Ends when on of the parties terminates or someone dies. A leasehold that is terminable at the will of only one party is not a tenancy at will.
      a. The fact that only one party has the right to terminate at any time generally does not make the tenancy one that is at will. Instead, the tenancy is analyzed as if the right to termination was not present. See, for e.g., Garner v. Gerrish: D died and his estate is suing P to get him out of the house he was leasing from D. Where the lease provided that the lease should continue “for and during the term of quit enjoyment from the first day of May, 1977 which term will end
– Lou Gerrish has the privilege of termination this agreement at a
date his own choice,” the court held the lease expressly and
unambiguously grants to the tenant the right to terminate, and does
not reserve to the landlord a similar right.
1.) Some courts would hold this a tenancy at will.
2.) If it’s a non- freehold estate then the tenant is on the street, if
it’s a freehold it is a little longer. Could this be the intention of
the parties? Maybe or maybe not. If the court implied a power of
termination in the landlord then Gerrish is out on the street.
Most likely option is that the court will imply a reciprocal power
of termination, but do not rule out freehold estate.
3.) The end of the war example does not really fit into a box, it’s
just what you may argue to get the court to fit it where you want
it to be. The tenancy at will may be the closest approximation of
the parties intention because a tenancy cannot be terminated
before the period (unless of course there is notice given).
   b. Note the theme of Power returns in this area. Renting is a proxy for
wealth.
6. Tenancy at Sufferance: arises when a tenant remains in possession (holds
over) after termination of the tenancy. C/l rules gave the landlord a choice
to evict or consent to a new tenancy. The prior tenancy of the hold over
tenant may be either of the three types and the tenant will be held to that
period if the landlord elects this (but if at will there really is no term).
Rationale: justified as a deterrent to holding over and is in the best
interests of tenants as a class, who should be able to move in promptly
upon the expiration of an old tenancy. Some jurisdictions have modified
this. Modern cases give tenant relief where tenant does not intend to hold
over but is forced to do so by circumstances beyond their control. The
tenant at sufferance is not a trespasser because the original entry was
rightful. The tenancy lasts only until T is evicted or L elects to hold over for
another term.
   a. Crechale & Polles, Inc. v. Smith: when a tenant continues in
possession after the termination of his lease, the landlord has an
election either to evict him, treat him as a trespasser, or to hold him
as a tenant. The letter was an effective election to treat the
appellees as trespassers and landlord cannot now change his mind
after failing to pursue his remedy and hold lessees as tenants for a
new term. By accepting the check, landlord consented to the
month- to- month extension of the lease.
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No C/l either party could term inate provided they gave notice of term up to 6 mo. For year next year. W/o notice there was no notice to the contrary.

OK OK Generally
7. **Note:** To A for as long as the parties shall please” can be construed as a determinable fee with a future interest in landlord.

C. **The lease:** sometimes what looks like a lease is not. This matters because leases give rise to the landlord-tenant relationship, which carries with it certain incidents (rights and duties and liabilities and remedies) that do not attach to other relationships. Originally, the lease was treated purely as contract, but since the sixteenth century onward, the court treated the lease as creating a possessory interest in land.

1. **Conveyance:** to the extent that a lease is a conveyance, the tenant typically acquires the right of exclusive possession, and the landlord can re-enter only if the tenant breaches a covenant. The tenant assumes the responsibility of caring for the property.

2. **Contract:** the contractual nature of the lease involves the respective promises, or covenants, between the landlord and tenant. The parties may allocate risks, expenses and duties as they see fit. The promises are mutually dependent, so that if one party does not perform, the other is excused from performance.

3. **Lease distinguished from other relationships:** to have a landlord tenant relationship, the landlord must transfer to the tenant the right to possession of the premises. Whether a transaction results in a transfer of possession, and is a lease, depends primarily upon the intention of the parties. It is the right to possession that distinguishes the lessee’s interest from an easement, license, etc. **go back and look at page 169 in Gilberts legal differences between leases and easements.**

4. **Miscellaneous Points**
   a. Leases more than one year has to satisfy SOF.
   b. Statutory Reform – Is this a good thing?

5. On Oct. 1, L leases Whiteacre “to T for one year, beginning Oct. 1” On Sept. 30, T moves out. L has no rights, this was a term of years. If the lease said, “to T from year to year” this is a periodic tenancy, notice must have been given by April 1. If the lease was for no fixed term “at an annual rent of $2400, payable $200 per month on the first of each month.” This is an ambiguous grant. OTOH, there is an annual rent and you have a specific period and the period is from year to year. Or you may say it’s month to month. We care because of the notice and hold over rights. Or, this could be a tenancy at will, there really is no fixed ending date.

D. **Selection of Tenants (Unlawful Discrimination):** 6 1982 provides protection for all citizens of the US to enjoy the same rights as white people to inherit,
purchase, lease, sell, hold and convey real and personal property. In Jones v. Mayer, the Supreme Court held that δ 1982 applies to all acts of discrimination, both private and public, in the sale or rental of property. In 1968, Congress enacted the Fair Housing Act as Title VIII of the Civil Rights Act of 1968. This act makes it unlawful to refuse to sell or rent any dwelling to any person because of race, color, religion or national origin. The act was amended in 1974 to prohibit discrimination on the basis of sex, and in 1988 was amended to prohibit discrimination against people with children and against handicapped persons. The Act prohibits the making of any public statement that indicates any discriminatory preference.

E. **δ 3604(a) sets out the protected people:** race, color, religion, sex, familial status, national origin. (b) protected against sales and rentals. Terms or conditions of the sales or rental, ads, by lying, inducing someone else to do these things, δ f deals with handicapped people, same protection plus L have to make reasonable accommodations or modifications at the handicapped persons expense. Exempt people, sale or rent by owner without an ad, who does it entirely without agent, or owner occupied, four units or less.

1. **Hypo:** O inserts an ad in a newspaper offering to rent a room in her house to a white person. O is in violation of the Fair Housing Act prohibition against discriminatory advertising. If O does not advertise, there is no violation if she refuses to rent to blacks, but she will violate δ 1982, which contains no exemption for owner occupied dwellings.

2. **Soules v. HUD:** P is a single mom with a 12 year old trying to rent from D. P must show she is a member of a statutorily protected class and that she was fully qualified to rent or buy and that she was rejected. She just must show discriminatory effect not purpose. This had to do with familial status under the statute. The burden shifts to the agent who must show a legitimate reason for why she did not rent the apartment, a non-discriminatory purpose. The burden shifted back to Soules to show that the reason offered by the D was pretextual. Held, for D. D argued that P had a negative attitude and anyone with this attitude would have been rejected. She was non-harmonious with the living arrangement. This was a tough case, the testers gave conflicting results. There is no right answer, the court will be influenced by the quality of the factual proof and the equities of the case. Notice how easy it is to manipulate the outcome, and how D can say she would have required anyone to show they were quit. If she was trying to weed only children out then this would have violated the act.

3. **Bronk v. Ineichen:**

4. **Exemptions**
   a. Private clubs
   b. Dwellings for religious organizations
   c. Persons leasing or selling a dwelling she owns IF
      1.) Does not own more than 3 AND
      2.) Does not use a broker AND
      3.) Does not advertise in a manner that indicates an intent to discriminate
   d. One who leases a room or apartment in her building of 4 units or less, one of which she occupies and does not advertise in a discriminatory way.
      1.) Note: 1982 does not have this exception for single dwellings or Mrs. Murphy. Page 180 proving discrimination.

F. **Subleases and Assignments**

1. **Assignments v. Subleases**
   a. **Assignment:** In the absence of a prohibition in a lease, a T or L may freely transfer her interest in the premises. If the tenant assigns his
leasehold, the assignee comes into privity of estate with the L, meaning the L and assignee are liable to each other on the covenants in the original lease. If there is privity of contract then their obligations bind them regardless of whether there is privity of estate. After the assignment, L can sue T on his promise to pay rent because T made the promise to L. There is privity of contract. L can also sue T2 on privity of estate theory.

b. Subleases: If T sublets T becomes the Landlord of sublessee. The sublessee is not in privity of estate with the original landlord and cannot sue or be sued by L. Nor can he sue in contract. The threshold question is: Is there an assignment or a sublease?

1.) Formalistic Approach: whole interest or part. If T retains a reversion then there is a sublease and he becomes LL of sublessee.

2.) Intent of parties: The modern view is the intention of the parties determines whether a transfer is an assignment or sublease and reservation of an additional rent indicates a sublease. On the other hand, a transfer of the lease for a lump sum indicates an assignment (See, Ernst infra). what they construe it as; to whom T2 pays rent, if to the L it probably is an assignment (step into the shoes of T1).

It matters from the perspective of the L from whom can he collect the rent. If it's an assignment L and T2 are in privity of estate. The promise to pay rent is a covenant running with the land, which means that the promisee can sue anyone on the covenant with whom she is in privity of estate. T1 is in privity in K with the L; L can collect from either party, T1 liable under the K. If it's a sublease, T1 is in privity in K and remains in privity of estate. The L can only go after T1 for the rent. The assignment does not change anything from the perspective of Ts obligations.

1.) Note that T2 is primarily liable with T acting as a surety. This makes sense because T2 is in possession of the land.

2. Ernst v. Condit: if the transfer is a sublease there is no privity and the original landlord cannot recover directly from the sublessee. If the transfer is an assignment, there is privity and the landlord can recover from the assignee. The transfer to D was an assignment. An assignment arises when the lessee transfers all of his interest under the lease – he transfers the right to possession for the term. If he transfers anything less there is a sublease. In a sublease, the lessee is said to have retained a reversion; the right to possession reverts back at the end of the period of the sublease.

a. If this was only a sublease, P sued the wrong D. The C/I tendency to rely on formalism despite the influence of contract law. This was probably NOT the intention of the parties. When in doubt rely on formalism, bad facts against the D and allows the court to vote to what seems to be the right result. ON EXAM – know what the parties could argue, this could go either way.

G. Duties, Rights, and Remedies (Especially regarding the Condition of Leased Premises)

1. Landlord- Tenants and Moral Hazard: Leases give rise to a problem called “moral hazard.” Once a lease is entered into, the landlord has an incentive to neglect everyday repairs because the costs of neglect are borne primarily by the tenants. Tenants, in turn, have an incentive to neglect maintenance, especially toward the end of the term, because the cost of neglect will soon shift to the landlord. How might the law deal with these difficulties?
2. **Landlord duties and Tenants rights and remedies:** At c\L, absent some clause in the lease providing otherwise, the tenant took the premises “as is,” and landlords were under no obligation to warrant their fitness. As culture changed in the direction of urbanization and specialization, so too did the c\L. 1960s reform in the area of L-T relations.

3. **Disputes arise in essentially two ways:**
   a. The tenant might wish to vacate or stay by pay less rent
   b. The tenant might be injured and claim tort damages

4. **The Tenant who Defaults – what may the landlord do?**
   a. At common law the Landlord was entitled to use reasonable self-help, but the modern trend is to prohibit self-help, so that judicial proceedings are the only solution.

   **Example:** tenant sues for wrongful eviction. LL claims that she abandoned the place. Besides, she was the one that was damaging the property. Whether Berg abandoned the property? Whether the landlord’s self-help was permissible as a matter of law. If she abandoned she has no lawsuit. *Held,* for P. Closing for remodeling is not abandonment. The C/L rule, a landlord may use self-help if the entry was peaceful and legally entitled to possession. Here, the entry was not peaceful and the landlord was not entitled to self-help. Look at the lease. **The court re-wrote the lease.** Despite what you agreed to, self-help is not okay. The landlord was legally entitled to possession because she remodeled. The court did not object to this. The police were with the landlord, and there was nothing unpeaceful about this. In this case, the fact was that the entry was peaceful, but the court twisted the fact and by definition any time the landlord enters it is not peaceful. The court re-writes the common law. The landlord could have gone to court and sought an eviction. The court said from now on we are going to reject self-help. The retroactive application of a new rule is problematic so the court manipulates the facts. As of the date of this case, reasonable self-help is prohibited. *Berg v. Wiley*

5. **Note: SUMMARY PROCEEDINGS**
   a. Ejectment was time consuming and expensive for landlords and self-help was viewed as problematic from the viewpoint of landlords, tenants and society. Summary proceedings are intended as a quick and efficient means by which to recover possession and termination of a tenancy. Any matter extrinsic to the issue of possession is ignored.

6. **Note: LANDLORD’S REMEDIES IN ADDITION TO EVICTION**
   a. Back rents, future rents may exceed what he can get, damaged premises
7. Should the LL be entitled to rent if tenant wrongfully vacates the premise, does the LL have a duty to mitigate damages by renting the premises?

   a. In general, there is no duty to mitigate damages. There is a tenant-friendly trend to mitigate based on tenants lease.

   b. Hypo. Lease from aug. to aug. and you have a great job opportunity in Chicago, please let me out of the lease. The LL says no. You leave anyway and are sued by LL. Assume MI has not followed this trend. Argue why a LL has the duty to mitigate damages.

1.) Arguments for LL
   (kk) Tenants will be escaping from the leases and they will lack the certainty that leases otherwise have.
   (ll) Lost Volume by mitigating damages
   (mm) Freedom of contract – do not re-write our agreement
   (nn) Efficient – more efficient to advertise once a year, not having to go through this process multiple times a year – more costly
   (oo) Vandalism – vacant apartments led to this

2.) Arguments for tenants
   (pp) Contract all – all elements of K law should apply
   (qq) Waste
   (rr) This may lead to a moral hazard: the costs are born primarily by the tenants and the LL has no duty save tenants from having to pay and LL gets a windfall.
   (ss) Public policy we want to favor tenants because they are the people who are in a legally compromised position. (as a matter of social policy).
   (tt) Efficient Breach
   (uu) Landlord does not have to be successful, only has to make reasonable efforts. This means if he fails, the tenant must still pay.

3.) Burden is on the landlord to show he has satisfied his duty to mitigate
8. Quiet Enjoyment and Constructive Eviction
   a. *Generally:* a tenant has the right to “quietly enjoy” the premises. This means that the landlord cannot interfere with the tenant’s use of and enjoyment of the premises. This covenant is implied in every lease. Even at cUL, this breach absolved tenant from his responsibility to pay rent. This covenant can be breached by actual eviction or constructive eviction.

   1.) *Actual eviction:* If evicted from the entire leasehold, tenant may treat the lease as breached and terminate it. He no longer has to pay rent.

   2.) *Constructive Eviction:* If, through the landlord’s fault, the tenant’s quiet enjoyment of the premises is substantially interfered with, the tenant may treat the lease as terminated and vacate the premises. He is no longer liable for the rent. The theory behind this is that the landlord has so interfered with the tenant’s right of possession that he might as well have evicted the tenant. The necessary elements are:

      (vv) Substantial interference, see for e.g., Reste Realty, infra.
      (ww) Notice to the landlord. Must give notice and reasonable time to cure.
      (xx) Tenant must vacate.
      (yy) Fault of landlord.

   b. *Meaning of substantial interference -- Reste Realty Corp. v. Cooper:* In 1958, D Cooper leased from P’s predecessor, a portion of the ground floor of a commercial office building. The term was for 5 years, but after 1 year the parties made a new 5 year lease covering the entire floor except the furnace room. The leased premises were to be used for commercial offices and not for any other purposes without prior written consent. (note: this looks like a term of years determinable). The lease utilized the space for meetings and training or people. A driveway ran along the north side of the building which was not part of the lease. Whenever it rained, water ran off the driveway and into the offices and meeting rooms. D would notify the manager when this happened and it would be fixed. When the lease was renegotiated, the manager told D it would be fixed. He told his executor about the various problems. The problem was fixed but got worse. After his death, nobody paid attention to P’s complaints. The flooding greatly inconvenienced the meetings. After one especially bad flood, she saw an attorney, who advised her to vacate. P instituted this action to recover rent for the unexpired term of the lease. P contends that 1.) the damage did not constitute a permanent interference with the use and enjoyment of the premises and 2.) the water did not justify
the departure because she had examined the premises and agreed to keep it in good condition.

- **Premises:** this does not include the driveway; there was nothing to show that the inspection gave her notice of the defective condition and that the water would leak into the ground floor. These types of latent defects were not assumed by D.
- As to the second lease, there was a promise to fix the situation. Also, there was an express covenant to of quiet enjoyment in the lease. D relied on this promise.
- **Covenant:** when there is a covenant, express or implied, and it is breached substantially by the landlord, the courts have applied the doctrine of constructive eviction as a remedy. Under this rule, any act or omission of the landlord, or of anyone who acts under authority or legal right from the landlord which renders the premises substantially unsuitable for the purposes for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of covenant of quiet enjoyment and constitutes constructive eviction of the tenant.
  - Failure to supply heat as covenanted in the lease
  - Main waste pipe clog
  - Renting to others knowing of lewd purposes
- **Plaintiff argued the interference must be permanent:** substantial interference meets the test. There was no obligation for P to remedy it.
- **Plaintiff argues this was an independent covenant:** this breach constitutes a failure of consideration.
- **P argues waiver by staying for an unreasonable time thereafter:** The general rule is that a tenant’s right to claim a constructive eviction will be lost of he does not vacate the premises within a reasonable time thereafter. What is reasonable depends on the facts of the case. In considering the problem, the courts must be sympathetic.
  
  c. Most courts will now imply, in every noncommercial lease, a covenant that the premises be delivered to the tenant in fit and habitable shape. The courts have further held that the landlord’s fulfillment of this covenant is an antecedent condition to the paying of rent. Typically, the tenant can avoid the lease, or make the repairs and withhold the amount of the repairs from the rent. This implied covenant cannot be waived. Waiver is a violation of public policy.
  
  d. **Note:** if she abandoned then LL can get future rents for abandonment and can get for an anticipatory breach or a rent acceleration to allow LL to recover for the entire 5 year lease term.
  
  e. **So what?** The tenant does not have to pay because technically the tenant breached but through this implied covenant the court shifts the view and converted the tenant’s breach into the landlords. Here the provision was explicit, but courts will imply. The breach of the tenant is dependant on the landlord’s breach of his promise. C/l said constructive conviction was a physical ouster. The court starches the meaning of the word “eviction” and “reasonable time” to favor tenant. As a matter of social policy, unequal bargaining power and urban development. This was the height of the court’s judicial activism.
9. The implied warranty of habitability – Hilder v. St. Peter: P began occupying an apartment at D's apt. building with her 3 children and new begun grandson. P orally agreed to pay D $140/month and a deposit of $50. P has paid all rent due under the tenancy P agreed to clean up the apartment in return for her deposit. She did this but never got the money. After moving in, P discovered a broken window, which she repaired at her own expense. D never provided a front door key. The toilet remained clogged and inoperable for the duration of her tenancy. The lights did not work and the pipes were leaking. The apartment stunk and there was no heat. D promised to fix everything but never did. The trial court held that D breached the implied covenant of habitability.

- D argues that this was error because P is required to leave under this doctrine but never did
- P argues that leaving is not a requirement
- At C/L, the landlord’s only covenant was to deliver possession to the tenant. The tenant’s obligation to pay rent existed independently of the landlord’s duty to deliver possession, so that as long as the tenant lived there he had to pay rent. The landlord was under no duty to make the premises habitable absent express provision in the lease.

A. An exception to this rule was in cases of constructive eviction

- Today, this doctrine does not hold up and people seek housing to obtain safe and sanitary living conditions Today’s tenants are not experienced in fixing things and is in an inferior bargaining position with respect to the landlord. It would be wrong to impose caveat lessee on residential leases.
- The modern view favors the contractual approach where the landlord promises to provide habitable premises in return for rent. These premises are interdependent and mutual.
- The warranty of habitability is implied and covers latent and patent defects in the essential facilities of the residential unit.

A. There is no assumption of the risk or waiver

- In determining whether there has been a breach, courts may first look to

A. Relevant or local municipal housing codes. A substantial violation of the code is a prima facie case there has been a breach. However, only on or two minor violations standing alone that do not affect the health or safety of the tenant in not a breach.

B. If there is no code ask whether there is an impact on the health or safety of the tenant

- In order to bring a c/a the tenant must have given notice and allowed a reasonable time for its correction

- Standard K remedies are available.

A. The measure is the value of the building as warranted and the value as exists.

B. Another remedy is to withhold future rent

C. Tenant can deduct the expense of the repair if she fixed it

D. Punitive damages – if willful and wanton

a. Options: terminate the lease and move out and recover damages, withhold rent, repair and deduct costs (abatement)

10. Notes and Problems: Landlord’s Tort Liability

a. If the landlord knows of a dangerous condition, and also has reason to believe that the tenant will not discover the condition and realize the risk, the landlord has a duty to disclose the dangerous
condition. If the landlord does not disclose, she is liable for injuries caused to the tenant or his guest. **Rationale:** It is either negligent or fraudulent to fail to give a warning of a hidden danger, but there is also an economic cause. If the landlord discloses the defect to the tenant, the tenant can minimize the risk by remedying the defect or avoiding it. Both on grounds of fairness and efficiency, the tenant should not be held to assume the risk unless he can reasonably discover the defect upon inspection.

**H. The Problem of Affordable Housing**

1. *Chicago Board of Realtors, Inc. v. City of Chicago:*
2. Note: The Debate over Landlord/Tenant Reforms

**VIII. The Land Transaction**

**A. Introduction**

1. A Typical House Purchase Transaction in the United States:
2. State v. Buyer’s Service Co.
3. In Re Opinion No. 26 of the Committee of Unauthorized Practice of Law

**B. The Contract of Sale**

1. **Generally:** During the gap, buyer typically arranges financing and check’s seller’ title. For the parties to be bound during this time there must be an enforceable agreement between them; this is the purpose of the land sale contract.
2. **Time for performance:** the contract will normally provide a settlement date.
3. **The statute of frauds**
   a. Must be a writing or
   b. Memorandum in writing
   1.) Writing must state with reasonable certainty
      (zz) Name of each party
      (aaa) Land to be conveyed
      (bbb) Essential terms
      (i) Price
      (a) Purchase price or
      (b) Reasonable price
      (ii) Signature of party to be charged
4. **Exception to SoF:** under the doctrine of part performance, a party who has taken action in reliance on the contract may be able to gain at least some limited enforcement of it at **equity.** This means the doctrine of partial performance allows an oral contract to be enforced specifically in equity.
   a. **Caveat:** the exception does not apply if the price itself is an interest in land.
   b.
5. **Example:** Seller and Purchaser have an oral agreement to sell BA. Purchaser gives a check for $500 to Seller who never cashes. Purchaser immediately agrees to sell his house, relying of the deal. Seller gets a higher bid and breaches the contract with purchaser. **Held,** specific performance is ordered by the seller. “a contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the statute if the party seeking enforcement, in **reasonable** reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so **changed** his position that injustice can be avoided only be specific enforcement. Rest. 2nd § 129. **Hickey v. Green**
   a. **Unequivocally referable requirement:** courts generally require that the acts point with reasonable clarity to the presence of a contract.
Courts will not apply this requirement if the D admits that the oral agreement took place. If the making of the promise is admitted or clearly proved courts will not require this. In Hickey, the court was heavily influenced by the fact that D admitted the oral agreement took place.

6. Marketable Title

a. Generally: if the contract is silent on the issue of marketable title, it will be implied in the contract.

b. Definition: a marketable title is one that is free from reasonable doubt both as to matters of law and fact, a title which a reasonable purchaser, well informed as to the facts and their legal bearings and willing and ready to perform his contract, would, in the exercise of that prudence which businessmen ordinarily bring to bear on such transactions, be willing to accept and ought to accept.

1. The buyer should not be required to "buy a lawsuit"

c. Defects that make the title unmarketable

1. Defects in the record chain of title: anything in the prior chain of title indicating that the vendor does not have the full interest which he purports to convey, may be a defect and

   (ccc) Variation of names
   (ddd) Misdescription – ASK KLEIN ABOUT HOWARD V. KUNTO
   (eee) Not suitable for recordation
   (fff) Lack of capacity
   (ggg) Adverse possession

2. Encumbrances

   (hhh) Mortgage
   (iii) Liens
   (jjj) Easements
   (kkk) Use restrictions ASK KLEIN
   (lll) Encroachments
   (mmm) Land use and zoning violations

d. Express waiver: the contract of sale may enumerate the encumbrances and the buyer ay waive them. Of the contract may provide that the seller shall furnish the buyer with a list of encumbrances prior to closing, and the failure of buyer to disapprove within a few days after receipt will be deemed a waiver. However, a waiver of an encumbrance in the contract of sale is not a waiver of a violation of the encumbrance when the buyer does not know of the violation. Thus, if in the contract the buyer waives the building restrictions, and it is then found that the building on the property violates the restrictions, the buyer can rescind. Lohmeyer v. Bower

e. Adverse Possession: Unless marketable title “of record” is called for, many states hold that marketable title can be based on adverse possession. Adverse possession must be clearly proven. The seller must offer the buyer written evidence or other proof admissible in court that the buyer can use to defend any lawsuit challenging title. Conklin v. Davi. In a few states, marketable title cannot be shown by adverse possession unless a quiet title action has eliminated the record owner’s rights.

f. The question of whether title is marketable is one of reasonableness.

1. Majority rule is municipal restriction does not destroy marketability but private and violation is unmarketable. This is unless the contract waives the buyer’s right to object.
g. Time when title must be marketable: unless the contract says otherwise, the vendor’s title is not required to be marketable until the date set for the closing.

h. The closing: seller tenders deed and buyer tenders payment.
   1.) Damages = market price – K price (benefit of bargain)
   2.) Specific Performance

7. The Duty to Disclose Defects
   a. A seller who misrepresents the condition of the property will normally be liable to the buyer for damages under the c/l doctrine of deceit or fraudulent misrepresentation. The buyer will have to show (1) a false statement concerning a material fact; (2) knowledge by the seller that the representation is false; (3) an intent by the seller that the buyer rely; and (4) injury to the buyer.
   b. Most states now hold that the seller has an affirmative duty to disclose material defects that he is aware of. See for e.g., Johnson v. Davis, where the seller knew of facts materially affecting the value of the property which are not readily observable and are not known to the buyer, the seller is under a duty to disclose them to buyer. Buyer who put down deposit without being told of material defects was therefore entitled to have the deposit returned and the contract cancelled.
   1.) Note carefully, if the buyer could have reasonably discovered the defects using reasonable diligence, this logic fails to apply.
   c. Courts are especially likely to find the seller liable for mere nondisclosure where the seller has brought about the defect or condition.
   1.) As a matter of law, the house is haunted ...
      (nnn)Example: wanted to rescind the contract after discovering that the house was haunted and this was published in well known publications. The court relied on the fact that the seller had previously encouraged the house’s reputation of being haunted. D was estopped to deny the ghosts’ existence, and as a matter of law the house is haunted. Buyers are allowed to go forward with their complaint. The defect is that the house has the reputation of being haunted and so this was created by the seller. *Stambovsky v. Ackley*
   2.) Check if MI has a disclosure statute.
   d. The seller of a home who fails to tell the buyer of a material defect known to the seller is liable for damages caused by the fraudulent concealment.
      1.)Example: The seller has to know about facts that are material and not readily observable (latent) to the buyer. The court was concerned that on a mere technicality the seller would get off free because this could be construed as a nonfeasance case. The tort rule is not enough to protect the buyer so the court creates a property rule. Therefore, the seller is liable for failing to disclose material defects of which he was aware. *Johnson v. Davis*
      2.)Note: The trend is to have a qualification on the buyer beware (caveat emptor). This is an example of the court modifying this doctrine. The court uses the property rule to bolster the tort rule. There are very few instances in the law where we force people to do good things – we protect ourselves. The converse argument is that caveat emptor is bad because it is hard for buyers to discover certain defects. The modern rule is premised
in the idea that the seller is in a better position to know of the defects and the perfect modal is of complete perfect information before negotiation and then the marketplace can take over.

3.) **Hypo:** what if there were noisy neighbors? Under the first rule seller is not liable but under the second rule he is.

e. **Under the contract there are two major issues which are --** Whether title is marketable? What type of warranties are promised in the contract? Usually in the contract it states what type of deed it will be.

8. **Implied Warranty of Quality**
   a. At c/l the rule was *caveat emptor*. Courts now imply a warranty of habitability in the sale of new homes. The builder impliedly warrants that the building is free from defective materials and is constructed in a sound and workmanlike manner. The courts have almost always refused to allow an implied warranty claim against one who is not in the business of building or selling homes. As a practical matter, this means that an implied warranty suit generally cannot be brought by the buyer of a used home against the person who sold it to him. But, most courts allow the purchaser of a used home to sue the original builder for breach of the implied warranty of habitability if a defect is latent when the purchaser buys, and appears within a reasonable time after construction. **Privity of contract** seems no longer to be generally required for implied warranty of habitability suits. See, for e.g., *Lempke v. Davis*, allowing the purchaser of a used home to recover against the builder for pure economic loss, provided that (1) the defects were latent at the time of the purchase, so that they could not have been discovered by reasonable inspection; and (2) the defect manifested itself within a reasonable time after construction.

C. **The Deed**

1. **Nature of a deed:** the document that passes title from grantor to grantee.

2. **Doctrine of Merger:** the deed typically replaces the contract as the embodiment of the parties’ relationship. Under the doctrine of merger, most obligations imposed by the contract of sale are discharged unless they are repeated in the deed. Thus, if the contract calls for merchantable title as embodied in the warranty deed, but the purchaser carelessly accepts a quitclaim deed, the buyer will not be able to sue on the contractual provisions if the title turns out to be defective; he is limited to the provisions in the deed. The contract is only relevant during the gap between its signing and the delivery of the deed.

3. **Three types**
   a. general warranty deed: warrants title against all defects in title, whether they arose before or after grantor took title
   b. special warranty deed: contains warranties only against grantor’s own acts but not acts of others
   c. quitclaim deed: contains no warranties of any kind. It merely conveys whatever title grantor has if any.

4. **Requirements**
   a. it is customary to state that consideration was paid to raise the presumption that grantee is a bona fide purchaser entitled to protection of the recording acts
   b. a deed must contain a description of the land
   c. seal or signature
   d. a forged deed is void, one procured by fraud is voidable. the grantor having introduced the deed into the stream of commerce
made it possible for the subsequent purchaser to suffer the loss. As between two innocent parties, one of whom must suffer because of the fraudulent third party, the law generally places the loss on the person who could have prevented the loss. (Love v. Elliot).

e. Must name or identify the parties
1.) Use of blank name may cause the deed to be ineffective, but some courts hold the grantee has implied authority to fill in his own name.

f. Grantor must sign the deed, but not the grantee
g. Some statutes say the deed must be acknowledged or notorized

5. In MI the warranties are implied by using that language ...

6. There are three present covenants and three future.
a. Present – these are breached if at all only when the property is conveyed. Therefore, a breach can occur even absent an eviction. All the grantee needs to do to recover is show that title was defective on the date of the conveyance.

1.) Seisin: grantor has an indefeasible estate of the quality and quantity that he purports to convey.
   (ooo) Outstanding remainder
   (ppp) An adverse possessor is on the property even if the statute of limitations has not expired
   (qqq) Note: Pertains to title only, not to encumbrances. If there is an outstanding mortgage, the covenant of seisin is not breached.

2.) Right to convey
   (ttt) Majority: most courts think of these two as identical.
   (sss) Minority: thinks of this as warranting ownership while seisin warrants both ownership and possession. Therefore, an adverse possessor who has not acquired title yet would not breach this covenant.

3.) Against encumbrances – two options for seller
   (ttt) Can provide a lesser warranty (special, quite claim)
   (uuu) Provide a general deed with an exception
   (vvv) It is merely a matter of informing the buyer

b. Future – these are breached only when eviction occurs.

1.) Quiet enjoyment: they do not promise that title is perfect rather they constitute a continuing contract by the covenantor that the grantee’s possession of the land will be defended against claims by third parties in existence on the date of the conveyance.

2.) Warranty

3.) Further assurance: a promise that the grantor will, in the future, make any conveyance necessary to give the grantee the full title that was intended to be conveyed.

7. Contract promises may merge into the deed warranties in jurisdictions that follow mergers. Other judx says that they remain independent and buyer can sue either on contract or deed for damages, the difference between the land as promised and delivered.

8. We need these because title searches are not perfect. The warranties shift the burden of an undiscovered problem on seller rather than a buyer who is less likely to know.

9. The future covenants of quiet enjoyment, warranty and further assurance are breached only when an eviction occurs. The SoL begins to run on present covenants immediately but future covenants when they are broken.
Example: Brown v. Lober: O -> Bosts reserving 2/3 interest in mineral rights. Bosts -> Brown by general warranty deed containing no exceptions. Bs K’d to sell the mineral rights to consolidated for $6 but had to renegotiate the K for $2 to reduce for the 2/3 they did not own. The grantor (O) never exercised these rights to the minerals.

Ps argue they have been constructively evicted bc the deed conveyed less than it purported to. Ct relys on Scott: rejected grantees claim o quiet enjoyment on the grounds that the surface lot was vacant on the grounds that the owner never took possession of the property and grantee could have at all times entered peaceably on to property.

- Quiet enjoyment guarantees possession and enjoyment not that no one else has superior title.
- If grantor never occupied the subsurface Ps possession was peaceful
- Until someone holding paramount title interfere with the land, there is no constructive eviction and no breach of covenant of quit enjoyment. Here the covenant of siesin was breached but was time barred.
- If the mere existence of a paramount title were enough to constitute constructive eviction, the warranty of quiet enjoyment would be indistinguishable from that of siesin.

Brown v. Lober.

a. Note: Ps should have kept their mouths shut and actually removed the minerals from the ground, or otherwise put the public on notice that she was specifically claiming the minerals so as to acquire them by adverse possession because the Ds never severed the mineral rights so Ps possession of the surface could have been found to extend below the surface.

b. Note: failure to sell could be construed as constructive eviction in a less hostile court. They should have done a title search and they would have discovered that there was a cloud in the title. They should have hired a lawyer.

c. Note: there was clearly a breach of siesin that had become time barred.

10. General Rule: An easement which is a burden on the estate granted and which diminishes its value constitutes a breach of the covenant against encumbrances in the deed, regardless of whether the grantee had knowledge of its existence or that it was visible and notorious.

11. General Rule: present covenants do not run with the land and cannot be enforced by remote grantees. At the time of the breach, the covenant becomes a chose in action (a personal right to sue) in the grantee and the chose in action is not impliedly assigned. A lawsuit is usually thought of as something that cannot be assigned. Future covenants are different and can sue upstream to a remote grantor. The covenant runs with the land. There has been no breach yet and the promise can run with the future buyer. (the moral of the story is title insurance – title search!).

a. A breach of the covenant transforms the provision into a chose in action in Ls favor and it no longer runs with the land. Therefore, assignees preceding and proceeding the assignee are not liable for breaches that occur before or after they enter the land.

12. Minority View -- Rockafellor v. Gray: In 1907, Doffing conveyed to P some land with an outstanding mortgage to Gray for $500 that he assumed. Subsequently, foreclosure proceedings were instituted culminating in a Sherriff’s deed, which was executed and delivered to

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Connelly. Connelly conveyed the land to Dixon for $4K and the usual covenants. Dixon conveyed to H&G by special warranty deed. P (original grantee) brought this suit to vacate the foreclosure on the ground s that the court lacked jurisdiction. H&G and Connelly were made parties and H&G cross claimed against Connelly. The court held for H&G and Connelly was liable for b/W of seisen and $4000 recited in the original deed with interest.

13. Notes: they could not have sued Dixon bc it was a special deed. They could not have sued on b/quiet enjoyment and warranty bc for a covenant to run with the land there must be title and possession, neither of which Donnelly had. Dixon transferred neither to H&G. Also, the covenants are not breached unless there is actually or constructively an eviction and possession is disturbed.

14. An encumbrance is defined as ``every right to or interest in the land which may subsist in third persons to the diminution of the value of the land but consistent with the passing of the fee by the conveyance.

15. All encumbrances may be classified as either
a. a pecuniary charge against the premises
   1.) mortgages, liens or assessments
b. estates or interests less than the fee
   1.) leases, life estates or dower rights
c. easements or servitudes on the land
   1.) rights of way, restrictive covenants

16. A latent violation that does not appear on the land records that are unknown to the seller may not constitute an encumbrance for the purpose of the deed warranty. Conceptual enlargement of wat is an encumbrance would create uncertainty and confusion because a title search would not uncover the violation.

D. Mortgages
1. Generally: Purchasers not sufficiently liquid find it necessary to find some device by which to pay the purchase price over time. In return, the lender will want security for repayment.

2. Contents
   a. loan
   b. interest
   c. payment schedule
   d. price

3. At closing the promissory note and mortgage exchange hands. Buyer’s may want to negotiate a prepayment sale. Seller’s have a due on sale clause.

4. There are two basic approaches to securing repayment
   a. The mortgage
   b. Installment sales contract

5. Nature of mortgage: if the buyer does his financing via a mortgage, he receives a deed to the property immediately. In the case of a purchase money mortgage, the financing is being done by the seller. Regardless of the type, the essence is that the lender may foreclose on the property and therefore is not required to rely on the personal credit of the buyer.

6. Two Documents
   a. The note: the buyer’s personal promise to pay. Since the note is not an interest in land, it is not recorded. It does serve an important function: if there is a foreclosure against the property, and the foreclosure sale does not yield at least an amount equal to the outstanding mortgage debt, the note will serve as the basis for the deficiency judgment against the borrower.
   b. The mortgage which is recorded
7. There are times when the land is sold without the mortgage having been paid off
   a. Sale subject to mortgage: purchaser is not personally liable for the mortgage but the mortgagor can foreclose.
   b. Assumption of mortgage: makes purchaser liable for the payment to both mortgagor and mortgagee. Original mortgagor can sue the purchaser if former is forced to pay.
      1) Novation lets mortgagor off the hook
8. The mortgage is generally an outright conveyance. The mortgage gives legal title subject to condition subsequent.
9. Foreclosure: the process by which the mortgagee may reach the land to satisfy the mortgage debt, if the mortgagor defaults. Foreclosure by sale is standard. Foreclosure by public sale preserves the mortgagor's right to receive the excess.
   a. Two types of foreclosure sales
      1) Judicial: this is time consuming but the mortgagor cannot attack the foreclosure sale after the fact
      2) Private sale: no need for a formal lawsuit. The lender must usually bargain for it in advance by getting his security in the form of a deed of trust. The lender is required to use good faith and due diligence to get the highest price possible at the sale. If he does not, he may lose the right to a deficiency judgment, and may even have to pay the borrower damages equal to the amount of equity the borrower would have realized from a properly conducted sale.
      3) First they try to work it out by negotiating,
   b. Example: Ps purchased their house financing it by means of a mortgage loan. The loan was refinanced and later assigned to Colonial Deposit Co. P became unemployed and went into arrears. After discussing unsuccessfully with the Ps proposals for revising the payment schedule, rewriting the note and arranging alternative financing, the lenders gave notice of their intent to foreclose. Ps made an effort to avoid this result. The lenders scheduled foreclosure and complied with the statutory requirements. The lenders agreed to postpone the sale at an additional cost. Ps failed to pay and new arrangements were not fruitful and the lenders refused to postpone the sale. The sale went forward, the only parties present were Ps and representatives of lenders and an atty. The rep was the only one to bid and was $27K roughly the amount owed on the mortgage. Later the same day the atty encountered a client Dube who was told of the sale. Dube then contacted lenders who agreed to sell at $38K. Ps commenced this action and the trial court held for Ps on the grounds that the lenders had failed to exercise good faith and due diligence in obtaining a fair price for the subject property at the foreclosure sale. The court also held that Dube was a BFP. Damages were FMV – sale $. The issue is whether there was a breach?
   1) Held, a mortgagee, being in a fiduciary relation with the mortgagor, must exert every reasonable effort to obtain a fair and reasonable price under the circumstances. What constitutes a reasonable price depends on the circumstances of each case. Inadequacy of price alone is not enough unless the price shocks the court’s conscience.
      In order to find bad faith there must be intentional disregard of a duty or a purpose to injure. Here there is
insufficient evidence to find bad faith. The lenders complied with the statutory reqs of notice and other provisions. The lenders did fail to use due diligence in obtaining a fair price. The test is whether a reasonable lender would have adjourned the sale or taken other measures to receive a fair price?

- In 1980 the house was appraised at $36K. At the time of the foreclosure the lenders did not have the house reappraised to take into account improvements. A reasonable lender would have realized Ps equity was $19K (46-27)
- The bid covered only the money due
- Lenders had reason to know they stood to make a substantial profit. The fact that the lenders offered the property only a few hours before supports the finding that they had reason to know of the profit. For this reason they should have taken more measures to ensure receiving a higher price.
- Compliance with statutory reqs not enough on the diligence claim. The lenders did not advertise to the general public of the postponement of the sale other than at Ps house, PO and city hall. That these efforts were not adequate is shown by the fact that no one was at the sale. This allowed them to make the profit bc they were the only bid.

A finding that the mortgagee had or should have had knowledge of his ability to get a higher price at an adjourned sale is the most conclusive evidence of such a violation. The court erred as to the damages formulation. The difference between the FMV ($54K) and the sale $ is appropriate in bad faith breaches but not here. Here it is the difference between the fair price of the property and the sale $. Also, where as here there is no bad faith atty fees are inappropriate.

This case illustrates a trend to protect buyers Mere compliance is not enough, courts are adding some duty of good faith and due diligence to get a fair and reasonable price.

- If lender does not do this, he may lose his right to a deficiency judgment, and may even have to pay the borrower damages equal to the amount of equity that the borrower would have realized from a properly conducted sale.

The lenders could have sold it for more, advertised more, and have a judicial sale. This would have protected them. The judicial sale will not be set aside later.

*Murphy v. Financial Development Corp.*

c. Sales often do not pay top dollar. They are often only advertised in dry lawyerly magazines. Also, if the lender buys they do not have to come up with any cash. They just wipe out the debt. Buyers are weary about buying at a foreclosure sale. See *Rockefeller v. Gray*, supra.

d. Grant S Nelson & Dale Whitmand, Real Estate Finance Law: Inadequacy of the sale price is an insufficient ground for
invalidating the sale unless it is so gross as to shock the conscience of the court, warranting an inference of fraud or imposition. Sale for much less than FMV have been upheld. However, where other factos are present (chilled bidding, unusual hour sale) courts do set it aside. For e.g., RE sold for 3%, court set aside bc mortgagee informed mortgagor of wrong sales date.

10. Installment Land Sale Contract

a. Generally: land can be bought under an installment contract. Such a contract provides for a down payment, with the balance of the purchase price to be paid in installments. What makes such an arrangement different is that the buyer does not receive his deed until after he has paid all, or a substantial portion of the purchase price.

b. The most important practical difference between mortgages and installment contracts is the consequences of a default. If the mortgagor fails to make mortgage payments, the mortgage must be foreclosed, pursuant to a whole array of statutory and judicial safeguards. Where the installment buyer defaults the seller just exercised his right to declare the contract a forfeiture. No judicial proceedings were necessary and buyer lost money and the property.

c. Relative rights of vendor and defaulting vendee: many courts have held that where the buyer has paid a substantial portion of the purchase price, and the seller would be unjustly enriched by a complete forfeiture,statutory foreclosure proceedings applicable to mortgages must be used. In the next case, the buyer made substantial improvements to the property and had paid almost ½ of the purchase price.

Example: P and D agreed on the sale of a house for $15K. The K provided for the sale over a 15 year period at 5% interest. The Ss had legal title which they agreed to convey at full payment. The K also provided that in the event of a default and failed to cure, the Ss could elect to call the balance immediately to or elect to declare the K terminated. If the later then a forfeiture clause came into play. Ds went into possession and claim to have made substantial improvements. They paid for 8 years until D Carl Walker was injured. At the time they paid almost ½ the purchase price. After the 30 day period, Ps commenced this action in ejectment seeking a judgment that they be the owner in fee of the property and that the be granted possession. Summary judgment went to Ps. Whether the purchase has an interest (equity of redemption) that must be accounted for before the seller can take back the property.

Purchaser is equitable owner of the land, the purchase money becomes personal property

The law of property declares the vendee acquires equitable title, the vendor holds legal title in trust for the vendee and has an equitable lien for payment of the purchase price

Vendee is for all practical purpose the owner with all the rights of one subject only to the K terms

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The vendor can enforce the lien by foreclosure or an action at law for the purchase price.
Upon the execution of a K an interest in property comes into existence by law, superseding the K terms.
Contract vendors may not summarily dispossess the vendees of their equitable ownership without first bringing an action to foreclose the vendees’ equity of redemption.
If a forfeiture would result in the inequitable disposition of property and an exorbitant monetary loss, equity can and should intervene.
Forfeiture provisions are disfavored.

*Bean v. Walker*

**IX. Title Assurance**

**A. The Recording System**

1. When you have a deed and mortgage and other evidences of title you record. Very necessary to have some system. It varies from state to state.

2. **Functions of the Recording System**
   a. Establishes a system of public recordation of land titles
   b. Preserves in a secure place important documents
   c. Protect purchasers for value. A subsequent BFP is protected against a prior unrecorded interest.
      1.) Remember: the common law rule of first in time. This continues to control unless a person can qualify for protection under the applicable recording act.

3. **Two types of index system**
   a. Grantor/grantee – most common
   b. Tract indexes – goes according to a description of land, according to location. These are superior but do not exist in all systems.

4. A title plant is not open to the public, but these others are.

5. Suppose Z owns BA and we want to conduct a title search to make sure there is good and marketable title. In 1990, you find Z acquired the property from Y. Z recorded it in the county courthouse. Now, we look until we find a deed from Y. He retained title from X but Y did not get around to recording the title until 1985. If you read you learn there was sale to Y in 1980 so there was a lag. X got the property in 1975. Look back as far as needed either to the beginning of time or some statutory point. Now, look to the grantor index and look back until the present date. In 1982, Y gave the property to Q. There might be competing chains of title. Look when the person acquired the property otherwise you may miss something. Forward in grantor index backwards from the grantee index.

6. **Effect of failure to describe property with specificity – What types of actions might constitute legal notice to a subsequent purchaser?**

   *Example:* Owens was the owner of interests in a number of oil and gas leases located in Coffey County. 2/1/71 Owens assigned to D International Tours, Inc. all oil and gas interests. The assignment was filed on the 16th. The Kufahl lease was not specifically described on the face of the assignment. The second paragraph of the assignment states that assignors intended to convey all their interest in all oil and gas leases owned by them whether or not they were specifically enumerated in the assignment. In 1975, Owens executed a second assignment of her interest in the lease to the D, Burris. Burris diligently checked the records and secured an abstract of title. Neither the inspection not the abstract reflect the prior assignment. The issue is who owns the ownership interest in
the lease? Whether or not the recording of an instrument of conveyance which uses a mother hubbard clause to describe the property conveyed constitutes constructive notice to a subsequent purchaser?

Tours argues that the general description put subsequent purchasers on constructive notice of such a conveyance

Burris argues that although the general description was valid to effect a transaction as between the parties, the general language was not sufficient to give a BFP actual notice of the assignment. Therefore, it was impossible to make the proper entries in the numerical index.

- The assignment failed to state the names of the lessor or lessee
- Failed to state the date of the lease
- Had no legal description

1. Mother Hubbard clauses are valid. The second paragraph of the assignment constituted a valid transfer of Owens interest in the Kufahl lease to Tours as between parties to that instrument. A subsequent purchaser who has actual notice is bound.

2. Recorded instruments of conveyance, to impart constructive notice to a subsequent purchaser or mortgagee, should describe the land conveyed with sufficient specificity so that the land can be identified.

3. Improper indexing alone is not enough to fail to constitute constructive notice. What is important is a proper description.

4. Note: the first assignee loses. The first assignee can impose a constructive trust Owens to prevent unjust enrichment.

5. Cheapest cost avoider wins. Some courts would hold differently.

**Luthi v. Evans:**

7. Misspelled name not enough to impart constructive notice

*Example:* Orr obtained a judgment against Elliot for $50K. The judgment identified Elliot erroneously by misspelling his name. Consequently, the abstract was listed in the Grantee/Grantor index under those names only. Elliot obtained title to property that became subject to Orr’s lien. When Elliot sold to Byers a title search failed to disclose the abstract of judgment. The judgment was not satisfied from the proceeds of the sale to Byers. Orr filed an action against Byers and the Bank seeking judicial foreclosure of his judgment lien. Orr argued the Ds had constructive notice under the doctrine of *idem sonans*. The trial judge ruled against Orr. On appeal, Orr argues that the attorney did not misspell his name but merely used an alternative spelling of the same name and a title searcher should be charged with knowledge of alternative spellings.

The doctrine has applicability to cases of identity but not to give constructive notice to BFPs

The doctrine does not apply when the name is material and here it is.

Requiring a title searcher to comb through the records for other spellings of the same name would place an undue burden on the transfer of property.

Basically, this is too burdensome. The searcher would be required to locate every lien against every individual with a similar name and determine whether the lien impacted the transaction under consideration.

The burden is on the judgment creditor, securing payment is easier.
**Orr v. Byers**

**B. Types of Recording Acts**

1. **Race Statutes**: as between successive purchasers the person who wins the race to record prevails. Whether the subsequent purchaser had knowledge is irrelevant.
   - **Rationale**: Transfer of title are more efficient where off record inquiries are eliminated.
   - **MI** is a race statute jurisdiction

2. **Notice Statutes**: if a subsequent purchaser had notice of a prior unrecorded instrument, the purchaser could not prevail over the prior grantee.
   - Protects subsequent purchasers only if they have no notice AND
   - Only protects a subsequent purchaser who records first. A Notice Statute protects a subsequent purchaser against prior unrecorded instruments even though the subsequent purchaser fails to record.
     1. This means that if the prior purchaser fails to record then the subsequent purchaser wins whether or not he recorded.

3. **Race-Notice Statutes**: a subsequent purchaser is protected against prior unrecorded instruments only if the subsequent purchaser
   - Is without notice of the prior instrument AND
   - Records before the prior instrument is recorded.
     1. Tends to eliminate relying on extrinsic evidence to determine who recorded first.

4. An improperly acknowledged but otherwise valid deed did not give notice to subsequent purchasers because the recording statute required instruments to be acknowledged before they could be recorded. Thus, even though the deed was valid as between the parties and present for any title searcher to see, it did not provide “notice” in the recording act sense. As a result, a purchaser from the person receiving the unacknowledged instrument was not entitled to rely on the record and lost title to an earlier grantee under an unrecorded quitclaim deed. **Messersmith v. Smith**.

**Example**: The Ps were owners of some property as of May 7, 1946. On this date P Caroline executed and delivered to P Fred a quitclaim deed which was not recorded until July 1951. Between the date of the deed and its recording the following happened:

- **April 23, 1951**: Caroline executed a lease to Smith which was recorded May 14, 1951
- **May 7, 1951**: Caroline conveyed to Smith an undivided ½ interest in minerals that may be produced on the land. This was recorded May 26, 1951.
- **May 9, 1951**: Smith executed a mineral deed conveying to Seale an undivided ½ interest in the minerals The deed was recorded May 26, 1951.

Caroline and her nephews were owners an undivided ½ interest in the land. The land was leased out to various tenants who used it for grazing Caroline looked after the renting of the land both before and after her conveyance to Fred. On April 23 Smith went to Caroline’s home and negotiated a lease. According to Caroline they just discussed royalties. A couple of days later Smith returned. The evidence is
contradictory as to their discussions, with Caroline maintaining they talked about royalties. On May 7, Smith again returned and this time a deed was executed for an undivided one half interest in minerals under three sections of the land. Smith claims the deed was acknowledged by a notary but Caroline claims she did not know she was signing a lease. Caroline kept $1500. Smith discovered an error in the deed and it was torn up and a corrected one was substituted. He claims he took the second deed to the same notary who called Caroline for an acknowledgement. The notary cannot remember these events. This second deed was recorded May 26, 1951 and was relied upon by D Seale. Seale attempts to divest Fred of his title and establish a statutory title in himself through the use of the recording statutes. The issue is whether Seale can prevail from Fred?

The only way Seale can prevail is by relying on the fact that Ps deed was not recorded until July 9, 1951 because Caroline had no interest in the land to convey and wither did Smith. This would give Seale a record prior in time (May 26)

D relies on the statute page 717.
P claims the lease was not acknowledged and not entitled to be recorded

1. When the recording of an instrument affecting title that does not meet the statutory requirements of the recording laws affords no constructive notice
   - The statute requires the instrument be acknowledged before it can be recorded
   - Caroline did not appear before the notary and acknowledge that she executed the deed. Therefore, it was not entitled to be recorded and did not constitute notice. The purchaser was not a BFP.
   - Again, his claim of title depends on the instrument recorded and not the one that was destroyed.

   **This was a “Wild Deed” MesserSmith v. Smith Look to Deed Warranties – Seisin or Quiet Enjoyment.**

C. Chain of Title Problems

1. Carrie conveyed some land to D&W on April 27 1909 but they did not record until December 21 1910. On April 27, 1909 D&W conveyed a warranty deed to the lot to Ps (Board of Ed) which was recorded Jan 27, 1910. On May 16 1906, Carried had conveyed the same land to D (Hughes) but the deed which was executed on May 17 1906 did not have his name on it. Board is fighting Hughes for the land. Trial held – Board.

   **Was the Carrie/Hughes deed operative?** Yes. Generally, deed is a nullity until name of grantee is inserted. Therefore, there was no conveyance until grantee’s name was inserted. The deed becomes operative without a new execution when grantee with express or implied authority inserts his name. Authority will be presumed either under an estoppel theory or implied authority theory.

   **If so, is Hughes a BFP?** Yes
Hughes deed was recorded before D&Ws and he is a subsequent purchaser because the conveyance dates from the time he filled in the blank space on Dec. 16., which was after the conveyance to D&W.

May 16 1906    May 7 1906    April 27 1909    Nov 19 1909    1/27/10
Dec 16 1910    Dec 21 1910

C – Hughes    Deed—H    D & W paid C    D & W – P    deed – P records    Hughes records    D & W record
P recorded first, then Hughes and then D & W.
See this case for the Wild Deed Rule and what is a PUC.

Note: In a tract system the Wild Deed Rule is not necessary.

Note: See page 624 Hornbook.

Board of Education of Minneapolis v. Hughes.

2. Subdivision Restrictions – Common Grantor

The question presented in this problem is stated in terms of the meaning of a “subsequent purchaser.” Does the term refer to someone who takes from the same grantor or simply to a subsequent purchaser of the same land?

Note: the courts are split as to this question

Example: Ps purchased a lot in a subdivision from Gilmore. The deed contained restrictions imposed for the benefit of the other lots on the recorded subdivision plan and stated that the same restrictions were imposed on each of the lots owned by Gilmore. It was the intention of the grantor and the seller to maintain the subdivision as a residential one to include only one-family dwellings. D purchased its lot from Gilmore in April 1972 and the deed made no reference to any restrictions but did refer to a 1968 plan. Daly made no inquiry concerning restrictions and did not know of any development pattern. It had a title examination made. Daly obtained a building permit to construct a multi-family apartment.

Each grantee is a beneficiary: where grantees are bound by writing reciprocity of restriction can be enforced. Each of the grantees is an intended beneficiary of the restrictions and may enforce them against all others.

Issue: whether D is bound by a restriction contained in deeds to its neighbors from a common grantor, when it took without knowledge of the restrictions and under a deed which did not mention them? Yes

• D claims it was only required to determine whether there were restrictions in prior deeds in its chain of title
  o P obtained not only one lot but also an interest in the rest of the land. Ps deed was properly recorded.

• D claims this is burdensome
  o The indexing is done using names. Lot numbers do not change what is recorded. In such a system the purchaser cannot be safe if the title examiner ignores any deed by the grantor in the chain of title during the time he owned the premises. Here, Ds deed referred to a recorded subdivision plan, and a search for such deeds is not an impossible task.

Guillette v. Daly Dry Wall

3. Courts are divided on this issue. Notice in deed by common grantor is notice to all. A tract index would still give you the same problem.

D. Persons Protected by the Recording System – Who is a BFP?
1. Purchaser is someone who paid more than nominal value. What is it to be a purchaser who takes without notice?
2. Recording statutes must be read carefully to see who comes within the statute. Recording statutes have been held not to protect donees and devisees. This may require the court to determine what is valuable consideration. There is some disagreement as to how much a grantee must pay. If the deed recites that it is for $1 consideration this raises the presumption that the grantee is a BFP and places the burden to establish the falsity on the party attacking the deed.
3. **Common Law Rule:** You are not a BFP until the last purchase is made. *Daniels v. Anderson (or Davis?)*. This rule is no longer the majority. The person making the installment payment is a BFP. If this was a bank the person would be a BFP. This kind of timing issue probably does not arise, the seller is paid off at closing.
   a. When do you take when payments are made over time. One ct takes harsh c/l rule but grants restitution. The other ct requires actual notice if applying c/l rule and destroying BFP status. In both cases the ct softens the view in an attempt to give the purchaser the benefit of the bargain.
   b. *Parker v. Paradise*: Muniments of title document: a purchaser takes constructive notice of every unrecorded conveyance that is referenced in their deed. Reed every deed to see if it gives you notice of prior conveyance.
   c. *Handout under inquiry notice §4(c)*: see *Parker v. Paradise*
   d. *SOL does not begin to run on a future interest until the people enter the property.*
4. Thorough Title Searcher
   a. Grantor Index: beginning of co. or period specified by statute
   b. Start when title was acquired not recorded
   c. A small maj is to search in the granter index all the way until the present time.
   d. Some courts require you read all deeds out from a common grantor. Read your own deed and all the others
   e. Some courts follow the muniments of title where you have to read all titles to see if you have notice of all adverse claims.
   f. Moral of story: Title insurance.

X. **PRIVATE LAND USE ARRANGEMENTS**
   A. **NUISANCE:** Unreasonable interference with another person’s use and enjoyment of their property. You do not need a physical invasion.
      1. **Balance test:** utility of conduct, who was there first, appropriateness of the activity. Context is important – the right thing in the wrong place. The court can either grant an injunction or compensatory damages.
   B. **EASEMENTS:** controlling land use through private agreements. To be successful they have to bind successors. An easement is the right to use the land of another. It is not strictly a right to possession. An easement is usually a full property right and you can record the easement in the county courthouse.
      1. **Appurtenant:** as easement that is for the benefit of a specific piece of land. Servient is the parcel of land that serves the dominant estate.
      2. **In Gross:** an easement designed to benefit a person.
      3. **Affirmative:** grants the holder the right to do an affirmative act on another’s estate.
      4. **Negative:** allows one to prevent an act on the servient estate. X may get an agreement from Y that Y will not build more than a two-story building on the property so X can see a view of the ocean.
a. Can be a covenant. If a person agrees to do an affirmative act on land this is a covenant not an easement.

5. Profit: the right to enter the land of another and remove something from it.

6. License: permission to come onto the land of another. Licenses are revocable at the will of the grantor, whereas an easement is not. A license is usually oral and an easement is supposed to satisfy the SoF or an exception. A license is more like a K not a property interest.
   a. The issue becomes whether this is a license or an easement in gross. If a license a subsequent owner is not bound by it, but if it’s an easement in gross a subsequent purchaser without notice is.
   b. License may become irrevocable
      1.) License coupled with interest
      2.) Estoppel (see Holbrook v. Taylor)

7. Four methods of creating an easement
   a. Express
   b. Implied
   c. By prescription
   d. Estoppel

8. Interest in Land: an easement is an interest in land, which means that the burden passes to subsequent owners of the servient land. The owner of the easement has more than K rights, he has rights against all successors to the grantor.
   a. This gives the person the right to use self-help in some jurx. If this is not good construe as a license.

9. easement can be in fee simple, term of years, etc.
10. fee simple or easement? If its limited in use and purpose and with clearly marked boundaries then it’s probably an easement.

11. Creation by reservation
   a. regrant theory : at c/ could not do so O \rightarrow A A \rightarrow easement to O
12. Reservation in favor of third party: could not do. Compare covenants where there can be a third party beneficiary.

13. Easements appurtenant or gross: all easements are one or the other
   a. Appurtenant: If an easement benefits its owner in the use of another tract of land, it is appurtenant to that land. The land benefited is the dominant tenement; the land burdened is the servient tenement. The benefit will pass to a subsequent owner.
   b. Gross: if an easement does not benefit its owner in the use and enjoyment of his land, but merely gives him the right to use the servient land the easement is in gross.
      1.) Note well: this does not mean the easement is personal and cannot be assigned.

14. Creation of Easements
   a. An easement is an interest in land and within the SoF. Creation of an easement generally requires a written instrument signed by the party to be bound. However, in addition to the part performance, fraud and estoppel exceptions to the SoF is the easement by implication and prescription.

15. General Rule: At c/l an easement could not be reserved in favor of a third party. The rationale lay in feudal notions of conveying and in the theory that the grantee regranted to the grantor the easement.
   a. Minority Rule: Willard v. First Church of Christ

16. Express Easements
   a. Example: McGuigan owned two lots (19&20), 20 was vacant and used by a church for parking services. She sold lot 19 to Petersen
who agreed to sell both lot 19&20 to Willard. Petersen did not own lot 20 at this point.

1.) Note: Right here not that Petersen signed a receipt that would satisfy the SoF and enforce the deal against him although not necessarily against Willard. Also, title would not be marketable because Willard should not be expected to purchase a lawsuit.

2.) Whether this is an easement in gross or appurtenant? For the benefit of the church on the property at the SW corner ... it is tied to that particular piece of land.

3.) McGuigan agreed to sell the lot to Petersen provided the church could continue to use it. Petersen recorded the deed. The church’s atty drew up a deed. Willard paid and received Petersen’s deed which did not mention an easement. Petersen did not tell him of the easement clause

(www)Note: that here Willard would lose a lawsuit against Petersen in any jurisdiction because Petersen recorded first and Willard had constructive notice that the lot was being used for parking services. The prior recorded conveyance was unrecorded.

4.) Willard became aware of the easement and commenced this action to quiet title against the church, relying on a c/l rule that one cannot reserve an interest in property to a stranger to the title. Willard on appeal argues that the old rule should be applied because grantees and title insurers have relied on it. Willard also contends that the church has received no interest in this case because the clause stated only that the grant was "subject to" the church’s easement and not that the easement was either excepted or reserved. The court looks to the whole clause which states the easement "is given." The parties to the deed intended to convey the easement to the church. Held, this is no more than a feudal shackle today. It frustrates the grantor’s intent and results in inequitable holdings

5.) More ways to accomplish the same result: McG → P then P → Church or McG → church then church → Peterson reserving an easement in itself.

17. Distinguish covenants from easements: If the owner of the servient land agrees to perform an affirmative act on the servient land this is a covenant, not an easement. An easement involves either the right of A to go onto Os servient land (an affirmative easement), or the right of A to prohibit Os use of his land in a way resembling a negative easement.

18. Licenses: a license is permission given by the occupant of land allowing the licensee to do some act that otherwise would be a trespass. A license is revocable whereas an easement is not. A license may be created orally and is not subject to the SoFs.

a. Exceptions to irrevocability

1.) A license coupled with an interest cannot be revoked
2.) A license that becomes irrevocable under the rules of estoppel. A license that cannot be revoked is similar to an easement.

(xxx) Holbrook v. Taylor: In 1942 appellants purchased the subject property. In 1944 they gave permission for a haul road to be cut for the purpose of moving coal. Appellants were paid a royalty for the use of a road. In 1957, appellants built a tenement house on their property and the roadway was used by them and their tenant. It burned down in 1961.
Holbrook obstructed road and Taylor’s sued. Whether this was an easement or a license? At all ties prior to 1965, the use of the haul road was by permission, so there was no easement by prescription. There was, however, an easement by estoppel. Taylor’s continued to regularly use the roadway and made improvements which cost money. Also, there was no other location over which a roadway could reasonably be built. A license to use cannot be revoked and this is an easement by estoppel.

(yyy)Note: If you have an irrevocable license it continues for so long as the nature of the license lasts. From the Taylor’s perspective is functionally the same thing. But, would anyone buy the land with an irrevocable license?? License gives a little more uncertainty to prospective purchasers. Record the easement by estoppel judgment and then on it’s good and marketable title.

(zzz)Adverse Possession: normally, to claim the tract by adverse possession, they would have to show they excluded the Holbrook’s for the statutory period (i.e., that they had exclusive possession), but for an easement by prescription the exclusivity element is not enforced. Also, they were there with permission.

19. Implied Easements

| Summary of Requirements: |  (1) land is being divided up so that the owner of a parcel is either selling part and retaining part, or is subdividing the property and selling pieces to different grantees; | (2) the use for which the implied easement is claimed existed prior to the severance referred to in (1), and was apparent and continuous prior to the severance; and (3) the easement is at least reasonably necessary to the enjoyment of what is claimed to be the dominant tenement. |

a. If, prior to the tie the land is divided a use exists on the burdened part that is reasonably necessary for the enjoyment of the benefited part and which the court finds the parties intended to continue after the tract is divided, an easement may be implied.

1.) Implied grant or implied reservation
b. Implied easements are an exception to the SoF.
c. Easements are implied in two situations.

1.) On the basis of an apparent and continuous (or permanent) use of a portion of the tract existing when the tract is divided. The existing use is referred to as a quasi-easement.

2.) The easement is implied to protect the probable expectations of the grantor and grantee that the existing use will continue after the transfer.

3.) Example: Bailey → owned plot of ground 19, 20 & 4

1904 city constructed a public sewer and at about the same time a private lateral drain was constructed from the Bailey residence on lot 4 running in a westerly direction through and across lots 19 & 20 to the public sewer.

✓ 1/15/1904 Bailey → lot 19 John Jones by warranty deed and Jones built a house
✓ 1904 Bailey lot 20 → Murphy by general warranty deed who built a house title passed to Royster
✓ 1920 Jones → 156 ft. lot 19 to Reynolds
✓ 1924 Reynolds → P lot 4 is now owned by Gray
d. 1936 Royster learns of the sewer drain across the property. Ds refused to stop draining and discharging their sewage resulting in this lawsuit. The drain pipe was several feet underground. There was nothing visible to indicate the existence of the drain. (no notice). The trial court held the lease was an appurtenant easement and P lost.
e. P argues there was no easement and if there was he was a BFP. Ds argue that an easement was created by implied reservation on the severance of the servient from the dominant estate of the deed from Bailey to Jones; and there is a valid easement by prescription.
f. When one utilizes part of his land for the benefit of another part, it is frequently said that a quasi easement exists, the part of the land that benefited being referred to as the quasi dominant tenement and the part which is utilized for the benefit of the other part is the quasi servient tenement. If the owner of land conveys the quasi dominant tenement, an easement corresponding to such quasi easement is ordinarily regarded as thereby vested in the grantee of the land, provided the easement is of apparent, continuous and necessary character.

1.) At the Jones purchased lot 19 he was aware of the sewer, and knew it was installed for the benefit of the lots owned by Bailey, the common owner. The easement was necessary to the comfortable enjoyment of the grantor’s property. This standard is reasonably necessary. (note: other jdx may require strict necessity). This is the Restatement approach.

2.) Holding: If land may be used without an easement, but cannot be used without disproportionate effort and expense, an easement may still be implied in favor of either the grantor or grantee on the basis of necessity alone.

(aaaa) Plaintiff had notice – the sewer was an apparent easement.

(bbbb) Reserving an easement and granting an easement. The restatement has a number of factors, whether the claimant is the conveyor or conveyee. Why do we care? We are more trusting when the grantor is giving something away then if they are reserving the right. A reserved implied easement will be scrutinized more closely. Here, Laura was the grantor and was holding the right back. This should have been more strictly construed. Van Sandt v. Royster

3.) Necessity is important in the prior use cases because it probably effects the intention of the parties as to whether the use will continue.

4.) Basically: it is really fair and she intended to do this. Intent is the analytical basis for an implied easement.

Review:

Express: Willard (reserved in favor of 3rd party); we are a little more suspicious of these. These are construed more carefully by the courts, and especially if reserved in favor of third party.
20. Easement by prescription
   a. Prescriptive rights cannot be acquired where the use is permissive. However, if a person uses land of another with permission and subsequently begins to do acts that reasonably should put the owner on notice that the user is claiming a right to use the land, the use becomes adverse.
   b. Easement by necessity cannot give rise to a prescriptive easement because this easement is by right and not wrongful. However, when the necessity ends so does the easement and further use of the easement becomes adverse and can give rise to a prescriptive easement.
   c. 

21. Easement by Necessity
   a. An easement by necessity is implied if the owner of a tract of land divides the tract into two lots and by this division deprives one lot of access to a public road. Usually, there must be strict necessity and not just a more convenient access. This doctrine rests on either the ground that public policy requires a way of access to each separate parcel of land or on the ground that, since access is essential to use, the parties intended to create an easement but overlooked putting it in the deed.
   b. An easement is implied only when land is divided. The necessity must exist when the tract is severed. The easement is implied only over that portion of the divided tract that blocks access to a public road from the landlocked parcel. An easement cannot be implied over land that was never owned by the common grantor of the dominant and servient tenements. See Othen v. Rosier.
   c. Distinguish implied easements: There need not be a prior existing use.
   d. Terminates when necessity ceases. An easement implied on the basis of quasi-easement may continue forever, even after the necessity disappears.
      1.) Note the order of the conveyance is very important.
   e. Example: Hill gave to the Rosiers 100 acres and it ultimately came into the hand of Rosier. Once the piece of land was gone and Hill owns the other tracks. Is it necessary at the time of the conveyance? It is questionable. Using common sense, it was not necessary. This is ambiguous. Othen built a roadway through the land. Othen is stepping into shoes of Hill and saying Hill reserved the right to cut through. He accepted the money and said by the way I reserved the right to cut through the land. In some cases necessity is strict. We want land to be marketable; also, we are creating a default rule to reinforce what the parties intended to do. Othen’s lawyer did not clarify the evidence. The property at the time the he sold off Hill owned no other property that he could have cut through to get to the main road. This was a sloppy record that the Ps lawyer recorded. Could
he claim necessity – cannot claim necessity over the land of a stranger. All we do with an easement by necessity is say that he intended to cut through his own land as that property is subdivided. There would be no basis for implying that a third party intended the same. This is similar to the no duty to rescue rule in torts. Note that there was no permission so this could be hostile for adverse possession. Rosier controlled the gate so if he leaves it open it is the same as giving permission. Some courts bring the exclusivity element. The court was sloppy, exclusivity is not an element of acquiring an easement by adverse possession. Here, though there was no adverse possession because he had permission. There was also some evidence that he could not show what route he took, it was not open or continuous if he could not show the route he took.

1.) How can you make sure nobody takes an easement by your property? Problem number 4. Adjacent is a golf club. How do you make sure the golf course will not get an easement by prescription. Grant permission because this eliminates the hostility element. You have a revocable license and can retract. Some states allow you to record, and is notice to all if you have signs and vandals are taking the signs down.

2.) Go back to the Van Sandt case – easement implied from prior use. Unity of ownership, apparent, continuous, reasonably necessary. He could have used this theory. You still have the problem of necessity under either theory. At the time the parcel was severed there was no other land that Hill owned that could get him through to his property. Othen did not satisfy his burden.

(Note: page 821 of casebook. When lot 1, 2, 3 it was not necessary at the time. But, at the time parcel 4 is severed then there is necessity. The only easement by necessity is to go through parcel 4. A bought parcel 5. There is no easement by necessity anymore. A owns the whole land. This is one method of extinguishing an easement, coming back into common ownership. Now A dies and leaves all the land to As kids. Does F have and easement by necessity anymore? If the court takes a harsh rule (Othen) then F is landlocked but because of our timing issue you cannot say whose land was the last conveyance. A strict necessity standard produces an absurd result.

3.) Can Othen use the right of way when it is necessary to get to the main road?

f. When there are many people then courts are less willing to grant group easements by prescription. The other theory they use is the public trust doctrine. The state owns land in trust for all of its citizens. Usually submerged lands, covered by navigable waters. This has ancient roots in Roman law, certain things are held in common and too precious to be caught up by one person. This is another example of property is power. Under this doctrine, Ps have the right to use the land under the waters. Trying to expand these greedy Ps are saying they should be able to use the other area. Some how there is a feeling that you are a better person if you are a land owner – powerful v. if you are not. There is a racial and
economic bias in our property laws. There is somewhat of an
egalitarian argument – morally wrong and economically foolish.
g. Externalities may be exported onto others. The negative aspects.

C. The scope of an easement
1. what are the types of uses to which the easement can be put and what are
   the rights of the servient tenement?
2. An easement appurtenant is used for the benefit of a particular dominant
   estate. The holder of that dominant estate will normally not be allowed to
   extend his use of the easement so that additional property owned by him is
   benefited. This is true even if the use for the benefit of the additional
   property does not increase the burden on the servient estate. Brown v.
   Voss.

   Example: P has an easement. He builds a house partly on the
   dominant tenement and partly on a new adjoining parcel. He
   extends the easement for the benefit of the new parcel. D
   asserts that P had no right to do this. Held, for D. An
   easement appurtenant to one parcel of land may not be
   extended by the owner of the dominant estate to other
   parcels owned by him, whether adjoining or distinct tracts
   The legal issue is whether an easement appurtenant can be
   expanded to tract C. The court holds that nominal damages
   are due. Technically, Bost won the case.

3. Limiting the Scope of Easements In Gross
   a. Example: Katherine had ownership and she granted the right to use
      the land to others. She granted an easement to Frank and his
      assigns. This was an easement not a fee. She granted him the
      exclusive right to fish and boat on Lake Naomi. Frank gave to Rufus
      a ¼ interest right to swim on Lake Naomi. He assigned his interest
      to Lutheran. Katherine thought she gave her husband the exclusive
      right. Now all these people are on this Lake. There was a deed
      creating this instrument so this was an express easement in gross.
      Whether there is an easement for the purpose of swimming by
      prescription? Yes there can via adverse possession. Swimming was
      not included originally probably because of health issues. Whether
      the easement was assignable? Yes, you can assign an easement in
      gross. This makes sense if takes all of it. If we divide it we are
      worried that we are increasing the burden on her Lake. The
      easement can be divisible in this way but this is in terms of
      ownership, in terms of use This court adopted the One Stock Rule.
      This means that it must be with unanimous consent. This is really
      just a financial division This gives Frank veto over Rufus’ use and
      Katherine veto over Franks. Miller v. Lutheran Conference Camp
      Association.

      1.) Remember Spiller undivided right to use the whole property.
      This would have been contrary to human nature. If the court
      does this, this would lead to overuse. This limited the scope of
      the easement. These types are tied to people and we need to
      have a limit to the use of the easement and have a people rule.

D. Terminating an Easement
1. Remember an easement is a property right. Fairly rare case that you can
   take away someone’s ownership interest.

   Example:

2. Abandonment
   a. This was an easement. You still own land in fee simple even if you
      abandon it. Can the scope be expanded to railroad use? Was this
reasonably foreseeable use? This was an easement appurtenant.
You have the right to use the land of another. The limitations are
1.) It has to be confined to the dominant tract
2.) Can only use it for foreseeable and reasonable growth
b. In addition to their fee simple argument, they then argue even if it
was an easement it was terminated by abandonment.
   1.) Must show **intent** to abandon plus **non-use**.
3. Fifth A taking for just compensation
   a. Yes, this was a taking under the 5th A. They are entitled to monetary
      compensation. Notice there are two remedies: stop the government
      (this argument rarely succeeds) or get the money.
4. Look at the warranty deed. The predecessors conveyed it to them to have
   and to hold ... forever. Grantors have a good estate in fee simple, etc. If we
   just looked at this in MI this looks like good short had language in fee
   simple. The court interjects public policy to get around this. If the deed is
   ambiguous, we will only grant a smaller estate. This was tainted by the
   eminent domain flavor and this is why the court ignored the express grant.
5. **Other ways to terminate** (in addition to abandonment)
   a. **When necessity ends:** implied by necessity will terminate when the
      necessity ceases
   b. **Merger:** when the dominant and servient land comes into the hands
      of one party
   c. **Release:** the holder releases the easement to the holder of the
      servient estate
   d. **Lost by prescription:** the owner of the servient estate
   e. **Failure to record:** you can lose to someone who records first or to a
      BFP.

**E. Negative Easements**
1. c/l disliked and limited to four categories (memorize these)
   a. a negative easement to protect the blocking of windows
   b. to prevent interference with airflow
   c. to prevent the removal of building support
   d. to prevent interference of artificial water course
2. **Modern Day application:** a conservation easement which expands on these
   four. Farmers and ranchers may have a sentimental attachment to land. A
   farmer can grant a conservation easement to a governmental entity to
   prevent him from building on the land and they would pay him for it.
XI. COVENANTS RUNNING WITH THE LAND

A. Historical Background

1. To treat more and more like property.
2. Spencer’s Case: contractual obligation to build wall can be assigned where there is privity of estate.

B. Covenants enforceable at law: Real Covenants

1. Promise relating to land: Bargains between neighboring property owners can operate to allocate resources efficiently by arranging land uses so as to minimize conflicts. These bargains can serve to minimize the harmful impacts (external costs) that arise from conflicting resource uses. These bargains are less likely to be struck if only the original promisor is bound and only the original promisee benefited. The promisee wants assurances that him and his successors will be protected. A mere contract right will not be sufficient to enable the market to allocate conflicting land uses efficiently. When transaction costs become sufficiently high, the external effects of using resources are unlikely to be taken into account through any sort of bargaining process, and the resources are likely to be misused. We need a property right.

a. The question of whether the covenant runs only arises when a person not a party to the contract is suing or being sued. Property rules then determine when a successive owner can sue or be sued on an agreement to which he was not a party.

b. Distinguished from easements:

1.) Affirmative covenant the promisor agrees to perform some act. B promises A that he will keep his fence in good repair. This is a covenant because I a promising to do something. It is affirmative because I have agreed to an affirmative act. Negative covenants are almost indistinguishable. I promise to not put up a fence. This also looks like a negative easement. It’s not one of those four narrow boxes that the common law recognized.

2.) Note: this is the only way to distinguish.

2. Note: the only way to distinguish.

a. Negative promises that are not one of the four types of negative easements are treated as covenants or equitable servitudes. On the other hand, an affirmative easement is a grant of an interest in land, whereas a covenant is a promise. A covenant never gives someone the right to enter onto the land.

b. Land use may also be controlled by a condition the breach of which results in forfeiture, whereas the remedy for breach of a covenant is money damages or and injunction.

2. Requirements

a. Writing

3. The issue is framed in terms of whether the benefit or the burden will run to assignees.

1. Enforceable promise + Intent → “heirs and assigns”

2. This means that the SoF must be satisfied but this will normally not be a problem.

b. Privity of estate

1. Horizontal – look between promisor and promisee. Do both have the same interest in the land.

(d) Common Law: landlord/tenant only

(e) Massachusetts: Present/future; covenants; LL/Tenant

(f) Major: sale of land that gives them a property law relationship

c. Touch and concern

d. Notice
1.) See example page 254
4. the burden will not run if the original promisor and promisee were not in privity of estate (had no property relationship). Can sue on breach of contract theory though.
   a. Test: was the promise made as part of the conveyance.
   b. There is vertical privity only if the party against whom it is to be enforced succeeds to the entire estate.
      1.) Think of landlord/tenant relationships and subleases.
      2.) If promisor in fee transfers a Life Estate to X then X is not liable for the burdens of the covenant.
5. The benefit side is more relaxed. The benefit may be enforced by anyone who takes possession of the property and has acquired some portion of the promisee’s estate.
   a. Therefore, life tenant may enforce the promise.
6. Touch and Concern:
7. PROBLEMS AND NOTES
   a. Page 859: problem 1 → C builds an apt. house on his lot, what result? A can get damages or an injunction.
      1.) There was intent shown by the words “heirs and assigns” (See Spencer’s Case)
      2.) There was NOT privity of estate they were grantor and grantee were landowners.
         (gggg)Note: this is what will trip you up on the exam.
   3.) There was notice → duly recorded
   4.) Touch and concern → Yes
   b. C is not entitled to damages for the same reason.
   c. Suppose to preserve A’s view over Bs lot they agree no bldg. Over 20 feet? B → C who erects a 30 ft. bldg. There is no privity of estate here. If A is successful on the argument that they had a negative easement, then this is construed as an interest in land and there would be privity of estate. This is a stretch but squeeze it in.
      1.) Note: if we were in equity this would not be a problem.
   d. Problem 2(b): A did not convey whole interest (FSA) only a term of years lease and the requirement to be bound as a promisor is to convey whole interest. A had a reversion. Therefore, there was no privity and C can continue to operate the nursery. See, Ernst v. Conditt (where sublease is not privity of estate between original tenant and sublessor, but court found an assignment therefore landlord could sue sublessor). Also check to the deed and see whether there were any warranties.
C. Covenants Enforceable in Equity: Equitable Servitudes
   1. In practical terms, the law of equitable servitudes has almost replaced the law of real covenants.
      a. Example: Tulk conveys some land and there are some promises. Elms sole the property to Moxey who took with notice although there was nothing in the deed. This was an affirmative covenant. It was not an easement because he did not give the right to use the land of another. Elms promised that Tulk’s tenants (see Willard v. First Church, holding that you cannot reserve and interest in another). Elms was not imposing the right to use the land of another. The case concerns the negative covenant not to build. Does this pass to Moxey? Is there an enforceable promise? Yes, most courts will imply that Elms signed it just by accepting the deed. So, there is a written valid promise. Is there horizontal privity? In
England at the time, only recognized a L/T relationship. Here, there was no horizontal privity, but today this is much different. Think about who should have won. Elms and Moxey both knew and got the land cheap. The fair result is that Tulk should win, and that is what the court did. Tulk v. Moxey

b. Note: this was the first case to hold that a written covenant was enforceable against a subsequent purchaser who acquired title to the burdened land with notice of the covenant.

2. Major Rule: why should he win in the court of Equity? If there was a mere agreement (K) and not a covenant. If an equity was attached, no one purchasing ... Burden side requirement three is notice, but the relax horizontal privity. Will not run unless Moxey had notice. The court grants an injunction. This is a very important case.

D. Equitable Servitudes

1. Hypo: Seller has a big plot of land and is selling it in numerical order. Say developer secures a promise from each buyer that they will only build a single story house. Notice that the seller is not making a promise in return. Assume somebody violates the covenant. The question is can they sue in equity (because they want an injunction). If yes, which one has standing to sue? Start with purchaser number 1. Now, the developer owns future lots 2 – 86. Lot number 86 wants to sue lot number 1 who is building a gas station. The legal issue is does the benefit flow to 86. Are they in vertical privity (purchaser 86 and owner of lot 1). There is horizontal privity. Number 86 should win under an equitable servitude standard.

2. Standard: the benefit flows downstream to subsequent purchasers, people who bought after the promise was made. A P can prevail against a prior purchaser.

3. Hypo: same facts, the developer has sold all his lots and is finally getting around to selling 86 who also makes the same promise. Can lot owner number 1 sue lot owner 86? At the time the developer owns nothing. The developer has no land left that those promises are going to benefit. The benefit flows downstream. Here, number 86 would win. This is the problem in the Sanborn v. McLean case.

4. Rule: If the owner of two or more lots, so situated as bear the relation, sells one with restrictions of benefit to the land retained, the servitude becomes mutual and during the period of restraint the owner of the lots retained can do nothing forbidden to the owner of the lot sold.

a. Example: An unidentified party X bought then X passed to McLain who wanted to build a gas station. These are primarily prior purchasers. Ps are seeking an injunction so we need to analyze this case as an equitable servitudes. In almost all cases we start with an ES. Contrary to our initial guess the prior purchasers win.

b. Legal difficulties:

1.) P is not in vertical privity
2.) There was no promise to enforce

c. Is Ds lot subject to a reciprocal negative easement? The court is sloppy about its language. The court should be talking about a reciprocal negative covenant.

d. Even if there was a promise it was not for any benefit retained.

1.) The earlier purchasers did make a promise to the developer. They imply that the seller made a reciprocal promise. This is a covenant created by implication. Then developer sold lot to D. Whether the burden of the developers implied promise runs with the land to the D.

2.) Notice could have been record notice as well here.
e. Two theories
   1.) This case;
   2.) Assume there were rec promises, to get around the vertical
   privity problem lets use K law – third party beneficiaries

5. Neponsit Property Owner’s Association v. Emigrant:
   a. Analysis
      1.) Affirmative or negative
      2.) Easement or covenant
      3.) Is the promise enforceable to sub purchaser, i.e. does the burden
       run with the land? Here, the promise had nothing to do with the
       land. The burden does not touch and concern the land. If it does
       not touch and concern the land it cannot “run with the land.”
       This is true at law or equity.
      4.) On the benefit side, did the prop owner succeed after the
       original promise was made? Arguments that the promise does
       not touch and concern the land? Could argue this is an
       affirmative covenant and the common law does not like this.
       Also, we are reluctant to find a promise to pay money touches
       and concerns the land.
          (h)Does the promise effect the owners as landowners and
          not merely as members of the community. Quit smoking,
          pay money, does not must effect them to use the property
          as a land owner.
          (i)How does the court get around the problem of no
          horizontal privity. The association is agent. Looking as
          substance over form.
      5.) Relaxed t&C req on burden side and on benefit side a relaxed
       privity requirement

6. Caulett v. Stnaley:
   a. If the benefit is in gross then the burden won’t run.

7. Fifth type of negative easement: see article. Bundle of sticks theory, timber
   co said they are giving up this right and in return they are getting money.
   Essentially this is a negative easement, timber co promises to refrain from
   using the land in a certain way. This is private land use control designed to
   accommodate modern interests. They call it a conservation servitude in the
   case book. This is a win- win situation. If the benefit is in gross the env.
   group may have a problem (because burden in gross??).

8. Problem 4 page 890: Imagine you rep East Lansing and developer asked for
   a variance but you must promise 5 bldg. Will be for the benefit of low
   income families. Is there horizontal privity? To establish you would need a
   L-T relationship, Mass Rule – cotenants a simultaneous interest, do not
   have hor. Vertical? If you try and have low income families as P they are not
   in vert privity to city. Beyond that is an affirmative covenant. Cts are
   reluctant to enforce them. The problem is with a normal agreement, seems
   like K rather than a property interest. very difficult to enforce as between
   any parties other than the original.

E. Enforcement Summary: P can prevail over prior purchaser and P can sue
   upstream – easier to prevail over a prior purchaser; Home owner’s ass. – hard
   to put them in vertical privity and to say they can benefit from grantor’s
   promise. A number of ways to get around – they are agents for homeowners
   who have standing. Benefits should flow downstream to people who by later. If
   they bought before, analytically it is hard to see why we should say the benefit
   should go to them. This is one of the more subtle points. In Shelley, the court
   is not willing to enforce a private agreement. The first two cases the court
   stretches to enforce.
F. Scope of Covenants
1. The equal protection clause of the 14th A inhibits judicial enforcement of restrictive covenants based on race.
      1.) Other ways property rights are not absolute
         (jjjj)Cannot operate a house of prostitution: laws of the state can act pursuant to their police power to promote health safety and welfare.
         (kkkk)Nuisance: depriving others to use land
         (llll)Adverse possession: sleeping on property
         (mmmm)Even owner of property law has limited property rights – freedom of speech
         (nnnn)Limits on the theme that “Property is Power”
   b. Probably not enforce in cases where race is not an issue
   c. Other arguments: freedom of contract; restraints on alienation
      (Mountain Brow Lodge, White v. Brown); Federal Fair Housing Act; did not have notice; does not touch and concern the land.
   d. To seller so long as nobody is black – property would have automatically gone to the grantor and there would be no state action. Fee Simple on condition subsequent – the person would have to go to court to retake the property and the court would have found state action.
   e. To get rid of these racially restrictive covenants say we can bring an in rem action where the property is the piece of land that today would be illegal or unconstitutional.

G. Termination of Covenants
1. Easement is a full fledged property right. Covenant is a hybrid. You would expect that they could be terminated voluntarily as can easements.
   a. Abandonment: intent + inaction – no enforcement and nobody is suing.
   b. Changed conditions
      1.) Promise not to build building taller that 1-story high. Stuff has changed. Has it been involuntarily terminated or can Charlie enforce it?
   c. Release
2. General Rule: cts will not enforce where neighborhood has so changed it would unduly burden the D without creating any significant advantage for plaintiff.
   a. Restatement View is different: only where conditions have made is impossible for accomplishing the purposes of the covenant. Conservation easements are not subject to termination under the statute.
3. test: whether the changes have been so substantial as to make in inequitable or oppressive to restrict the property to a particular use.
   a. Restrictive covenants are still enforceable despite commercial development, if the single family residential character of the neighborhood has not been adversely affected, and the purpose of the restriction has not been thwarted.
   b. The covenants were of real and substantial value to the homeowners
   c. A zoning ordinance cannot override a privately placed restriction and the court cannot be compelled to invalidate restrictive covenants merely because of a zoning change.
d. In order for community violations to constitute an abandonment, they must be so general as to frustrate the original purpose of the agreement.

H. Common Interest Communities
1. Modern day subdivision
   a. Looking more carefully at the scope to make sure we have not
2. Condominium – they own in fee simple absolute but the exterior are owned as all the residents as tenants in common.
3. Co-op: developed primarily in New York, there is a corporation that holds title to the interior and exterior and individuals buy shares. If one or two do not pay, the bank could potentially foreclose on the building.
   a. Financial and social screening before you are allowed to live in the building.
   b. As a matter of social policy the advantages are
4. Advantages and disadvantages: At what point do they quit being private, voluntary group and become involuntary? To what extent should the constitution apply and rescue people from involuntary agreements that people find them in? Similar to Landlord Tenant law – is this truly voluntary? Is the majority oppressing and imposing an ideology on them?
   a. Sharing of costs, tax break freedom of K; lose ind freedom, elitist groupings; lose larger “marketplace of ideas” the foundation of democracy. Are they always truly voluntary? Ex. 50 year old woman fined for kissing and doing “other bad things.”

XII. ZONING
A. Introduction: state has police power (authority to regulate for the general health and welfare). The state delegates it’s power and there is an enabling act. Municipalities where there is a zoning commission and a board of appeals. These are citizens appointed by the mayor. The commission has a zoning ordinance. The ordinance is the nitty gritty and must be consistent worth the comprehensive plan. Zoning changes the whole fabric of our community.
B. The ordinances generally specify land uses very specifically
   1. Use Districts
   2. Size limitations
   3. Location – set backs from property line
   4. Other factors (eg. Aesthetics)
C. Board of Adjustment – considers ind. case that does not fit into the pattern
   1. Flexibility – three ways to introduce flexibility
      a. Variance – LO denied a building permit be the proposed lan use is not consistent with the plan can request a variance
         1.) Cannot be contrary to the public interest
         2.) Unnecessary hardship will result from denying the variance
      b. Special Use Permit – when one of the delegation boards exercises its discretion about whether a particular use is within the zoning ordinance;
      c. Zoning Amendment – are allowed as long as they are not spot zoning. If the community wants to change its zoning ordinance that is fine, but cannot do it only with a few parcels because then it looks like a favor.
D. Constitutional Limits on State’s Authorities
   1. Police Power cannot be exercised in an arbitrary way
   2. Cannot be exercised in a discriminatory way
      a. We can classify and discriminate among uses but it has to be rationally related to a legitimate state purpose
   3. Confiscatory – handle this next week
E. Challenges
1. facial
2. as applied

F. Euclidian Zoning – separated by uses and said to be cumulative
   1. Use 1 – least invasive, single family homes through to the last Use. Central aspect is strict separation of uses. More modern aspect is mixed zoning.
   2. Vacancy is an influential factor in the court’s decisions
   3. what percent of the value that has been affected by the zoning scheme
   4. How does the zoning ordinance deprive him of property? Enjoyment and use of the property. It’s not that the land has been physically taken or that title has passed, it is as if the government had done this because of the severity of the zoning ordinance
   5. Allegedly depriving P of 75% of land is within the state’s police power. Before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no (substantial) relation to the public health, safety, orals, or general welfare. Euclid v. Amber
      a. Can promote health, safety and welfare is a legitimate goal
      b. As applied challenge is much easier to win as a plaintiff
      c. He brought the lawsuit too soon he did not have damages yet
      d. Supreme court puts its stamp of approval on zoning. Zoning is constitutional and will not be struck down.
      e. Lochner Era – freedom of contract. Here the government was more willing to permit legislation to save people. This case signals a move away from Lochner.

6. Benefits
   a. Strict segregation may minimize nuisances
   b. Inertia – human tendency to be complacent with what we have
   c. Limit traffic

7. Burden

G. Aesthetic Regulation
   1. Euclid says the police power is broad enough to regulate zoning in general. Just how broad is the police power?
      a. There was an architectual review commission in the city of Ladue. The basis of the challenge for the zoning scheme was that it was too vague. The protection of neighborhoods through aesthetic ordinances are legitimate. This is a legitimate goal under the police powers. The conceptual framework is that the property value will decline if there is a monstrosity on the property. The commission is a valid way to make sure that property values are not diminished.
      b. The means is what is being challenged. Here it was the board. The legitimate goal is to protect property values.
      c. The distinction is between a purple house and this case is the difference between individual preferences and community. Painting is not permanent. Also, the MI case was a private restrictive covenants and here it was a public land use control. Should it matter? We are more ready to live with a private agreement than government imposed restrictions. In general, the regulation of aesthetics has been upheld both under private and public.

H. Controls on Household Composition – Exclusionary Zoning
   1. You can discriminate based on non-familial relationships. Village of Belle Terre v. Boraas
      a. Court takes a little closer look at means and ends because could be excluding people. Almost never accomplished directly. “In View 1 there will be no students or handicapped.” These are unconstitutional. Instead, the city comes up with a pretext for what they are doing. This is done by defining family in a way that is
restrictive of who lives there. Sometimes the pretext is done by restricting the size of the building. The effect is that only wealthy can afford to live there. As long as there is a legitimate basis then it’s okay to make these kinds of restrictions. This allows us to discriminate in favor of a certain type of social structure.

b. Single family dwellings looks okay, but you could have 10,000 people with 10,000 cars as long as it is a “family” with no more than two unrelated people. The goal was clearly to exclude students. The means chosen was not an ordinance that said no students but family. Is this type of exclusion of students okay? This ordinance was upheld. As a general matter excluding students is allowed. East Lansing has more protection as a matter of city ordinance even though it is not unconstitutional.

c. The court used the rational relation test. Depending on the test then the outcome would change. Dissent argues for a more searching standard of review – strict scrutiny.

XIII. EMINENT DOMAIN AND THE TAKINGS CLAUSE

A. Public Use: if demonstrated that the taking is not for a public purpose, the government’s action may be enjoined. It is practically impossible to defeat a taking on this ground

1. the requirement has been satisfied even when the direct beneficiaries are other private parties rather than the general public. Such a redistribution of property will be upheld as long as it is rationally related to a conceivable public purpose. Hawaii Housing Authority v. Midkiff

B. Mostly, for constitutional violations you get an injunction. These constitutional rights are “for sale.”

1. Categorical per se rules
   a. Loretta: permanent physical occupation or invasion is a takings for 5th A purposes. The court found a per se taking when New York required owners of apartment buildings to allow cable television companies to install cables in their buildings. The fact that the cables occupied less than two feet of space and that the harm to the owners was minimal had no bearing on whether there was a taking.

   1.) Here there must be permanent as opposed to temporary invasion

   2.)

b. Remedy
   1.) Injunction
   2.) Pay damages

2. Balancing
   a. Court is more tolerant of regulatory interference with property than it is with interference caused by physical invasion

   1.)Rational: in an organized society, regulation of private activity for the common good is unavoidable.

   b. If regulation goes too far it will be a “taking.” The court has had difficulty coming up with a set formula, preferring to engage in ad hoc factual inquiries. One factor seems to be Diminution in value of Ps property

   1.)Penn coal: does not go too far. Case by case balancing determination, with focus on how much value has been taken. Goes too far if it is commercially impracticable. Coal was very important in the context of this environment. Also, some homes can be destroyed. This is a fair decision. Average reciprocity of advantage. The court says look at the whole parcel as a whole.
Dissent of Loretta wins out under Justice Holmes. Dissent says this is a public nuisance.

c. Three situation that will be a taking

1.) Singles out some for adverse treatment

2.) Destroys well founded investment backed expectations. It is not enough to show that a property owner’s expectations have been disappointed. To establish a taking on this basis, it must be shown that the expectations have stemmed from explicit governmental assurances.

(oooo) Under Penn, must show what value if any remains in the parcel as a whole.

(qqqq) In Keystone Bituminous Coal.

3.) Strips property of all its value

(ffff) If does not strip of all value, there will be a partial taking if substantial value is lost. In Lucas, the court agreed that in at least some cases the landowner with 95% loss will get nothing while 100% loss will recover in full. The nuisance exception does not apply to regulations that outlaw a productive use that was previously permissible under relevant property and nuisance principles. The prohibited use must be always unlawful so that the original use was not in the Ps bundle of rights.

(i) The old dead judge rule: if an old dead judge would say landowners cannot do this, implicitly embedded in the law. If a judge today did this the state would pay. Frictions between the branches of government. Judges have always recognized nuisance but some new environmental regulation then you have to pay for it.

d. Character of the government action (Hadacheck: nuisance control is not a taking)

C. Surface rights but reserved right to the subsurface

D. Analyzing Takings Problems

1. The government may effect a taking in three ways

   a. by physically invading
   b. by regulating the use of private property
   c. by imposing conditions on the development of private property

2. Has the government caused a physical invasion of private property? If so, 

   a. Was there a permanent physical invasion and therefore a takings per se? OR
   b. Was there a temporary physical invasion in which the harm to the owner outweighs any public benefit conferred? Or was the government’s action either arbitrary or destructive of basic expectations?

3. Has the government regulated the use of private property? Of so, 

   a. Is the regulation inherently arbitrary?
   b. Did it violate basic expectations?
   c. Did it strip property of all use or value
   d. Does the nuisance exception apply

4. Has the government attached to a building permit a condition that would have effected a taking had the condition been imported outright? If so, the condition amounts to a taking unless the following two inquiries are answered in the affirmative
a. Does the condition bear an essential nexus to a legitimate government purpose
b. Are the nature and extent of the condition roughly proportional to the impact of the proposed development.