

## Property Outline

### First Acquisition

- I. Discovery
  1. Exclusive title goes to the government, person, or subject who made the discovery against all others.
- II. Conquest:
  1. The taking of possession of territory through force, followed by annexation of the defeated territory.
- III. Capture:
  1. Rule for wild animals: In order to obtain title to a wild animal, the claimant must have mortally wounded or otherwise deprived the animal of its liberty, before a property right is created.
  2. Lockian theory of labor-reward the possession rights to the laborer.
    - a. Possession is equal to dominion and control.
    - b. First possessor has the right of property.
  3. Rule of increase: if you own the mother, you own the offspring.
  4. Constructive possession of wild animals (occurs when wild animals are on your land) gives a first right of taking.
    - a. Where a person's trade has been hurt by another taking animals, he can recover for the amount lost, but not the loss of the animals.
  5. Rule for baseball is that once the ball is hit, it is abandoned property and the first person with control has the possession.
    - a. Conversion:
      - i. Does plaintiff have a property interest?
      - ii. Did defendant refuse to give the property back?
  6. Oil and gas rule: Analogized to wild animals, rules of capture.
    - a. Natural underground reservoirs are not considered to be owned by anyone until reduced to physical possession.
    - b. Surface owners own down the imaginary lines of their property.
    - c. Slant drilling is considered trespass.
  7. Water rules:
    - a. Riparianism: ownership rights to the ownership of the land which abuts the watercourse.
    - b. Prior appropriation: the first person to appropriate the water and puts it to a reasonable and beneficial use has a superior right to later appropriators.
- IV. Tragedy of the commons:
  1. Internalizing externalities: bringing the cost of the resources' use on the user.
  2. May cause socially undesirable consequences when a commons is divided up, the people may or may not act to make it long term.

### Creation: IP

1. There is a property right to control the product or exact words used, but not the information located within.
  - i. Information which is not contained loses its value.

- ii. When resources have been expended to obtain and disseminate information, the producer is protected against its competitor using it for its benefit.
- 2. A person has a right to protect his image, which is devisable beyond death, and the person does not have to exploit it during his lifetime.
- 3. Excised materials do not create property rights in the person they were taken from.
  - i. Normally have property rights in your own body.
  - ii. Public policy rationale to promote research.

## I. Patent

- 1. A limited monopoly on ideas reduced to conditions or quality.
- 2. Patents allow for greater creativity and inventiveness and protects people's work.
- 3. Criteria:
  - i. Patentability-process, machine, manufacture, or composition of matter.
  - ii. Novelty-not been processed in an identical form.
  - iii. Utility-offers some benefit.
  - iv. Non-obvious-has to have been a large enough of an advance.
  - v. Enablement-describe in sufficient detail so an ordinary person would be able to use the invention.
- 4. An organism developed through scientific research that has characteristics different from any found in nature and has the potential for significant utility is patentable.

## II. Copyright

- 1. Gives creator exclusive rights to the original material.
  - i. Protection extends for life of the author plus 70 years and is not renewable.
- 2. Prevents others from:
  - i. Reproduction.
  - ii. Derivative works.
  - iii. Distributing copies of the work to the public.
  - iv. Performing the work in public.
  - v. Displaying publicly.
  - vi. Performing the work by digital audio transmission.
- 3. Licensing allows other to distribute.
- 4. Criteria:
  - i. Originality
  - ii. Work of authorship.
  - iii. Fixation in a tangible medium.
- 5. Only the elements of a factual compilation which are original (i.e., selection and organization) are copyrightable. The facts which they contain are not.
- 6. To be infringed upon there must be
  - i. Ownership of a valid copyright, and
  - ii. Copying of the original elements of the work.
- 7. Fair Use Doctrine balances four factors:
  - i. The purpose and character of the use: i.e., commercial v. scholarly;
  - ii. The nature of the work;

- iii. Substantiality of the portion used in relation to the original; and
  - iv. The effect on the market for or value of the original work.
- III. Trademarks
1. An identification which is used to identify and distinguish a particular product.
    - i. Cause confusion if competitors used it.
  2. Criteria:
    - i. Distinctiveness: Must distinguish the good or service of one person from those of another.
    - ii. Non-functionality: this is a patent, not a trademark if it protects the functionality.
    - iii. First use in trade: Must be first use not just first adoption.

### Finders

- I. A person who discovers an object and intends to keep it and does take control.
  1. Finders do not have complete property rights, but has superior rights against all but the rightful owner and can recover against others.
    - i. Finder is first in time.
  3. **Lost** property occurs when the owner inadvertently loses possession of the property.
    - i. Finder obtains the property rights; the true owner is unlikely to retrace to find it.
  4. **Mislaid** property occurs when the owner intentionally place the item in some location and then forgets to retrieve it.
    - i. Owner of the locus in quo (the place in which) obtains the property rights because the true owner may return to find it.
  5. **Abandoned** property occurs when the true owner intentionally relinquishes all legal rights to the property and disposes themselves of it.
  6. **Treasure trove** is gold, silver, bullion, or money which has been concealed in a private place. Most courts treat as lost or mislaid and if buried, goes to the owner in locus in quo.

### Bailments

- I. Bailments are rightful possession of a good by one who is not the true owner.
- II. Bailments create:
  1. A bailee has to return the property upon the bailor's demand.
  2. Delivery is possession of the goods.
  3. Use of reasonable care.
- III. Bailors intends to transfer possession and keep title and the bailee intends to take possession.
- IV. Strict liability for any misgiving.
- V. No bailment is created of items inside of the baile without the knowledge of the bailee.
- VI. If the bailee rejects the baile, not bailment is formed.
- VII. Involuntary bailment:
  1. More or less forced into taking control.
  2. Bailee has the obligation to use reasonable care under the circumstances.

## Gifts

- I. Types
  1. Gifts inter vivos are given during the life.
  2. Gifts cause mortis are given in anticipation of death.
    - a. Old rule is that it is revoked if the donor lives.
    - b. New rule donor has the opportunity to revoke, but it does not automatically transfer.
- II. Requirements
  1. Present intent to make a gift.
  2. Delivery-possession: objective manifestation of the subjective intent.
    - a. Manual: handing over.
      - i. Must be done when it is possible.
    - b. Constructive: Access (e.g., a key)
      - i. Allowed where the items were not present or could not be manually delivered.
    - c. Symbolic: a writing of the intent.
  3. Acceptance: presumed unless otherwise shown.
- III. Wanting to give a gift is not giving a gift.
- IV. Gratuitous promises to give a gift later are not enforceable.
- V. Delivery is more important than the words used.
- VI. Where there is a present intent to transfer ownership, along with a present transfer of some interest, the gift is effective.

## Adverse Possession

- I. Elements
  1. Actual entry without the permission of owner; adverse to the right of the owner to make use.
  2. Exclusive possession-cannot be share with the true owner or general public.
  3. Open and notorious-puts the true owner on notice.
  4. Hostile and adverse-no permission of the true owner.
  5. Continuous and uninterrupted by the true owner for the statutory period; no ejectment.
- II. State of mind
  1. State of mind is irrelevant (majority).
  2. "I thought I owned it."
  3. "I thought I didn't own it, but I intended to make it mine."
- III. Policy questions:
  1. Land is a resource within a state, which promotes using the resources.
  2. Protects certainty of title to someone who may have paid money.
  3. Bars assertion of claims based on old unreliable evidence by limiting the time in which the claim can be brought.
- IV. Title does not transfer, but a new title is created.
  1. Becomes retroactive to when possessor claimed the land.
- V. Adverse possession is a defense against ejectment or a cause of action.
- VI. Does not need to be used daily, only as a like owner would use it.

- VII. In some jurisdictions, once the possessor recognizes the rights of the titleholder, he cannot claim adverse possession.
- VIII. Color of title:
  - 1. The possessor has some instrument that looks to convey a part of the land, therefore, you get all of the land listed in your deed.
- IX. Tacking:
  - 1. Can add another's adverse possession for a chain of interest.
  - 2. Creates a relationship over a piece of land.
- X. Actions
  - 1. Trover: Wanting the value of the object.
  - 2. Replevin: wanting the physical object back.
- XI. Non real property
  - 1. Discovery rule applies.
  - 2. Due diligence must be used.

### Estates-in-land

- I. Fee simples
  - 1. No one else has any interest in the land.
    - a. Prior to 1800, the presumption was a life estate, not a fee simple.
    - b. Modern times, presumption is a fee simple.
  - 2. Alienation (ability to convey during life) and divisibility (ability to pass on after death).
  - 3. Words of purchase=who gets the land; words of transfer=what is transferred.
    - a. O→ To A and **His Heirs**.
  - 4. Heirs: spouse, issues/descendants. If neither, then parents/ancestors, siblings. If no heirs, then it Escheats back to the state.
  - 5. Conditions to not sell are meaningless in Fee Simples.
  - 6. When a will is ambiguous as to whether a fee simple absolute or life estate was created, the courts will always read the will as if a fee simple absolute was created and in a way that will dispose of the whole estate.
- II. Fee Tail.
  - 1. O→ To A and **his bodily heirs**.
  - 2. Cannot sell a Fee Tail.
  - 3. If no issue, it reverts to O.
  - 4. Most jurisdictions turn a fee tail into a fee simple. (MA allows)
- III. Life Estates
  - 1. Present possessory life estate.
  - 2. Land poor-large assets of land but it cannot be utilized to make money.
  - 3. Restraints on alienation:
    - a. Disabling restraints: not allowing grantee to transfer.
    - b. Forfeiture restraints: not allowing grantee to attempt to transfer.
    - c. Promissory restraints: grantee promises not to transfer interest.
  - 4. Life estates pur autre vie-conveying life estate is only good for the life of the conveyor.
- IV. Waste
  - 1. Must have a present possessory life estate and a future interest.

2. Remainderman wants to use the land to maximize benefit; PPLE can make use as long as it is not wasteful, as it damages the future interest.
3. Categories:
  - a. Affirmative waste arises from voluntary acts, and liability results from injurious acts that have more than trivial effects.
  - b. Permissive waste arises from a failure to act and involves essentially a question of negligence-failure to take reasonable care of the property.
    1. Letting it fall apart.
  - c. Ameliorative waste arises from voluntary actions by the possessory tenant that change the property in question substantially increasing its value.
    1. Creates liability because person was entitled to take land in substantially the same condition.
    2. Most courts reject.

#### V. Trusts

1. Create legal title in trustee (e.g. a bank).
  - a. Takes on a fiduciary duty for someone else's benefit.
2. Creates equitable title in beneficiary.
  - a. Has a right to sue for abuse of duty.
  - b. At its termination, it becomes a fee simple in beneficiary.

#### VI. Defeasible Fees

1. Fee simple determinable-A fee simple so limited that it will end automatically when a stated event happens. (So long as, during, while)
  - a. Presume it reverts back to the grantor automatically once the condition is satisfied. Possibility of Reverter.
  - b. Condition is there from the beginning.
  - c. Conveyable inter vivos or by will.
2. Fee simple subject to a condition subsequent-A fee simple which does not automatically end, but can be cut short by divestment. (but if)
  - a. O reserved the right to re-enter and retake the land.
  - b. May be cut short by divestment.
3. Fee Simple subject to an executory interest-created when a grantor transfers a fee simple subject to a condition subsequent and in the same instrument creates a future interest in a third party at the occurrence of some specified future event.
4. If there is ambiguity, the law favors a presumption of Fee Simple subject to a condition subsequent.

#### VII. Future Interest

1. Reversions are future interests held by grantor in remainder after a conveyance.
  - a. O→To A for life.
  - b. Reversion is a complete interest in land and is transferrable and divisible.
2. Remainders are vested interests in land and are transferrable.
  - a. The future interest in a transferee which is capable of becoming possessory at the natural termination of the preceding estate and does not divest to anyone estate except the transferor.
    1. Vested remainders- specifically mentions who the future interest is in and has no condition precedent.

2. Contingent remainders-leaves who open (e.g. heirs) and/or has a condition precedent.
  - a. If condition is not met, the interest goes away.
3. Executory interests-Divests into a third party if some specified event occurs.
  - a. Shifting Executory Interests become possessory at the termination of the preceding estate.
    1. O→To A for life, then to B for life, but if B obtains a J.D., then to C and her heirs after B's death.
      - a. A-PPLE
      - b. B-Vested Remainder in Life Estate subject to a shifting Executory interest.
      - c. C-Shifting Executory Interest.
      - d. O-Reversion
    - b. Springing Executory Interest does not become possessory at the termination of the preceding estate and temporarily reverts back to O.
      1. O→To A for Life, then to B for life, then 1 day after B's death, to C and his heirs.
        - a. A-PPLE
        - b. B-VR in LE
        - c. C-Springing executory interest.
        - d. O-Reversion

#### VIII. Limitations of contingent remainders

1. Destructibility of Contingent remainders. (old)
  - a. A legal remainder is destroyed if it does not vest at or before the termination of the preceding freehold estate.
  - b. Merger-Lesser estates merge in the larger in the same person.
2. Rule in Shelly's Case (old).
  - a. If (1) one instrument (2) creates a life estate in A, and (3) purports to create a remainder in persons described as A's heirs, and (4) the life estate and remainder are both legal and equitable, the remainder becomes a fee simple in A.
    1. O→To A for life, then to B for life, then to the heirs of B.
      - a. A-PPLE
      - b. B-VR in LE followed by a VR in FS, merges into a VR in FS.
3. Doctrine of Worthier Title (old).
  - a. Title provides intervivos conveyance of land to a person with a limitation over to the grantor's own heirs by remainder or executory interest, not future interest is created.
    1. O→To A for life, then to B if the lions have won the super bowl, if not to the heirs of O.
4. 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.
    1. O (by will) to the children of A when they reach 25.
      - a. Not good as there is a contingent remainder.

2. O (by will) to the S and W (life in being) when they reach 25 (are 5 at the time). Good.

### Joint Tenants

- I. Tenants-in-common:
  - a. Separate interests in an undivided property
  - b. Alienable and divisible.
  - c. All have a right to use all of the properties.
  - d. Can be partitioned
    - i. Physical separation (partition in kind)
    - ii. Sold and proceeds divided.
  - e. Tenants in common have an equal right to occupy the whole. Unless the tenant in actual possession ousts the co-tenant or has agreed to pay rent, nothing can be claimed if the tenant in possession occupies the whole.
    - i. Ouster requires the other party to go back to land to claim his portion.
- II. Joint tenants:
  - a. Must have all the unities
    - i. Time-all joint tenants acquired at the same time.
    - ii. Title-all acquire by the same instrument.
    - iii. Interest-equal and undivided shares.
    - iv. Possession-each has a right to possession of the whole.
  - b. Each tenant owns an undivided property
    - i. Can sell, but destroys the joint tenancy
    - ii. Cannot will, share goes to survivors (right of survivorship).
  - c. Can be partitioned.
    - i. Partition by sale can only be used when it is practical and when it promotes the benefits of all of the owners.
    - ii. Partition in kind is preferred.
  - d. A joint tenancy is not severed when one party executes a mortgage and that mortgage does not survive the death of the mortgagor.
- III. Tenancy by the entirety
  - a. 2 parties only
  - b. All unities plus marriage.
    - i. In MI allowed for parties other than husband and wife, such as siblings.
- IV. Relation among Co-owners
  - a. A partition in kind is preferred where it is not impracticable.
  - b. Benefits and Burdens (Assurances of profit)
    - i. Party must share rent and the payment of taxes.
    - ii. Cannot force the other party to pay for enhancements. However, the party will get the balance once the property is sold.

### Landlord-tenant

- I. The Lease Hold Estates:
  - a. The term of years: a leased estate that ends at some fixed period of time.
    - i. No limit on the number of years.
    - ii. There can be statutory limits.

- iii. Can be terminated upon some condition.
    - iv. No notice of termination is necessary.
  - b. The Periodic Tenancy: a lease for a period of some fixed duration that continues until notice of termination is given.
    - i. CL: 6 months notice for 1 year lease; 1 month notice for month to month.
    - ii. If not terminated with proper notice, subject to the lease until sufficient notice is given.
  - c. Tenancy at will: no fixed period that endures so long as both landlord and tenant desires. Ends when 1 party terminates it.
    - i. Period of notice by statute (most specify 30 days).
  - d. Tenancy at sufferance: Staying past termination.
    - i. Landlord has options:
      - 1. Eviction and damages.
      - 2. Consent to new leasehold.
        - a. Cashing a check is implied consent.
  - e. A leasehold cannot be set to end at death, becomes a tenancy at will.
- II. Sublease/assignment
  - a. Right of possession, not actual possession, creates obligations.
  - b. 2 rules:
    - i. Minority: Intent of the parties.
    - ii. Majority: Was the full interest conveyed?
      - 1. If full interest was conveyed it was an assignment. Destroys the privity of estate between lessor and lessee but does leave the privity of contract. O can go after the assignee in possession or the assignor.
      - 2. If partial interest is conveyed, it is a sublease and privity of estate and contract are unaffected.
  - c. Termination
    - i. Surrender of lease if the tenant gives up possession and is no longer liable for further rent.
      - 1. Silence is not equal to acceptance of the surrender.
    - ii. Novation (The act of substituting an old obligation for a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new one) is the only way to get out of a lease. Rarely used.
  - d. Express conditions to get permission for assignment/sublease.
    - i. Two alternative rules:
      - 1. Unless the contract states that denial must be reasonable, an owner can withhold permission arbitrarily. Majority rule.
      - 2. Even if the contract does not have a reasonability clause, an owner can only deny for a commercially reasonable objection. Minority rule.
  - e. Rule in Dumpor's Case:
    - i. Once permission is given once, it is waived, unless it is expressly written out.

- f. Self Help
  - i. Common law rule is that self-help is available to retake if:
    - 1. The landlord is legally entitled to the possession.
    - 2. The means used are peaceable.
  - ii. Berg rule: Can only be peaceable if the landlord uses the judicial process.
- g. Mitigation
  - i. A lessor has a duty to use due diligence to mitigate losses when a lessee attempts to surrender a lease. (majority)
    - 1. Burden is on the landlord to show that he attempted to mitigate reasonably.
    - 2. No duty for commercial leases because of the equality of bargaining power.
  - ii. Terminate the lease (minority).
  - iii. Leave the premises vacant and collect past due (minority).
- h. Covenants under common law were independent:
  - i. If landlord failed to perform, there was still a duty to pay rent.
  - ii. Gave rise to the concept of “as is.”
- i. Eviction:
  - i. An eviction occurs when a landlord deprives the tenant of the possession and quiet enjoyment of any part of the premises (Actual); or,
  - ii. If a landlord commits such acts or omissions that deprive the lessee of the beneficial enjoyment. (Constructive)
    - 1. A lessee may elect to abandon the property and avoid further obligations or sue for damages.
  - iii. Implied that the tenant shall have the right of possession, occupancy, and beneficial use of every portion of lease premises:
    - 1. Wrongful conduct by landlord.
    - 2. Substantive interference with the use.
    - 3. Vacation of the tenant within reasonable time.
      - a. Cannot sue if tenant does not vacate. Objective evidence of a subjective interference.
- j. At common law, a landlord only had a duty to care for:
  - i. The furnished dwelling.
  - ii. Common areas.
  - iii. Latent defects not discoverable by the tenant (duty to disclose).
  - iv. Nuisances.
- k. Landlords have no duty to stop free speech from a third party.
- l. Implied warranty of habitability
  - i. A person who sues under this does not need to vacate.
  - ii. A lessee must prove:
    - 1. The landlord had notice of the defect and failed to repair it; and
    - 2. The defect affecting the habitability existed at the time.
  - iii. A lessee can refuse to pay rent until the defect is fixed or sue for the difference between the value received and the value promised.
  - iv. Remedies:
    - 1. Value of the dwelling as warranted minus the dwelling as received.

2. Damages for tenant's discomfort and annoyance.
3. Withhold payment of future rent.
4. Deduct the expense of the repair the tenant paid.
5. Punitive damages for wanton and willful conduct.

## Deeds

- a. Statute of Frauds requirements:
  - i. Signature of the party to be charged (objective evidence of the subjective intent).
    1. Only seller on a deed.
  - ii. Description.
  - iii. Price.
- b. Estoppel or partial performance can overcome the Statute of Frauds requirement.
- c. Marketable title means that the title is not subject to reasonable doubt that would create an apprehension of its validity in the mind of a reasonable person.
  - i. Does not require a showing of perfect title.
- d. Equitable conversion: if there is a specifically enforceable contract for the sale of the land, equity considers done that which should be done.
  - i. Risk of Loss and inheritance, the point after the sale before closing in which the burden transfers from the seller to the buyer.
- e. Duty to disclose:
  - i. Restrictions on a deed do not make it unmarketable, but violations which could expose the buyer to litigation and doubt do.
  - ii. When a condition by the seller, materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent buyer exercising due care.
  - iii. Where the seller knows of a fact materially affecting the value of the home not readily observable and not known to the buyer, the seller has a duty and the buyer can rescind.
- f. Merger, a contract is merged with the buyer's deed and the buyer can only look to the deed to see what rights he has. Buyer can no longer sue on promises in the contract but only on the warranties contained in the deed.
- g. Types of deeds:
  - i. General warranty: Provides greatest title, warranting against all defects in title.
  - ii. Special Warranty: Warranties against grantor's own acts but not the acts of others.
  - iii. Quitclaim: No warranties of any kind.
- h. Elements to create deeds:
  - i. Names of the grantor and grantee.
  - ii. Words of grant
  - iii. Legal description
  - iv. Warranties
  - v. Consideration might be noted.
  - vi. Signature of the grantor.
  - vii. Seal not required.

- i. Forgery=void, fraud =voidable
    - i. SBFP gets a good deed from fraudulent grantor.
  - j. Covenants in deeds
    - i. Present covenants: Action at the time of the delivery.
      - 1. Covenant of sesin-the grantor warrants that he owns the estate he purports to convey.
      - 2. Covenant of right to convey-the grantor warrants that he has a right to convey the property.
      - 3. Covenant against encumbrances-The grantor warrants that there are no encumbrances on the property.
        - a. Mortgages, liens, easements, and covenants.
    - ii. Future covenants: Action begins once breach occurs.
      - 1. A covenant of general warranty-the grantor warrants that he will defend against lawful claims and will compensate the grantee for any loss the grantee may sustain by assertion of superior title.
      - 2. A covenant of quiet enjoyment-the grantor warrants that the grantee will not be disturbed in possession and enjoyment of the property by an assertion of superior title.
        - a. About enjoyment of the title, not nuisance.
      - 3. A covenant of further assurances-The grantor promises that he will execute any other documents required to perfect the title conveyed.
    - iii. In order for constructive eviction suit on a violation of quiet enjoyment, the possessor of the paramount claim must have acted on it.
  - k. When a deed is manually deliver, it has been legally delivered and the intent to pass title is effective.
    - i. Delivery is an objective act demonstrating the present subjective intent to transfer.
    - ii. The intent to transfer must be present, future intent means nothing.
    - iii. A conditional delivery can only be made by placing the deed in the hands of a third party (escrow agent) to be kept until the condition was met, but there was constructive delivery.
- II. An action to quiet title resolves a dispute to ownership of land.
  - III. Makes no matter if a deed is destroyed.

### Mortgages

- I. A mortgage is a lien, a legal right a creditor has in another's property, until the note is paid off.
- II. When a foreclosure is bought, the original owner has a right to a period of redemption where he can buy the property back.
- III. Mortgagor is the borrower, a person who takes out a loan from a mortgagee, the lender, and gives a mortgage and note.
- IV. Sheriff's deed is a quitclaim deed which certifies that the foreclosure sale was proper.
- V. Banks get equity over the mortgaged amount.
  - a. 1st mortgagee gets paid off before second mortgagee.
- VI. Three occurrences:
  - a. Arrange to pay off mortgage.

- b. Agree to pay off (“subject to” approach).
  - c. Assumption of prior mortgagor.
- VII. In order to constitute bad faith, there must be an intentional disregard of a duty or a purpose to injure. In order to constitute due diligence, it must be determined whether a reasonable man in the mortgagee’s place would have adjourned the sale or taken other measures to receive a fair price.
  - a. Fair market value is what a reasonable price is for a home like this.
  - b. Fair value is the price someone would pay for a foreclosure at that time.
- VIII. Adjustable rate mortgages are unfair if:
  - a. The ARM is for 3 years or less;
  - b. Feature an introductory loan at least 3% below the fully indexed rate;
  - c. Used the low rate to determine debt-to-income ratio; and
  - d. Were financed at 100% or featured a substantial repayment penalty.
- IX. Mortgagees need to establish that they are the mortgage holder.
- X. Dodd-Frank Act: reins in risky provision, most importantly is that creditors make a reasonable and good-faith determination based on verified and documented information that the consumer has a reasonable ability to repay a loan according to its terms.

Title Assurance

- I. Indexes:
  - a. Grantor index lists all instruments recorded under the grantor’s surname.
  - b. Grantee index lists all instruments recorded under the grantee’s surname.
- II. Searching title:
  - a. First, search back in the grantee index to an acceptable source or the root of title (often statutorily defined).
  - b. Then search forward under the grantor index.
    - i. Golden Rule: Search the grantor index for each person in the chain of title, under his/her name, from the date of delivery of the deed to the person [date in] until the date of recording of the first conveyance from that person, of all of his/her interests, [date out].
  - c. Must also inspect the land to protect against adverse possession.
- III. Bona fide purchasers are those with no notice and who paid value.
  - a. Subsequent bona fide purchasers are protected against prior unrecorded interests.
  - b. Usually first in time wins.
- IV. In order to impart constructive notice, an instrument must identify a property or contain sufficient information so that the property can be identified.
- V. The doctrine of idem sonans (sounds the same) does not apply in the transfer of property. The BFP cannot be expected to search everything that sounds like the right name of the grantor.
- VI. Sufficiency for descriptions:
  - a. Identifies the property or sufficient information.
  - b. Specific enough to impart constructive notice.
  - c. Undue to require BFP to search all spellings.
- VII. Recording Acts
  - a. Race: the first person to record wins
  - b. Notice: a subsequent bona fide purchaser wins, even if they fail to record.

- i. Shelter rule: a person who takes from the protected subsequent bona fide purchaser is also protected.
  - c. Race-notice: a subsequent bona fide purchaser is protected if:
    - i. He was without notice when he took; and
    - ii. He recorded first.
- VIII. Wild title occurs when a prior purchaser does not record before a bona fide subsequent purchaser.
  - O→A→→®
  - O→→B
- IX. A subsequent owner who received as a gift cannot win as he is not a bona fide purchaser. Donee must obtain first and record.
- X. Estoppel by deed occurs when a person sells before they own the property but subsequently obtain the property. It goes back in time through to B.
  - A→B
  - O→A→C

B wins because the deed goes back in time.
- XI. For the recording acts, it is the chain that must be recorded first, not just the subsequent BFP.
  - O→A→→C®
  - O→→→→→B®

B wins since his chain was recorded first.
- XII. A deed not properly acknowledged is not entitled to be recorded. Therefore, it does not constitute notice.
- XIII. A deed does not become operative until the grantee's name is placed in there, but this can be done by the grantee with authority, expressed or implied, from the grantor.
  - a. Once done, he become a subsequent purchaser from other purchasers who paid later.
- XIV. Types of Notice:
  - a. Actual notice: Personal knowledge of the prior interest.
  - b. Record notice: notice of a prior interest that would be revealed by an appropriate title search.
    - i. A purchaser is protected if he could not have been put on constructive notice at the time he received title.
      - 1. E.g., lis pendens (notice of a lawsuit affecting title to a property) not being recorded until after the closing.
  - c. Inquiry: notice based on a purchaser's duty to investigate relevant circumstances.
    - i. Can be created when records in the courthouse reference documents outside of the chain of title.
    - ii. Actual possession is constructive notice.

### Servitudes

- I. The use of someone else's land.
- II. Types:
  - a. Licenses are revocable.
  - b. Easements: one party has a right go on and use someone else's land.
  - c. Covenants

- d. Equitable servitudes
- e. Profits
- III. Easements:
  - a. Types:
    - i. Affirmative: the interest holder has a right to do some affirmative act on the land of another.
    - ii. Negative: forbid a landowner from doing something on his land that might harm his neighbor.
  - b. Classifications:
    - i. Appurtenant: rights to owner of the dominant land; runs with the land and dominant land and the servient land.
    - ii. In gross: rights without ownership of the land.
      - 1. A person can gain additional rights via prescription.
      - 2. They are alienable and assignable.
      - 3. They are divisible but the parties must operate them jointly.
  - c. Creation of easements:
    - i. Express creation.
      - 1. Old rule is that you cannot create an easement in a third party.
      - 2. New rule is to determine the intention of the grantor from the four corners of the instrument.
    - ii. Implied
    - iii. Prescription (like adverse possession but does not require full use and control).
    - iv. Estoppel
      - 1. Created when a property owner misleads another, or
      - 2. Causes another in any way to change their position to his or her prejudice:
        - a. Prejudice is a detriment and can be shown by a forbearance of some right.
      - 3. Irrevocable license can become easements by estoppel.
  - d. Implied easements
    - i. Prior Use:
      - 1. An initial unity of the land with a prior existing use of a dominant and servient section (quasi-easement);
      - 2. Unity is followed by a severance of the land;
      - 3. An existing, apparent, and continuous use by the dominant land; and
      - 4. The use is a reasonable necessity at the time of the severance.
    - ii. Necessity: Ends once the necessity ends.
      - 1. There was unity of ownership among the dominant and servient land;
      - 2. There was a necessity, not a mere convenience;
      - 3. The necessity existed at the time of the severance.
  - e. Prescriptive easements:
    - i. Open and notorious use.
    - ii. Adverse

- iii. Continuous for the statutory period.
    - f. Scope:
      - i. An easement is appurtenant to a particular parcel of land. If it is extended to other parcels, whether appurtenant or not, it becomes a misuse.
        - 1. An injunction is an equitable remedy at the discretion of the trial court.
      - ii. Cannot relocate an easement without the dominant estates acquiescence.
      - iii. Can transform an easement if it is within the scope of the easement to serve a reasonable purpose that was reasonably foreseeable at the creation.
    - g. Termination
      - i. Release
      - ii. Expiration, if the duration is limited in some way.
      - iii. End of necessity
      - iv. Merger, if the easement owner becomes the owner of the servient estate.
      - v. Estoppel, if the servient owner reasonably relies upon a statement or representation of the dominant owner.
      - vi. Abandonment, not simply by non-use, but by acts of the owner of the dominant estate which conclusively and unequivocally manifests either a present intent to relinquish the easement or a purpose inconsistent with its use.
      - vii. Condemnation, when government exercise eminent domain to take the fee simple servient estate.
      - viii. Prescription.
    - h. Negative easements:
      - i. Blocking windows
      - ii. Interfering with air flow.
      - iii. Removing supports
      - iv. Interfering with the flows of water.
- IV. Covenants: right to compel owner to do some action.
- a. Real covenants:
    - i. Intent of the parties
    - ii. Appropriate privity at the creation through some transfer of land (horizontal privity).
    - iii. Full estate must be transferred to subsequent in order for the burden to run (vertical privity).
      - 1. Benefits can run without full horizontal privity.
      - 2. Burdens need the full privity to run.
    - iv. Must touch and concern the land-promise relates to the land.
  - b. Equitable servitudes:
    - i. Intent of the parties
    - ii. Touch and concerns the land.
    - iii. There was notice of the servitude
      - 1. Notice replaces the privity requirements.
  - c. Affirmative covenants (e.g. paying fees to homeowner's associations):
    - i. Touch and concern the land when that is the intent and the covenant has a benefit to the community.

- d. Termination:
  - i. Merger
  - ii. Release
    - 1. Defendant has the option to release, is not required to.
  - iii. Acquiescence
  - iv. Abandonment
  - v. Unclean hands
  - vi. Latches-Statute of limitations
  - vii. Estoppel
- e. Restrictive Covenants: A radical change which affects the whole area of the covenant so as to defeat the purpose of the restrictions will render them unenforceable.
- f. Common interest communities:
  - i. A restriction declared and recorded for a CIC is presumed valid and reasonable and will be enforced against all unless:
    - 1. It is arbitrary;
    - 2. Imposes burdens which outweigh the benefits;
    - 3. Violates a fundamental public policy.
  - ii. Two types of restrictive covenant
    - 1. Expressly stated, given more deference.
    - 2. Adopted by the association.

V. Profits

- a. A right to enter someone's land and remove something from the land.

Zoning

- I. Zoning is a function of a state's police power.
- II. Zoning ordinances will not be considered in the abstract, but in connection with the circumstances and locality and if the validity is debatable, deference will be given to the ordinance.
- III. A lawful, non-conforming prior use establishes a property right in the owner which cannot be abrogated or destroyed unless it is a nuisance, abandoned, or confiscated by eminent domain.
- IV. Flexibility in zoning:
  - a. Variance: getting permission to do something not allowed under the zoning code.
    - i. Must show that:
      - 1. Not allowing the variance would impose undue hardship.
      - 2. Reasonably attempted to comply with the ordinance.
      - 3. Harm was not self-inflicted.
      - 4. Not substantially impinge upon the public good and then intent and purpose of the zoning plan and ordinance.
    - ii. Special variances
      - 1. Impose reasonable conditions on the land use.
      - 2. Area variance-increasing area of building, lower burden.
      - 3. Use variance-wanting to change the particular use of the land, greater burden.

- b. Special exception: a use permitted by the ordinance in a district in which it must be applied for and is not necessarily incompatible, but might cause harm if not watched.
  - i. E.g. a gas station or church in a residential area.
- c. Spot zoning: changing the zoning code by legislation to change a parcel for an otherwise nonconforming use.
  - i. Invalid where:
    - 1. Singles out a small parcel of land for a special and privileged treatment;
    - 2. Only for the benefit of the land owner rather than the public;
    - 3. Done in a way that is not in accord with a comprehensive plane.
- d. An ordinance which is so vague that a person of common intelligence must necessarily guess at its meaning and differ as to its application is unconstitutionally vague.
- e. Zoning ordinances based off aesthetics are valid if they are enacted to protect the value of neighboring homes, as they are promoting the general welfare.
- f. Ordinances limiting occupancy are valid, but not those based on preserving the family character of the neighborhood.
  - i. Old rule used to allow them to be valid.

#### Eminent Domain and Regulatory Takings

- I. If State seeks to control land use with zoning → Is it within the police power (Health, Safety, Welfare) → If no, set aside. If yes → Is it rationally related (generally, as applied to a particular piece of land, to extractions, nexus test) → No, set aside. If Yes → Does it violate a constitutional right of landowner? (1st Amend., 5th Amend., Takings, extraction, 14th Amend.) → If Yes, set aside. If no, state wins.
- II. If state seeks title to land (Eminent Domain, Fee simple Easement) → Does it serve a public use and is there just compensation?
  - a. The court will give deference to the legislature to determine what is a public purpose and will not review it piecemeal, but as an entire plan.
- III. A permanent physical occupation authorized by the government is a taking without regard to the public interest.
- IV. Penn Coal Rule: Where there has been a significant reduction in market value, the regulation went too far and is a taking.
- V. Penn Central Test: Interference with a reasonable expectation of an investment return.
  - a. Not barred by mere fact that title was acquired after the effective date.
- VI. Extractions: Local government regulations that require developers to provide goods and services or pay fees as a condition to getting a project approved.
  - a. Test:
    - i. Nollan rule: There must be a sufficient nexus between the governmental purpose and the reasons for the permit conditions.
    - ii. Dolan rule: There must be a rough proportionality between the dedication and the nature and extent of the impact of the proposed development.
  - b. Cannot demand money instead of conditions on land.