

## Property

### I. Introduction: Property as Power – the Right to Exclude and Its Limitations (The Right of Access)

What is property? - Stuff real or imagined that we can control and have the lawful right to control. It must have value. Property has value.

“Owners of property generally possess a bundle of entitlements—including privilege to use; right to exclude others; power to transfer title to the property; and immunity from having the property taken or damaged without your consent.”

Property rights are NOT absolute.

Legal concept of how we can use or not use resources or things of value.

#### A. Trespass – Intentional intrusion on another’s land that is not privileged.

(In criminal trespass, you have to be told to leave, and you need “intent to invade.”)

Intentional means intent to go on land—that’s all.

##### 1. Public Policy Limits on the Right to Exclude

State v. Shack - The farmer tried to exclude two agents (gov’t funded programs) from visiting his employees on his property.

Tedesco tries to exclude. Cops came and wouldn’t until Tedesco put it in writing.

Issue: Right to exclude. Was it privileged?

Not necessity. Not consent. Public Policy.

*Privileges* - Necessity; Consent; Public Policy Concerns

Public Policy Concerns: Whose rights are more important

(Unequal bargaining power – basis for public policy decision.)

Desnick v. ABC

Ophthalmologists gave ABC to come to clinic and give “fair and balanced” report on cataract surgery. Said they wouldn’t use undercover surveillance or ambush interviews. But they did.

Instead:

Spy reporters

Desnick sued for trespass; defamation and fraud. False pretenses: Patients pretending to be reported.

Issue: Is this trespass—was it privileged? Was it consent?

Is consent attained through fraudulent means valid for privilege to prevent the entry being an injury to a trespass. If you lie to get consent, is the trespass still privileged?

Found via public policy that the utility of undercover journalism outweighs personal right to exclude property or negative effect of fraudulent means of gaining consent to be on.

PUBLIC SERVICE.

PROBLEM 1 on 115 WRITE OUT ANSWER!

##### 2. Rights of Reasonable Access to Property Open to the Public

Uston v. Resorts International Hotel, Inc.

Card-Counting case.

Issue: Right to exclude vs. right to access.

Rules:

Majority: Generally there is a right to exclude for any reasons—even if open to general public—except for improper discrimination. Exceptions: Common carriers; innkeepers; gas stations; private hospitals—any basic necessities.

NJ Minority Rule (and some other states): Any place open to public (Diminishes rights of landowners) NEED good reason to deny access. (Being a good gambler is not a good reason.)

Balance arbitrary discrimination/improper. Discrimination based on skill on cards is an invalid form of discrimination in NJ. (In Nevada, it is valid.)

VALID REASONS: security threat; obstructive to business; a threat.

Public Policy: Avoiding hidden discrimination; shifting balance from business to patron.

OVERVIEW: Right to exclude is important and fundamental to property—but it's limited.

Decisions are based on balance of elements—including pub. policy

## II. Competing Claims to Original Acquisition and Allocation of Property Rights

### B. Possession, Labor, and Investment

#### 1. Wild Animals

Pierson v. Post (Read broadly or narrowly meaning animals or any unowned property)

Post is pursuing fox, and Pierson interferes and kills it on wild and uninhabited land called the beach.

Issue: Who has right to possess?

Rule: Occupancy—whoever exercises dominion and control.

Whoever occupies fox first wins (has superior rights to fox)!

In terms of fox hunting, occupying is killing (or at least mortally wounding) a fox. (Limits litigation.)

Dissent: Pursuit is not enough, but pursuit with likelihood of capture may be enough—public policy to reward people who try to kill foxes. (Encourages fox stealers).

(Judgment call on court—both could be right.)

(Duck pond was different because it was on his property.)

BROAD RULE First person to exercise dominion or control (occupy) property, has rights.

Popov

Barry Bonds' homerun ball.

Facts:

Bonds hit ball and MLB abandons baseball when it leaves field of play. (Makes it a wild ball.) Popov seemed to occupy it, then crowd knocks him over, and Hayashi picks it up. No way of knowing if Popov actually had control.

Issue: Since there is no way of knowing who occupied the ball first, who do they give possession of ball to?

Custom: once someone starts catching ball should be allowed to finish. (Fox hunting)

Rule: Whoever first had (lays claim over unowned property) possession wins (has possession of property), but when that cannot be known, sell ball and split \$. (Unfair to one of them, and overgenerous to the other.)

#### 2. News pgs

INS v. AP 1918 Page 32.

Both are news services that collect and share news their subscribing newspapers.

AP has a problem with INS taking their news and sharing it with their subscribers, and sometimes INS news will beat AP news on the West Coast.

Issue: Is news property.

Article is creative process of author and is protected as property.

News is just facts—not property—therefore, AP cannot own underlying facts.

Distribution is protected as property.

Rights to distribution of news against competing companies—not individuals spreading the news.

Analysis:

PP: Only way AP will invest in news is if it can make money from it, and INS's behavior is disincentivizing AP from gathering news.

Compare Pierson: Pierson rewards results, while INS encourages labor/effort.

AP didn't abandon news when it was on bulletin board—no intent. INS wasn't capturing owned property, they were capturing owned property.

Rule: Here, encourage labor over results.

### 3. Human Body

Moore v. Regents, Page 45

Facts: Moore sues UCLA, et al for lack of informed consent, breach of fiduciary duty, and conversion of his property. UCLA removed spleen and kept it w/o telling him.

Kept having him come back for treatment he didn't need or could have gotten elsewhere for further testing of his cells, and developed the MO Cell Line.

Moore wants money for use of HIS spleen.

Issue: Does Moore own cells.

No. Don't own your own body.

Cells are minimally valuable compared to work done on them.

Moore had controlling interest over his own body, but does not own it.

It is true that but for the researchers, there would be no Mo cell line, but it is also true that but for Moore, there would be no Mo cell line.

If we allow Moore to win, we inhibit medical research: PP!!!

Researchers couldn't get to his spleen without consent, and they didn't get consent.

Didn't disclose financial interests.

NO CONVERSION;

Does become property once it's removed.

Cannot own your own body: PP no commodification of persons.

Once organs are removed, are they property??? Once out, it is usually property.

Not conversion because Moore didn't possess/own his body, but had the controlling interest in it.

CUSTODY???? ASK HIM!!!

Only have control of organ when it's in your body.

Researchers would contract up front with the person if they knew they had to compensate them.

No necessity for body.

Problem on 53.

Fiancee died, and all property was left to children. Sperms are quasi-property and are based on intention of original owner at the time. Sperm are better off being born.

Baby M

Stern contracts with Whitehead with surrogacy arrangement with his sperm and her egg. She bore it and wants to keep it.

Issue: was surrogacy contract enforceable?

Contract was in conflict with statute that said you can't sell babies.

New Jersey: surrogacy contracts are unenforceable because there is a danger of treating people as property.

Michigan: surrogacy contracts are criminally illegal.

Contract commodifies children. ILLEGAL outside of California.

Contract was contrary to public policy.

Public Policy: we don't want poor women being exploited for their wombs.

In Johnson v. Calver, two women can claim to be the mother: carrier and genetic provider, and it goes to who *intended* to be the mother.

In Cal, need evidence that women are being exploited.

### **Frozen Embryos**

Davis v. Davis

Divorced couple.

Issue: are embryos people or property?

Contract issue or best interest of child?

Embryos are quasi property worthy of special respect.

If they were property, you could do whatever you want with the, so if they are a person, they have rights of personhood.

Reasoning: Don't want to say that embryos are property, but not people because they can't have individual rights.

Litowitz

Facts: couple with frozen embryo.

Court says contract rule when they aren't in agreement. Embryos unfrozen and destroyed.

Court pays lip service to embryos not being property, but almost always treats them as property.

## C. Family as Source of Property

### 1. Wills and Inheritance

There is a right to bequeath (personal property) and devise (real property).

NO right to inherit!!! (Except spouses usually have right to inherit—meaning that spouse can choose whether to inherit under a will or inherit under her right as spouse (which is a fixed percentage.)

Intestate (No will) Usual Hierarchy:

- 1) Spouse
- 2) Children
- 3) Parents
- 4) Siblings
- 5) Aunts and Uncles

Divided equally among a class.

Inheritance Tax: Donor is taxed; not the recipient.

Only the dead have heirs, and the living have heirs apparent.

PP: Encourage dynasties; taxes purport to redistribute wealth.

Dead can't compel the heirs to destroy things: PP against wanton destruction of property; he could have destroyed it when he was alive, but not after he dies.

PP: Don't want dead to control things.

At discretion of executor—with leave of heirs to destroy property.  
HYPOS on p69.

2. Marriage

In Re King

Facts: Jack is pro gambler; King wanted house; Jack wanted it sold and proceeds split  
Two children.

Court gave her house because wasn't willing to gamble on Jack paying child support.  
In lieu of child support, King got whole house.

Allocation is at discretion of court with factors:

Children involved.

Duration of marriage

Age

Health

Vocation

Issue: what to do with house.

No reasonable purpose would have been served with selling house.

Could have: sold it and split \$; given it to Jack; given it to King; left it in both their  
names and given occupancy to Pam.

Jack's objection: property distribution should be a separate issue from child support;  
court said issue is intertwined—look out for children.

When children are involved, look at best interests of them.

Two systems: Separate property: Each spouse owns property separately

Community Property: Property earned during marriage belongs to both equally

3. Gifts Transferring of property from one person to another without compensation.

Need:

1) Intent

2) Delivery (Actual; Constructive; or Symbolic (Clump of dirt for land)

3) Acceptance (usually presumed

With Engagement Rings:

Condition precedent vs. condition subsequent

Condition precedent: condition must occur before gift becomes effective (prior to  
being transferred) in which case, it's still donor's until condition has been met. So  
burden of proof on give.

Condition subsequent: condition occurs after gift. Burden of proof is on donor  
because title was transferred before condition is met.

"I give you this ring on condition that we marry." PRECEDENT

"I give you this ring, but I want it back if we don't marry." SUBSEQUENT

Burden of Proof is on party seeking title.

Traditionally, rings go back; fault mattered; whoever broke off marriage, doesn't  
keep ring—unless it was the other person's fault.

POINT: Conditional gift.

D. Reliance, Possession, Use, and Title

1. Finders

Finders

Previous Finders

Subsequent Finders

Land Owners

True Owners

Who has the right to found property?

Lost – Unintentional leaving somewhere (Fell out of your pocket) Right of Possession/Ownership until true owner shows up.

Misplaced – Intentionally left somewhere, but either don't remember or it isn't there anymore (Depending on jurisdiction: landowner or finder)

Abandoned – Intentionally left it with no intent to keep it. (Bonds baseball) Right of Possession/Ownership forever given up, and finder gets it.

DIFFERENCE IN IMPLICATIONS FOR LOST VS. MISLAID!!?!?! NO SIGNIFICANT IMPLICATIONS!

Embedded Property: Belongs to whoever owns the land

Treasure Trove: Intentionally concealed; Unknown who did it—goes to finder—exception to embedded rule. PP had to search for it?

If you find it on property where you have permission, what you find is yours—unless it is embedded. CAN'T OWN PROPERTY YOU FIND WHILE TRESPASSING!

Charrier

Amateur archaeologist, court rules that he didn't have permission to be there.

Knew when he was digging that he didn't have permission.

Excavates artifacts and tries to sell them to Harvard. Harvard tries to find origin/source, and Charrier doesn't want to tell him. Charrier sues to declare possession and quiet title.

Issue: What was character of property?

Rule: Abandoned goes to finder, but anything else no.

Since it was burial stuff, it wasn't abandoned. It was intentionally placed there to leave there.

With Occupancy, it would go to land owner, but it needs to be abandoned.

With Occupancy, property must be unowned.

With unowned land, occupancy would work.

ELEMENT OF UNJUST ENRICHMENT

1) ENRICHMENT

2) IMPOVERISHMENT

3) Enrichment and impoverishment must be unjust and connected.

Common law protects funerary items.

2. Relativity of Title

Sarah Lewis got title of property;

Lewis dies; Title is unclear because of debts.

Cobbs = Lewis's heir

Tapscott lives and farms on land.

Cobbs wants land

Issue: Between two non-owners, who has right to possession?

Rule: First peaceful possessor of land has relative rights over the other. But true owner wins.

Plaintiff has burden of proof that they possessed it peacefully first.

Since Lewis possessed the property first (and died there), she passes on her "Possession" to Cobbs. So, Cobbs was first peaceful possessor by inheriting through Lewis. Since no true owner, title doesn't matter.

IT'S ALL RELATIVE!!!

PP: peaceful is important because prevents people from seizing other people's land by force.

Cobbs might want to file suit to quiet title to establish ownership.

No one has right to ownership—only right to possession.

E. Adverse Possession—trespasser becomes owner of property

1. Border Disputes

Brown v. Gobble

Fence incorrectly demarcates property line, wrong border.

True owners want to reclaim land. Long time ago.

Everyone in neighborhood thought it belonged to AP.

Analysis:

Standard of Proof: Need clear and convincing evidence—more than preponderance of evidence because you are depriving true owner of land without compensation—taking property away—you want to be pretty sure!

Whoever owns the land, owns the fence.

No need to tack because previous owners fulfilled elements for statutory period and passed on the possessory interest to purchaser.

Elements(all elements for statutory period and title transfers to possessor)CONJUNCTIVE:

Actual Possession: Adverse possessor must show that they actually possess the land—use the land as the true owner would use it (Based on previous use?)

Open and Notorious: Sufficiently visible—for true owner to be on notice—would anyone walking by assume that it belonged to the AP.

Exclusive: Exclude others from land—particularly true owner—use property the way true owner would use it. Have to exclude true owner.

Continuous: For statutory period, with tacking if previous guy also met the other elements. Tackers must be linked by possessory interest.

Hostile: (hostile to the interest of true owner): Using the property & the TO cannot.

Majority looks only at state of mind of true owner—was it hostile to his interests.

Minority: require AP to know that it isn't his

Minority 2: require AP to NOT know that it isn't his.

With Permission is NOT hostile.

Silence is assumed not permissive—assumed hostile. Presume you are not granting permission.

Statutory period varies.

Ownership goes back to date that AP started running. Once AP is established, ownership goes to date of AP.

Color of Title: Possessor has defective deed/document saying you own the land even though you don't. Don't have actual title, but have "color of title." Sometimes, with color of title, the statutory period would be longer and changes actual possession element—gives you constructive possession over whole property—rather than AP which gives you possession of land that you ACTUALLY possess.

Color of Title Examples: Mistaken deed; fraudulently sold deed; A document that purports to give you title, but is defective.

Once you establish AP, you have to go to court to quiet title—even though you have it.

PP: Land is a scarce resource, and it should be used!

CANNOT AP AGAINST GOV'T.

2. Squatters

Nome 2000 v. Fagerstrom

Defendants used land off and on for long period of time that was owned by Nome and claim they owned it.

Analysis:

Court says that elements are met. Cabin nine years, but camped before that which counts as possession on that part, but clearing trails and picking up litter were not enough for the other parts of the land. Court says it doesn't matter that they're native Alaskans because issue is whether it was hostile to true owner.

In many jurisdictions you have to pay property taxes to show you had actual possession.

Wandering cattle does not constitute possession, but deliberate placement of cattle is. Use land as true owner would.

F. Other Informal Ways to Transfer Title to Real Property

Abandonment: Have to knowingly abandon your rights to land—so if you don't know, it's not yours.

Generally, S/F requires a writing for interests in land.

Improving Trespasser:

**ENCROACHMENT**

Common Law: True owner has absolute rights to his land.

New Rule/Majority: Relative Hardship:

Balance of Burden—when burden of removal is substantial, greater than presence for true owner, encroacher compensates true owner for land—ASSUMING IT'S A MISTAKE OR ACCIDENT—CANNOT BE INTENTIONAL AND MUST BE GOOD FAITH.

Difference w/AP, is no time requirement and you need to compensation. IT needs compensation; AP no compensation. (AP is often required to be intentional; IT has to be a mistake or accident/good faith(not obligated to get survey for good faith).

Sommerville v. Jacobs

Facts: Plaintiffs are innocent trespassers—surveyor effed up, and built a building on the land.

True owners want the building.

TOs argue annexation; Somerville argues unjust enrichment.

Court rules for IT (under Benefit/Unjust enrichment), BUT this is minority opinion.

Usually TO gets building.

Majority puts burden on builder to know where he is building; and some jurisdictions can require builder to tear down building at his expense.

**Boundary Settlements**

Oral Agreement: Courts may uphold oral agreements between neighbors that set the boundary between their property if (1) both parties are uncertain where the true boundary lay or a genuine dispute exists over the location of the boundary, (2) the parties can prove the existence of an agreement setting the boundary, and (3) the parties take (and/or relinquish) possession to the agreed line.

Acquiescence:

Even without oral agreement, the courts may nonetheless recognize long-standing acquiescence by both neighbors in a common boundary. (1) Adjoining owners(2) who occupy their respective tracts up to a clear and certain line, (3) which they mutually



recognize and accept as the dividing line between their properties (4) for a long period of time, cannot thereafter claim that the boundary recognized is not the true boundary. Estoppel:

A boundary may be established by estoppel when one owner erroneously represents to the other that the boundary between them is located along a certain line and the second, in reliance on the representations, builds improvements which encroach on the true boundary or takes other detrimental actions.

Adverse Possession of Personal Property:

When is it actually possessed:

- 1) Conversion (MINORITY) Clock starts at conversion—when the APer took it.
- 2) Discovery (O’Keefe) Clock starts when real/constructive knowledge of WHERE PROPERTY IS/when know or should know where property is. Burden is on TO to be actually looking for property. Benefits museums because TO has to look for it.
- 3) Demand Rule (Guggenheim): clock doesn’t start until TO demands it back. Burden is on possessor to find out who true owner is. Benefits true owner because museum can never quiet title to pieces of unknown origin.

**Jurisdictions are split on 2 and 3.**

Good Faith Purchaser is protected—he gets possession of the property in the end, BUT may have to compensate TO. (Or get value of it from merchant who sold it???) TALK TO HIM!!! UCC sez if you buy something from merchant as good faith purchaser, it is yours and doesn’t go back to TO, but TO can get value of it from merchant.

Displaying is one way to show open/notorious.

### III. The Law of Neighbors: Nuisances and Servitudes (Public Regulation of Private Agreements Restricting Land Use)

- A. (Private) Nuisance – Substantial and unreasonable interference with use and enjoyment of land belonging to another.

PAGE 278-79

Approaches:

- 1) Plaintiff has absolute security. Stop people from bothering him.
- 2) Prior Use—who was there first—coming to the nuisance.
- 3) Reasonableness

You can use your land in any way that does not cause unreasonable harm to the use and enjoyment of your neighbor’s land.

Balance of interest Test: Balance of right of owner to use land as they wish with the rights of the neighbor to enjoy and use his land not be interfered with.

Balance Approaches 1) and 4)

- a) Extent of harm to plaintiffs
- b) Social utility/value of defendant’s conduct
- c) Cumulative cost to both parties
- d) Alternatives to defendant to avoid nuisance.

Possible Remedies:

- a) No remedies: Plaintiff loses
- b) Damages: Plaintiff gets \$ for his nuisance. Plaintiff’s harm is socially useful, but he should be compensated for harm caused. Plaintiff shouldn’t be made to bear burden of harm or society’s benefit.
- c) Injunction: Plaintiff wins; harm is result of conduct that is not socially beneficially useful

- d) Purchase injunction: 50/50. Defendant must stop, but is compensated for his loss. (Usually in cases of prior use.) Allows plaintiff to buy the injunction if they can't/won't live with nuisance. Not forced to purchase it???NO, NOT COMPELLED TO PURCHASE, BUT YOU CAN.

Balance of Interest determines damages: Outline on 280.

- a. Plaintiff may obtain an injunction against defendant's conduct when: Defendant's conduct is unreasonable (causes more harm than good) and causes substantial harm to plaintiff.
- b. Plaintiff may obtain damages but no injunction if: Defendants conduct is reasonable (it causes more social good than harm and therefore should be allowed to go forward), BUT the harm to plaintiff is substantial so that it is unfair to burden plaintiff with the costs of defendant's socially useful conduct.
- c. Plaintiff is entitled to NO REMEDY if:
  - (1) The harm to plaintiff is not substantial; or
  - (2) Defendant's conduct causes more social good than harm, and it is not unfair to impose the costs of defendant's activity on plaintiff; or
  - (3) The imposition of damages would put defendant out of business and avoiding this result (because of the social value of defendant's conduct) is more important than preventing the harm to plaintiff
- d. Plaintiff is entitled to a purchased injunction if: Defendant's conduct caused more harm than good; but it is fair to impose the cost of shutting down defendant's activity on plaintiff (for example, when plaintiff comes to the nuisance.)

Person coming on land has duty to inspect for possible nuisances, but if you couldn't have known, no duty.

- 4) Defendant has absolute right to use his land however he wishes irrespective of how it affects others.

1. Radiation

Page County Appliance Center, Inc. v. Honeywell, Inc.

Central Travel buys NASA computer that spews radiation that interferes with TV signal that Appliance Center TVs need. Tried to fix, but it didn't work. Then fixed after lawsuit started.

Rule:

Elements:

Substantial: Offensive or significantly inconvenient to average or ordinary person who is not hypersensitive?

Not nuisance if most people wouldn't be offended by it. (Bell curve)

TVs are normal and common—not unusual device; therefore, Plaintiff is not hypersensitive.

Hypersensitivity is a factual question.

Unreasonable: ASK HIM!!! Also ask, how familiar we should be with 278-80.

Is activity reasonable weighed against the harm it imposes on plaintiff?

2. Light and Air

Fontainebleu

Built hotel from across FB property that blocks sun during winter. (Possibly partially for spite) Light was for aesthetic value—hotel patrons catching rays. (P argued that sun was needed to protect their business interests.

Issue: Can they build structure that block's neighbor's sun.

ER argues they have right to sun.

Rule: Nuisance – has to interfere with lawful right to the land, but there is no lawful right to the sun passing over another's property.

Exception: Spite fences. CANNOT USE PROPERTY SOLELY TO HARM OTHERS!

Not a nuisance (court not willing to believe spite) because not interfering with lawful right. Looks to right of builder—not person whose rights were disenfranchised.

#### Prah

Prah = hippie was there first with solar panels.

Maretti is gonna build a house—not on center of house.

Prah tells Maretti that house will block sun, and asks him to build somewhere else.

Sun is used as energy by Prah.

Difference between Prah and Fontainebleu demonstrates flexibility of nuisance law.

Changing view of what constitutes an unreasonable interference with a person's ability to use and enjoy property.

Rule: Have a right to sunlight at least in respect to solar panels.

“First in time; first in right”

#### B. Introduction to Servitudes and Licenses

“Who has the right or obligation”

Servitude in general: all about control and generally runs with the land.

Right to control or be controlled is attached to land itself—so whoever owns and has right or duty attached to land.

Ways land or use of land can be controlled:

- 1) Zoning—government's way of controlling how you use your property;
- 2) Nuisance: Individuals. If you make nuisance claim, can block activities from happening or be compensated.
- 3) Easements: Right of someone else to use other's property – Classic “Right-of-way” PERMANENT and controlled by S/F. Right must belong to land, so it will be permanent. Easements are interests in land. S/F!!! So, most easements are created by writings. Bind all subsequent parties(Except for easements created through implication.)
- 4) Covenant (Called servitude): Inability to use your land in a particular way  
Can come together: Easement to pass over land may come with covenant to maintain a paved road.  
Creating easements
- 5) Licenses – right to individual – passed licensee and REVOCABLE.  
Usually a “Negative Easement” = Covenant But few neg easements—court prefers covenants

#### C. Easements Created by Implication (No compensation for Implied Easements)

##### 1. Easements by Estoppel

##### Holbrook v. Taylor

Exception to S/F. Easement by implication

Holbrook is landowner.

Taylor/Moore builds house and makes road to it through Holbrook's property.

House is only accessible by road.

Spent \$ to build and maintain road. Taylor had license to use road.

Holbrook claims it's a license and can be revoked.

Holbrook blocks access to road. Taylor sues.

Rule: Reasonable/Detrimental Reliance. Since relied on road, and built house. House didn't matter as much as improving road. Holbrook is responsible for knowing what was going on on his land.

If you allow someone to reasonably rely—to their detriment—you can't revoke it.

More of an irrevocable license than an easement.

When Taylor—to his detriment—reasonably relied on statements/conduct that license will not be revoked, then he has right to expect that it will NOT be revoked.

Can't just sit back and watch your property be improved without saying something.

Estopped from making argument against the easement.

### **Difference from Improving Trespasser?**

Unjust enrichment argument.

Turns a license into an easement and the party does not have to compensate anything because it is implied easement.

## 2. Constructive Trusts

Creation of the court to prevent unjust enrichment.

Rase v. Castle Mountain Ranch, Inc. 1981 (Montana)

Facts: Lake in Montana; Owner, Tavenner, let several people build cabins on the lake on land that belonged to him.

No acknowledged agreement until later.

Agreement:

Pay \$6/year

Can't transfer cabins w/o permission

Either party can terminate agreement w/ thirty days.

So Tavenner had right to terminate—preserved his right, but never did.

Tavenner sells land to Ward; Ward tells Tavenner to kick off all of the licensees as part of the sale agreement.

*License* permission of landowner to use land

*Lease* transfers possession—transfers actual property interest

*Trust* is when grantor conveys property w/ conditions—benefit to 3<sup>rd</sup> Party.

A trust is a property arrangement in which the owner/settler transfers property to another person called the trustee with instructions to manage property for the benefit of the beneficiary.

*Constructive Trust* courts read in trust—court constructs trust

Tavenner's failure to enforce the license provision repeatedly allowed cabin owners to rely on the assumption that he would not revoke the licenses.

(He didn't enforce it, but kept it in order to kick out a-holes.)

Prevents adverse possession because writing showed permission.

Relied on lack of revocation—he wouldn't revoke in the future.

Difference between Holbrook and Rase: a writing!

Writing showed intent for the trust. Made Tavenner's intent clear!

Land has to be used for benefit of cabin owners (13 years).

Rase and Holbrook both prevent termination of a license, but in two different ways.

Easement by estoppel and constructive trusts.

To look at:

1. Apparent (or express) intention of owner—was intent for it to be permanent/was it permissive at all? (Constructive trust?)
2. Reliance on belief that it was permanent
3. Writing to guide intentions.

Constructive trusts run with the land until settled.

**Charitable Constructive Trusts are Permanent**—charities have special trust stuff\*\*See Horse Pond

Trusts can be permanent—depending on the trust itself

3. Prescriptive Easements

Just like adverse possession, but USE not POSSESSION.

And does not have to be exclusive of true owner.

And for AP get title, for Prescriptive easement, just an easement.

Acquiescence is allowing use w/o objection—does not mean it's permissive.

(Exclusivity might help, but not required)

Most jurisdictions don't care whether user knew it was his property.

*When use is public, assumption is permissive*

Open, notorious, hostile, continuous for statutory, (not exclusive)—most courts also require acquiescence.

Community Feed Store v. Northeastern Culvert Corp 1989/pp207

Feed lot and gravel company.

Area between to companies was used by Feed Store as a turnaround.

After a new survey, Culvert found out that lot was theirs and erected a barrier.

Feed wanted barrier taken down because of prescriptive easement.

Even though Feed couldn't prove use over all of it.

Use for particular purpose. Could only use it as turn-around.

Not public use because customers are not considered general public.

**Bad faith trespasser???**

4. Granite Properties Ltd. Partnership v. Manns, 1987 Page 333

Granite owns entire area. Sells off two parcels to Manns.

While Granite owned the whole area, they used the parcels to access shopping center and apartment complex.

Manns wants to stop Granite and tenants from using the driveways that are on his parcels.

Manns knew that Granite had been using these driveways for years, and should have been able to continue using it.

Would have been highly inconvenient to use the driveways and dangerous for apartment.

Price did not reflect easement—unclear?

Evidence of intent?

Could have made express easement and discounted.

**WHAT DOES INTENT MEAN???**

Prior Use Elements:

1. Common Grantor (Common ownership of entire parcel before—division after single owner)
2. Had to have used part of severed parcel *before* severance (dominant/servient)  
Prior to severing parcels, one parcel had to be used for the benefit of other parcels

3. Must be Necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor or transferor (Reasonable and convenient.)  
Argue against the grantor who had duty to put in easement???  
Could have made express easement.  
(If intent was to sell land with easement, then easement happens, if not they don't, right?)

--For prior use easement, either party can claim it!

#### 5. Easements by Necessity

Finn v. Williams 339, 1941

Facts:

Williams owned 140 acres, and sold off 40; Then sold off to Finn.

Public roads on North track.

Previously used two other owners' private roads to get to highway, but they closed them off.

Finn is more or less landlocked, and wants to use Williams's drive to access road.

Williams is not letting him use road—right-of-way

No prior use because he used other private roads.

Elements:

1. Common grantor
2. Absolute necessity; if there are other routes, easement lies dormant; Absolute Need to cross land; other impractical considerations considered
3. No subsequent divisions of land
4. Don't need prior use

Reasonable outlet

Rationale: Presume grantor would allow guy to access land because he landlocked it.

Public Policy against wasting land.

#### **SUBSEQUENT DIVISIONS????**

If public road touches public road touches land, then necessity goes away; but private roads don't matter.

Dormant Easements—if there are other routes, easement lies dormant until they routes go away.

#### **D. Easements Created by Express Agreement**

1. **Writing (S/F)**

2. **Intent**

3. **Notice**

**Was common in jurisdictions to prohibit easements made for 3<sup>rd</sup> parties; many jurisdictions ???**

**Dominant Estates???**

Types of Notice:

1. Actual—Actual knowledge of easement;
2. Inquiry Notice (If reasonable inspection of property: visible signs: paths/utility lines)
3. Constructive Notice—on record (Deed/title)

Writing S/F;

Easement can be created along with land transfer

Prohibit reserving for 3<sup>rd</sup> Party

If the servient estate prevents dominant estate from access/use of easement, court will enjoin them to stop or make them tear whatever down.

Dominant Estate: Benefits from Easement  
Servient Estate: Burdened by the easement

*Burden always runs with the land with an easement-*

Appurtenant vs. In Gross—Does the *benefit* run with the land; is the easement owned by an individual (in gross) or whoever owns the dominant estate (appurtenant).

Appurtenant: Default setting; where there is a dominant estate.

In Gross Easement: Beneficiary is not dominant estate, individual person/corporation

Green v. Lupo pp350;1982

Green is common grantor; sells land to Lupo, but wants to buy easement for ingress/egress from Lupo. Green subdivides and builds mobile home park; Lupo unhappy because mobile home parkers are using easement for motorcycle drag. Lupo blocks access to easement.

Issue: Does easement apply to just the Greens or their trailer tenants as well.

If *in gross* only Greens have right to the easement—they can sell it but not to multiple people.

**ASK: rights to sell easements in gross v. appurtenant v. exc/nonexcl.**

Always assume appurtenant because if you presumed in gross, people anywhere in the world might have easements.

Appurtenant easements are preferable because they limit the number of persons with easements over the land to the number of neighboring parcels; KEEP IT IN THE NEIGHBORHOOD!

If appurtenant, then anyone with present land interest has right to use easement.

Court presumed appurtenant so that trailer parkers could use it to, but remanded to court because easement was for ingress/egress—not for moto racing.

Presumption is important to burden of proof is on party claiming in gross.

## **E. Interpretation of Ambiguous Easements: Scope & Apportionment**

### 1. Appurtenant Easements

#### Cox v. Glenbrook Company

Facts: golf course case.

Quill bought easement from Glenbrook to use their roads to access his lot.

Cox and Detrick bought land from Quill

Cox and Detrick want to subdivide lots; they want to expand the access roads to accommodate building and residents.

Issue: Can Cox use easement to expand road.

Rationale: Look at intent of original agreement

Holding: Dominant estates had right to subdivide property, but cannot use easement in way that exceeds parameters. Has to stay a single lane. Cannot widen because it goes against intent of OW.

Easement that they own is just “a path” not specifically the path they have been using. They just own a “right-of-way.”

Two Tests:

1. Intent of original signers;  
What did price reflect.

2. Balance of burdens on present parties

**INTENT SHOWED THAT THERE WAS A SMALLER EASEMENT.**

Necessity: If you build at your own peril, you probably cannot claim necessity—

unreasonable reliance—cannot manufacture your own rights. “Build at your own peril.”

## 2. Easements In Gross! –Modifying and terminating easements

### Henley v. Continental Cablevision of St. Louis County, Inc.

Facts: Plaintiff's predecessor had utility easement for electric/communication lines

Issue: Does easement include right to run cable.

Original easement did not mention cable—didn't exist at the time.

Was easement exclusive or non-exclusive.

Holding: Look to intention of original grantor: Did he mean to include coax if it had existed.

Yes, because it was part of the cable lines.

**Exclusive:** Landowner has no right to use easement—only easement holder does; furthermore, landowner cannot give further easements of that nature, and easement holder can lease rights to someone else. Exclusive easement belongs solely to easement owner—landowner has sold off his rights to use land that way.

**Non-Exclusive:** Landowner has right to use easement as well. He can also sell more easements of that nature on his land. Landowner can lease his rights further..

The easement was exclusive so company was not interfering with landowner's right to lease or sell.

**If writing is silent—presumption is *non-exclusive*???**

### F. Modifying and Terminating Easements

#### **MODIFICATION: IN WRITING WITH COMPENSATION???**

Easements last forever unless they are terminated:

- (1) By agreement in writing (release of the easement/a new writing);
- (2) By their own terms (original agreement had expiration date/term);
- (3) By merger (if owner of dominant estate and servient estate is one person);
- (4) By abandonment (if conduct of easement owner shows *intent to abandon easement*);
- (5) By Adverse Possession or Prescription by servient estate owner or third party?  
(Reclaim easement—exclusive/nonexclusive).

#### **ASK HIM ABOUT EXCLUSIVE/NONEXCLUSIVE USE FOR PRESCRIPTION!**

- (6) Frustration of Purpose—easement goes away when there is no longer any benefit from it—all about impracticability—once easement becomes impossible to exercise, it goes away.
- (7) Eminent Domain: Gov't can take easement away from you.

\*\*\*Once terminated, easement cannot come back—does not lie dormant—but new easement could be created???

*Difference between terminated and dormant is good exam question*

#### **MINE HYPO???**

### G. Real Covenants and Equitable Servitudes

Real Covenants: King's Court--REPLEVIN

Equitable Servitude: Equity--INJUNCTION

Covenants

- (1) A writing
- (2) Intention that it run with the land—and not be personal to individuals
- (3) Touch & Concern Land—does it affect land directly in any particularly meaningful way—ACTUALLY LIMITS LAND
- (4) Notice by Burdened Estate—should have known at the time of conveyance  
\*\*\*Some jurisdictions require more expansive search for notice to check out neighboring deeds!!!  
For original sides, there is always notice!



\*\*\*Notice is not required for gifts and inheritance—notice is only required for those who pay money for the land.

(5) Privity (At least for real covenants)

PRIVITY – Share Interest in Land: Legal Fiction NANOSECOND (For horiz. Privity)

Privity has to happen conveyance.

\*\*For real covenants, must have privity, must have been written in at conveyance

Strawman create privity. NEED A CONVEYANCE!!!

Horizontal Privity: Between Original Parties

Vertical Privity: Before original parties successors—successive interests.

To look at intent: Look at document, all factors: nature of covenant—enhance value of land or diminish it? Price?

Davidson v. Katz

Davidson owned two grocery stores. Neither store was profitable, so they sold one grocery store with restrictive covenant that property couldn't be used as grocery store.

Katz bought it knowing (with notice) that they couldn't but they did.

City wants grocery store opened. Lot was leased to C-Town and they used it as grocery in violation of covenant.

Covenant?

Writing: Explicitly says runs with land.

Actual Notice: In Deed.

Issue: Does restriction touch and concern the land.

Holding: Court throws out traditional touch and concern with 8 factor test for Non-Compete Clauses:

1. Parties must have had a viable purpose that did not conflict with commercial laws and public policy (Has to be legal and cannot interfere with pubpol.)
2. Was price affected by restriction? (More permanent, less it's worth)
3. How clearly the restrictions stated? (Covenant clearly and expressly sets forth restrictions) (More clear, more reasonable)
4. Was it a writing; was subsequent grantee on notice of covenant
5. Reasonable time and place (Whether the covenant is reasonable concerning area, time or duration. Covenants that extend for perpetuity or beyond the terms of a lease may often be unreasonable)
6. Monopoly/Unreasonable restraint on trade
7. Whether covenant interferes with public interest
8. Is it reasonable now (May have been reasonable at time, but is it still reasonable?)

In place of touch and concern requirement, court balances all these factors—applies to all covenants???

Whitinsville v. Kotseas

CVS Case

Kotseas sold trust; couldn't use retained property for particular purposes—no discount store.

Sell Pharmacy;

Can plaza enforce restriction against CVS: is there privity between Kotseas and CVS?

Strict (Vertical) Privity requires that you share same interest in land—owner to owner

Relaxed (Vertical) Privity don't need same interests in land—lessor to lessee.

Plaza cannot enforce restriction against CVS.

For relaxed privity, can go after lessee; under strict can only go after owner pretty much

Restatement—direction policy is going: privity is going away and covenants and servitudes are being merged.

Can go after both real covenant and equitable servitude, but if you get both damages will be smaller.

### **Injunctions vs. Replevin??? etc.???**

\*\*\*If mutually agreeing to a covenant, there are two, and both are servient and dominant.

### **REDO PINKY AND BRAIN WITH HIM!!!**

Real covenants attach to estate in land;

Equitable servitudes attach to land itself

--which means if you adversely possess, you kill a real covenant, but since ES attaches to land, it will never go away!

With reciprocal covenants/servitudes, if one side is broken, the other may go away depending on jurisdiction!

### **When merchant isn't involved, UCC doesn't apply, and TO gets it, and buyer is SOL.**

#### 2. Interpretation of Ambiguous Covenant

Blevins v. Barry-Lawrence County Association for Retarded Citizens 406;1986

Facts: Group Home

Covenant restricting property to residential purposes and single or double family dwelling.

Issue:

- 1) What is residential? Not profitable/non-commercial Where people live and spend their lives?  
Rationale: Ambiguous covenants will be narrowly read. Look to intent, but will interpret the minimal restriction of land use.
- 2) Single-family dwelling was attached to building not to use.

Use can be both residential and commercial. (Apartments)

Court found that it was more homelike so it fell within the restrictive covenant—there was no violation.

Group home is a residential purpose and single-family applied building.

Purpose of the activity.

Hagemann: More like a for-profit boarding house—not a group home.

#### 2. Modifying or Terminating Covenants

El Di, Inc. v. Town of Bethany Beach

Facts:

Town was founded by church—was a quiet beach community.

Restrictive covenant on parcels “Old Town” area prohibiting sale of alcohol

Many years later El Di bought Holiday House—patrons frequently brown bag their own alcohol

El Di wants to sell alcohol.

- 1) Writing? Yes
- 2) Run with land? Yes
- 3) Reasonable restriction at time? Yes
- 4) Notice? Yes
- 5) Privity? Yes

Issue: Have circumstances changed to make the restriction no longer beneficial

Changed Circumstances Doctrine:

Change SO significantly that there is not longer any substantial benefit from restriction.

No longer any meaningful benefit. (We don't like restrictions)

Was a quiet Church affiliated beach community; Now it's a resort town summer resort!

Alcohol not sold on lots themselves, but sold down the street.

Not a meaningful restriction anymore—negates benefits of restriction.

(Intent is actually better served because they can now restrict alcohol to minors by not serving them.)

(Dissent says restrictive covenants need to be enforced—difference between sale and consumption)

**Relative Hardship—compare servient estate’s burden compared to master’s benefit**

May be able to invalidate burden based on relative hardship

Does harm outweigh benefit?

If hardship outweighs benefit, doctrine invalidates the restriction.

HARDSHIP HAS TO BE CONSIDERABLY GREATER!

*Diner hypos*

**Other Equitable Defenses:**

- 1) Acquiescence; abandonment; unclean hands
  - a) Unclean hands: dominant estate violates covenant themselves (as to that part of the covenant);
  - b) Acquiescence: Dominant estate has tolerated previous violation by the servient estates or delay in enforcement of covenant;
  - c) Abandonment: Dominant estate has tolerated violations of the covenants by owners of other restricted parcels in the neighborhood covered by the covenant
- 2) Estoppel: dominant estate orally represents owner of a servient estate that she will not enforce the covenant—if the owner of the servient estate changes his position in reliance on the oral statement
- 3) Laches: unexcused delay + detrimental reliance. (Covenant has been ignored or breached for a substantial period of time—but less than the time necessary to establish prescriptive rights—the court may find that unexcused delay in enforcing the covenant prompted investment in reliance on the failure to object to the violation and that enforcement of the covenant would be unconscionable—reliance on the owner not doing anything
- 4) Marketable Title Acts—some statutes require a title to be re-recorded every set number of years. If the covenant is not recorded in the re-recording, it is gone.
- 5) Other:
  - a) Language in instruments
  - b) Merger—burdened and benefitted estate become one; covenant will terminate
  - c) Contract saying covenant is terminated
  - d) Prescription: Open and notorious violation of the covenant without permission for the statutory period.

\*\*\*Difference between easements and covenants:

With covenants, changed circumstances and relative hardship doctrines.

Easements: Frustration of purpose.

Covenants and Zoning restrictions exist independently of each other—one gone does not cancel the other out.

But, if mutually exclusive, the public restriction wins out over the private restriction, usually.

But if they overlap and use is still available, they both still apply.

**H. Public Policy Limits on Enforcements of Covenants**

1. Racially Discriminatory Covenants

Shelley v. Kraemer Page 433; 1948

Restrictive covenant said that house couldn’t be inhabited by African Americans, but they could own it.

(Not really restrictive covenant—no privity—really an equitable servitude, but court didn't seem to care)

Issue: Restrictive covenant conflicts with anti-discrimination law and Constitution Amend XIV.

Holding: Individuals are allowed to have racially (or other discriminatory) restrictive covenants, but government cannot enforce them. So, an injunction or replevin could not be judicially enforced.

Fourteenth Amendment only applies where there is discrimination in a state action—not a private action.

Enforcement of restriction is using state power to discriminate.

\*\*\*Selling house is a public action\*\*\*

Can discriminate in private action—and state can enforce private action (Kicking people off your lawn for race)

Point: We are restricting land use, but we never had right to do it, so we're not taking away a right???

Fair Housing Act limits it.

**Talk to him about Shelley!!!**

Courts don't like restrictions—construed very narrowly.

What happens as a result

- 1) Ignore Covenant
- 2) Revert it back to grantor

**Depends on Original INTENT?!?!?!**

**Divestment:** Property is taken away and given to whoever is indicated in the servitude or covenant. (Previous owner or someone else). Divested owner would have to sue to get money back.

2. Restraints on Alienation (Presumptively bad—we don't like to restrict land—won't enforce unless reasonable)

Three Types of Restraint:

1. Disabling – directly forbids owner from transferring her interests in the property
2. Forfeiture – provides for a future interest that will vest if the owner attempts to transfer her interest in the property—you get compensated by the new party right?
3. Promissory – covenant by which grantee promises not to alienate his interest in the property.

Alienation = Transfers of property; lease and sell

Fee Simple Own it outright w/o conditions or covenants—no limitation on use of land (Truly fee simple is rare)

Horse Pond Fish & Game Club, Inc. v. Cormier 1990 pp451

Horse Pond deeded land to members and they deeded it back to create privity (strawman transaction to create privity)

Restrictive Covenants unless 100% membership agrees or the club is dissolved.

Thirty years later, Horse Pond wants to trade with another parcel, but one guy (whose land is right next to Horse Pond) says no.

Issue: Was restriction reasonable? (Was Horse Pond a charity)

Rule: Charitable Organization restriction / Reasonableness rule

(We want to encourage giving to charities—so we allow unreasonable restraints on land transferred to charities)

But, was unreasonable because required 100% of vote and went on forever!  
So, it was unreasonable, but remanded to find out if Horse Pond is a charity.  
Northwest Real Estate Co. v. Serio p 453; 1929 –consent to sell provisions  
Developer develops parcel and subdivides and includes covenant not to sell for five years without consent from developer.

Issue: Is this a valid/reasonable restraint on alienability.

Restraints on alienation are repugnant to a fee-simple title.

**Holding: Restriction is invalid because title says fee simple. Can't have restriction with fee simple????**

If developer still retained parcels, they may still have a legit interest in maintaining the community.

Rule: Can't sell someone a fee simple then restrict it.

Riste v. Easter Washington Bible Camp

Bible Camp has land off of silver lake.

Sold land to members of church—with two restrictions:

- 1) Occupants have to conform to tenants of Assemblies of God
- 2) Can't sell w/o Bible Camp's permission

Riste wants to sell property.

Church refuses to give permission.

RULE: All restraints on land are generally bad—except with charities, trusts or reasonableness.

Disabling restraints are not enforceable—except for charities.

Court says this restraint was unreasonable—goes on forever and no reasonable standards attached—arbitrary and capricious—can say NO for no reason.

**Moral: should have either leased it to churchy people or transferred with conditions—covenant.????**

Second Provision was not enforceable because it discriminates based on religion.

Trusts, charities and life estates CAN restrict alienability

Common Interest Communities: Consent of the association:

Condos: Give up some personal rights to have rights over your neighbors.

Condos are a creation of statute.

Limits courts ability to adjust what goes into these rules.

Aquarian Foundation, Inc. v. Shalom House, Inc. 1984 pp455

Condo declaration says you need written consent to sell or lease your condo—it also provides that association CAN BE arbitrary, capricious and unreasonable in denying consent.

Also included is a reverter clause whereby condo would go back to them, but they would have to pay fair market value to condo owner.

Member of board sold unit w/o permission to Aquarian.

Rationale: Condos can be have restrictions that other properties cannot because they are set up to maintain integrity of the community.

Problem is that it prevented them to sell it at all because of reverter clause. (They'd never know fair market value—only required that they pay if it was actually sold—prevented people from getting buyers—which preventing them from getting fair market buyers) ILLUSORY!!!! Only people who would make offer would be people who Shalom would approve of—made it ineffective and they'd get what they wanted anyway,

NO WAY TO KNOW FAIR MARKET VALUE

Accountability Clause Ask him what's up with Aquarian???

Wolinsky v. Kadison pp458; 1983

Debra Rae owns a unit, and wants to buy different unit.  
She sells her after buying a new one.

Contracts to buy new one; then contracts to sell old one  
Then told she can't buy the new one.

Condo claims that she's not financially viable; she claims it's because she's a single mother.  
In order to not sell though, need a 2/3 vote from the association. Never happened—so she wins.  
They didn't follow her own procedure—they failed their fiduciary duty to her because she was a resident. (If not a member, fiduciary argument goes away) Explain what would have happened?  
Outsider would have to argue discrimination—which is a hard argument because the burden of proof would be on her.

Rule: Condos cannot be discriminatory; but they can be arbitrary and capricious so long as they follow their own procedure and proper compensation is possible.

Woodside Village Condo Association v. Jahren

Condo enacted amendment after he bought his land saying they couldn't lease land out.  
Amendment says can't lease for more than 9/12 months—can't lease during first twelve months of ownership.

Holding: Amendments are allowed and can be applied retroactively per the original declaration. When the bought the property, they knew the rules would change and they would be bound by those changes.  
It's the statute's rule, not the court's rule.

Rule: can make their own rules, but they have to follow them.

ANY RULE WILL BE ENFORCED THAT (1) FOLLOWS PROCEDURE AND (2) **IS NOT ARBITRARY????**; AND (3) DOES NOT VIOLATE CONSTITUTIONAL RIGHTS.

There is wide latitude for homeowners' association and condo association to enforce rules that event he government cannot make.

Restrictions are generally frowned upon unless condo or homeowners' association.

Prior owners generally cannot control property after they have transferred it.  
Can only sell interests in land.  
Partial restraints might be enforceable if reasonable: need particular purpose; time limitation; prior owner has ongoing interest in property

IV. Common Ownership of Property

Present and future interests

Leasing: landlord interest to *possess* transfers to tenant, but landlord still has future interest—non-freehold estate

Non-freehold interests are strictly related to landlord-tenant relationship

Freehold Interests are everything else.

A to O for life, then to B = O has present interests

A	To O for Life	Then to B
	Present interest Life Estate	Future interest

**Have to account for possession for entire timeline**

If you divide timeline, you have to ensure that there is no gap or you have a time paradox—black hole.

Conflict of interests: Interests of present and future owners of property. How much control should we give the original grantor to control the land after his ownership.

Fee Simple is largest estate you can grant;

**INSERT CHART ON 514**

**Estate System: Freehold Interests**

Present Interest	Words Used to Create	FI in Grantor	FI in Third Person
Fee simple absolute (No limitation on present interests/present=future) All sticks in the bundle	“to a” “and her heirs” “in fee simple absolute”	-	-
Fee simple determinable FSD (Duration)	“so long as” “while” “during” “until” “unless”	Possibility of reverter Reverter is alienable <b>(Automatic)</b>	-
Fee simple subject to condition subsequent (Condition) FSSCS	“provided that” “on condition” “but if”	Right of Entry for condition broken (or power of termination) Right of entry is not alienable. <b>(Grantor has to assert property rights)</b>	-
Fee simple subject to executory limitation FSSEL????	“until (or unless)..., then to...” “but if..., then to...”	-	Executory Interest
Life Estate	“for life”	Reversion	Remainder

Life Estate: Present interest for his life, then either reverts to grantor or is remainder to third party.

Can transfer your *interest* in the land—present or future— but not the land itself

Life estate per autre vie—life estate or the life of another—if A sold his life estate to B, that’s what B has. Life estates future interests are remainder interests.

Present interest for life estate is interest in land until you die; future

Defeasible Fees can be taken away

Trusts: The grantor (settlor) conveys the property to a trustee to be managed for the benefit of the beneficiaries. *The trustee, as holder of legal title, has the power to sell the property (the trust assets) and reinvest the proceeds in other assets if so doing is in the best interests of the beneficiaries, unless the settlor intended the property not to be sold.* Trustee has fiduciary obligations to act in the best interests of the beneficiary and is subject to liability to the beneficiary for mismanaging the trust assets. (Trusts are equitable interests in property since they originated in the equity courts—**does that mean no damages?**)

convey land to a trustee in trust for X to use for X’s benefit until

Fee simple subject to conditional subsequent—present interest has it until fails to meet condition.

Grantor has right of entry. Has right but no obligation to reclaim property.

Fee simple subject to executor limitation—third party holds future interest

Executory interest divests a present estate while a reversion or remainder takes effect at the “natural” termination of the preceding estate, such as death of a life tenant holder.

*O to A, unless A drinks, then to B, remainder in C????Placeholder interest?*

**Ask about clock starting**

**With fee simple subject to executor limitation, language doesn’t matter????**

## Present Estates and Future Interests

Interests are merged; then conditions are extinguished.

Life estates can be combined with FSSCS or FSDs

Doctrine of Worthier Title:

To avoid inheritance tax—doesn't matter much anymore.

But was O to A for life then heirs avoided inheritance tax because it went to A then to O's heirs. Now, courts ignore this and acknowledge that it's still going to O's heirs and they have to pay inheritance tax.????????????

### Can't sell until O dies?

**Remainders** – Contingent and Vested

- 1) Contingent Remainder—know who it is that might get property, but don't know if they'll get it; or we don't know who the person is, but they will get the property
- 2) Vested—third party who WILL get the property upon death of life estate holder.

Shelley's Case:

### Merger???

Policy justification: Possible to contract with heirs during A's lifetime.

Fee Tail: Purpose to keep property in blood line—O to A and her heirs—only applied in four states—prevents marketability in land; some states interpret as fee simple absolute.

Wood v. Board of County Commissioners of Fremont County page 516; 1988

Woods conveyed land for purpose of WWII Memorial Hospital.

“for the purpose of constructing and maintaining thereon a County Hospital in memorial to the gallant men...”

Issue: Whether the deed is sufficient to create a fee simple determinable or fee simple subsequent

Holding: NO.

If fee simple determinable, Wood would immediately revert property upon not hospital;

If fee simple subsequent, Wood would get it upon claiming it

NO;

Rationale: the dedication only said “for” did not use any **precatory** language to bind to FSD or FSSCS

Reason: there is a general presumption against destroying presently held estates unless it was CLEAR in CONVEYANCE

Rule: Language has to be very clear that present estate would revert or be destroyed if a condition goes away.

Unless fraudulent, court has no problem with Fremont doing whatever it wants with land.

Destructibility of Contingent Remainders: If there is a time gap in possession, the property goes to statutory or common law heir. If A only gets interest once he becomes 21, but the life estate or grantor dies first, then the land goes to heir. Grantor is presumed remainder of last resort. Contingent remainder never gets it—but few states still follow this rule. Has to be reverted to grantor's heirs because grantor is dead.

Vested remainders subject to open:

“Class gift” Bequeathes to specific class—and it's unknown who is in the class.



Class is open up until death. Then whoever qualifies gets it—but if no one qualifies at that point, class is open someone qualifies—rule of convenience. Class closes when one person qualifies.

Landowners may own property in common in two ways:

- 1) Concurrently (husband and wife or roommates)
- 2) Over time (Present estate owner has rights to property until certain point, and then future interest holder will obtain the right to possess it.)

Problems:

Dead Hand

Hierarchy excluding others and promoting castes (perhaps based on race)

*Nonfreehold interests* associated with landlord-tenant relationship—different rules apply to leaseholds.

*Freehold Interests*: All other ownership interests.

*Trust* property arrangement in which a grantor (Settlor/trustor) conveys property to one person (trustee) for the benefit of a third party (beneficiary).

Trustee holds legal title.

### Fee Simple Interests

*Fee simple absolute* Property ownership without an associated future interest—you can do whatever you want with it. (Does this include being free of easements and covenants?)

“O to A”; “O to A and her heirs”; “O to A in fee simple”

*Defeasible Fees* Present interests that terminate at the happening of a specified event—other than the death of the current owner.

When the future interest belongs to the grantor:

Two kinds:

1. Automatic Transfer -  
Present Interest: “Fee simple determinable”  
Future Interest: “Possibility of Reverter”  
“O to A so long as used for residential purposes”  
“O to A while used for residential purposes”  
“O to A during residential use” ...

*Any language denoting that the ownership is limited to a time period during which certain conditions are met will generally be interpreted when the condition is violated or met.*

So, if A breaks the rules, the property automatically reverts to O.

2. Transfer upon grantor’s assertion of property –Original owner chooses to retain for herself the right to decide at the time a condition is violated whether to retake the property. So, if there’s a condition and it gets broken, the grantor can have the option of taking it back.  
“O to A on condition that the property be used for residential purposes; in the event it is not used, O shall have a right of entry.” . . .

Both are “fee simple subject to condition subsequent with a right of entry in O or her heirs.”

So if A breaks the rules, it is still his property until O exercises his right to it.

When the future interest belongs to a third party:

“O to A so long as used for residential purposes, then to B.”

So same as the other two, but some other shmuck gets the land after A breaks the rules.

### **Reversions and Remainders**

Present ownership for the life of A. Upon his death it will revert back to O or go to B. So, A could enjoy it during his lifetime, but he has no right to devise upon his death.

“O to A for life”; “O to A for life, then to B”

Reversion goes back to A; remainders go to B

### **Contingent and Vested Remainders**

Contingent remainders: if one or both conditions are met:

- 1) If the remainder will take effect only upon the happening of an event that is not certain to happen; or (B goes to law school)
- 2) If the remainder will go to a person who cannot be ascertained at the time of the initial conveyance (heirs not yet born; unnamed spouse).

Vested Remainders (Anything that isn't a contingent remainder):

1. Absolutely vested remainders

If it comes from the grantor's estate, it “springs.”

If it comes from a third party, it “shifts.”

**“Follow onto contingent remainders is another contingent remainder????”**

Point of Wood, if ambiguous court will opt

Size:

FSA

FSSCS

FSD

*Words of Purchase:* Defines Estate

*Words of Limitation:* Limited conditions attached to the estate

*Precatory:* Means nothing/not binding.

If a the contingent remainder and contingency do not occur by the end of the life estate, then the remainder is destroyed.

SO:

Merger doctrine:

O to A until B is 18, then to B.

If A died before B was 18, then B's interest was destroyed, but this is not really followed anymore—except by some states. In most states, the gap time is given back to O or heirs until remainder vests. B has a contingent remainder until he turns 18. If B dies before it vests, then O's heir has fee simple.

Contingent remainder:

There is a condition on the remainder vesting. Once the condition is met, it is a vested remainder.

Conveyances:

If it's in a will, the conveyance occurs at death; if it's in document, the conveyance happens when the document is executed.

### Cathedral of the Incarnation

Stewart heirs (of OW) conveyed land to Cathedral with express limitation not to sell or mortgage it.

Church went bankrupt and wanted to sell the land.

Issue: Right of Entry or Possibility of Reverter?

If Right of Entry, it is automatically the Stewart's; if Possibility of Reverter then it is subject to action by the Stewarts.

Point is, either would allow the Stewart's to get it back.

Heirs assigned rights to company.

Possibility of Reverter is alienable, but right of entry is not.

**Holding: Since it was ambiguous, it was possible reverter because of public policy of not to take land away from present interest???**

Right of entry gives present interest holder greater rights, so other party has to act to get the property—rather than it being automatic.

**Cy Prez**—allows reforming of a trust for conveyance—if circumstances have changed such that the original purpose is no longer possible—trying to preserve the original intent of O. Prefer to alter than cut clauses out.

#### Edwards v. Bradley

Margaret was left property with (ambiguous) limitation not to allow her to encumber the property, and if she tried to, it would go to Margaret's children.

Margaret wanted to sell property. All but one child agreed. Margaret cuts out that child from will.

Margaret dies.

Siblings want to sell.

Issue: does Bev have interest in property?

FSSEL or Life Estate?

If FSSEL, they would have stricken the limitation and given an FSA to Margaret's heirs *because* it would have been a direct restraint on alienation.

If FSSEL, once condition can no longer occur (Margaret's dead so she can't sell the thing) Estate becomes FSA. In which case, it would let Marg do whatever she wanted with it—since that wasn't Viva's intent, it is a life estate.

**Restraints on alienation for life estates are valid?????**

Differences in FSSEL and LE?

Once Marg died, FSSEL would have been an FSA and Bev would have been excluded, and that would have gone against Viva's intent. So, it's a life estate and Bev has an equal interest with sibs.

Rule: Courts try to come as close to the intent of the grantor when there is ambiguity in the estate conveyance.

#### Johnson v. Whiton\

Left estate to heirs on her father's side.

Rule:

**CANNOT CREATE A NEW ESTATE**

If you write something funny, courts will put it into a defined estate. Will work from right to left striking clauses until there is an established estate.

Five things you cannot do:

1. No new estates
2. No unalienability
3. No discrimination
4. No restraints on marriage to specific people

5. No perpetuities.

RAP

Old rule: Future interest are invalid unless they are certain to vest or fail to vest within the lifetime of someone who is alive ("in being") at the creation of the interest or no later than 21 years after her death: "no interest is good unless it must vest, if at all, no later than 21 years after the death of some life in being at the creation of the interest."

Pp533?

The RAP is violated if it is **possible**, however unlikely, to violate RAP.

Any interest reverted to grantor is not subject to RAP.

RAP does not apply to reverter to grantor

Future Interests:

~~Reverter~~

~~Right of Entry~~

~~Vested Remainder~~

+Contingent Remainder

+Executory Interest

+Vested Remainder Subject to Open (only partially vested, so subject to RAP)

Purpose: to prevent the control of the dead hand.

First Question:

Does RAP apply?

Second Question:

Has RAP been violated (could it be violated) ???

Is it possible that it could vest outside of the period?

Think of ways it could violate RAP—not how it couldn't.

Do we know for certain whether it will vest or won't vest within life and 21 years.

Perp period starts at time of conveyance.

If it could vest outside of period, VIOLATES the RAP.

Life in Being: Anyone alive at the time of conveyance; anyone named in conveyance, anyone who affects vesting.

Solution for violating rap is for court to strike out only up to point where it becomes a valid interest.

If violation of RAP court will strike out language (right to left) until valid conveyance.

Wait and See: Some jurisdictions will wait to see if interest vests before end of RAP period.

Three circumstances:

Unborn widow (O to A for life, remainder to A's widow for life, then to A's surviving children)

Fertile Octogenarian; (O to A for life, remainder to A's grandchildren)

The endless will contest; If lawsuit goes on forever???

If VRSO violates rap, even the vested parties are out because whole violating clause is stricken.

**What are valid VRSOs???**

**Vested remainders will go to heirs of dead vested party.**

**O to A for life, then to B's children.**

**If B had a child who died, the child's heirs would get it right?**

Cy Prez court will sometimes change 25 to 21 to be in RAP to fit w/l original intent of grantor.

Conflicting Goals:

Want to follow intentions of grantor, but also don't want to limit the present owner's interest in the land. Up to a point, they follow the intentions of the grantor. Usually the grantor's wishes are granted.

For the exam, if there's a letter, assume it's an actual name???

WASTE:

You have a duty to maintain the property because you would otherwise be taking away the rights of the future interest holder.

Maintain in roughly the same condition.

Doctrine of waste is relevant whenever there is a future interest—including mortgagers?

Moore v. Phillips

Old lady lets house go. The future interest holders knew it was going on, and didn't sue during present interest holder's lifetime. Daughter was estranged from mother. Didn't wanna take her money away while she was alive and needed it.

Issue:

Whether they had an obligation to stop the waste while they knew about it or whether it was OK to wait and seek damages until after her death.

Holding: Didn't have to sue mother while she was alive; public policy against creating familial disputes/suits.

Laches wouldn't work because of delay???? You should have acted beforehand.??? Laches require a detriment from delay in time, but Ada benefited by getting to keep money while she was alive.

Three Kinds of Waste:

Permissive;

Intentional;

Ameliorative (Improving waste) (Used to have to devalue land before conveyance)

Maintain in condition you received it—natural wear-and-tear is allowed, but keep it in ok condition.

New roof only has to be maintained.

Remedies for Waste:

1. Injunction against problem to compel present interest to fix it;
2. Damages for *decrease in value*
3. In very special cases, future interest can cut short present owner's interest.

Three ways to own in common:

Tenancy in Common:

1. All owners are able to use whole property—undivided interests;
2. Each interest in property is owned separately—they can devise it to their heirs and sell it

Joint Tenancy: When JT dies, interest transfers to in equal parts to remaining JTs.

1. Four Unities: (Necessary but not sufficient)  
Time—all cotenants got their interests at the same time

Title—all cotenants got their interests by the same conveyance  
Interest—all have to possess equal fractions of undivided interest  
Possession—all must have the right possess parcel

2. Intent: You need express intention of grantor to create a joint tenancy.

Severing a JT:

Selling an interest makes that fraction of the interest severed from JT, but the JT is not altogether destroyed.

The other interests are still in a JT.

Tenancy by the entirety (protects marital property from debts and misadventures of one spouse):

1. Marriage
2. Four Unities
3. Both parties must agree to anything done with the property, and it cannot be partitioned.
4. Protected from unilateral action.

If ambiguous, courts prefer Tenancy in Common—pubpol to not limit rights of divestment.

Dying is not severing. After death, interest no longer exists—just expands survivors' interest: right of survivorship.

Why would you want JT? For the right of survivorship—cleaner, no will needed.!!!

Remedy if cotenants do not agree:

Partition:

1. Physically divide lot if possible
2. Sell whole thing and divide proceeds proportionally for T in C; evenly for JT.

Ouster: Prevention of rightful owner from accessing the property. (Traditionally was physically, but now there is constructive ouster as well.)

Possessing co-owner has to pay for taxes and fees up to fair market rental of the property, then the non-possessing co-owner has to pay equal share of on fees and stuff beyond that

### Olivas

Hubby and wife are tenants in common. Hubby moved out.

Wife is in possession.

Issue: does wife owe husband rent on his half; was he constructively ousted or did he leave on his own?

General Rule: Possessing owner does not owe rent to non-possessing owner unless he was ousted.

Since hubby left, he wasn't ousted.

*Divorce by itself does not constitute ouster, but can result in ouster if the relationship is so strained that they cannot live together.*

Depends on whose fault it is, if possessing owner made it such that co-owner couldn't live there.

**Are the rules special for spouses when it comes to constructive ouster?**

Abuse Exception: if wife was abused and got restraining order (e.g.) no ouster.

If house is too small, is that actual ouster???

Non-marital co-owners constructive ouster does not work?

Courts say use partition!?? Much less likely to be claim of constructive ouster.

Majority rule:

Person claiming ouster is required to prove it just like anything else.

### Carr v. Deking

Son and father were tenants in common. Both leased to Deking for entire parcel.

Couldn't physically partition because whole was leased.

Son wanted cash instead of crops as payment—current lease was for crop share.  
Father—behind son’s back—made ten-year lease for crop share with Deking.  
Leased his interest in entire property.

Analysis: No right of ejectment because father can lease his interest—which is as to the whole property.

Holding: Proper remedy is partition, but son has to honor the five-year lease and his share of the payment until land. Could sell land but it’s still encumbered by the lease.

Lease will affect sale price of property and will get less money for his share?

If father had acted in bad faith, court could have rescinded lease.

But there is no rule of giving co-owner notice that you are encumbering the land!!!!

#### Tenhets v. Boswell

Joint tenancy problem.

One JT leased the land. Then died.

Issue: Does lease sever JT?

If lease doesn’t sever, does lease survive the death of the JT?

Rule: Leases do not sever JTs and death does not sever JTs. If person dies, then the remaining interest in the co-owners automatically expands, cannot divide duty interest.

Leases do not survive death because the interest of the JT is gone and absorbed by the other JT???

Problem: Joel can lease his share too? This is why we have problems in property law.

Right of survivorship.

A lease is not inherently inconsistent with a joint tenancy, so as to sever it.

If you want to keep your lease when leasing from JTs, make sure they all sign the lease.

If you inherit the land that is being lease, you inherit it encumbered by the lease, but cannot inherit a JT!

#### Kresha v. Kresha

Father—w/o consent, knowledge or authority of mother leased nonhomesteadland to son for six years.  
Wife divorces and sues, and gets the land.

Issue: does the wife getting the land in the divorce terminate the lease to the son.

Even though the four unities are no longer met—because father is still alive—the father’s interest was transferred to the mother in the divorce.

In the divorce, his interest was transferred to her—still tenancy in common. No merger of interests.

So, son still gets to lease land from mom.

Divorce will not change a tenancy in common, and leases survive it.

**Death does change a tenancy in common.???**

Conversion of joint tenancy encumbered by lease.

When you sever a JT, it becomes a tenancy in common.

Fraud might undo things.

#### Sawada v. Endo

Husband and wife have property

Husband injures the Endos.

To protect the property, they gave it to kids (would have been fraudulent if not Tenancy by the Entirety)

Holding: Because they owned land as tenants by the entirety, the debts of the husband was not subject to the satisfaction of the settlement.

Rule:

Tenancy by the entirety has right of survivorship, cannot be severed and must agree to anything being done by property. Only broken through death or divorce.

## Marital Property

It's all about "equitable distribution"

### **Separate Property (From English Common Law)**

1. Each spouse owns property separately
2. Do not need consent of spouse to sell or encumber property (Yours, you can do what you want)
3. Duty to support spouse
4. Even though it's separate, courts will take all marital property into consideration for settlement
5. Courts will look at many factors

Death:

Default: you write your own will and devise property how you want.

Intestate: according to particular state's intestacy law, all/most goes to spouse.

Statutory forced share: (usually 1/3) goes to spouse; spouse can choose their willed share or statutory forced share. (Get to see will before you choose)

Estate is liable for all debts at death. If debt exceeds estate, heir get nothing.

### **Community Property (From Spanish Common Law) Minority of States**

All property *earned/purchased* during marriage belongs to both parties. (Anything before belongs to individuals) (Gifts and inheritances do not apply)

If one spouse gives something to another, it is hers because he gave his interest to her. His 1/2 of the interest goes to her.

If you buy it with a down payment before marriage, then pay for mortgage with common funds, the other spouse earns an increasing share. If you want house, pay for mortgage with separate funds.

If owned commonly, either party can encumber it.

Separate property can be brought into community property.

Example: put both names on title.

Presumption is common property.

The rule of where you're domiciled at time of divorce is the law.

Death: Can devise separate property as they wish, and can devise their half of the community property as they wish. Surviving spouse already has her share.

*No statutory forced share in community property jurisdictions!!!*

In both jurisdictions, there is a duty to support spouse.

Common law marriage:

Couples who hold themselves out as married and live as married for statutory period of time are then deemed married where tend to be community property jurisdictions.

**Pre-Nups:**

**Now they're enforceable by law, but you can't trump community property rules—courts tend to follow them. You cannot by contract go against statute. ??????**

O'Brien v. O'Brien

Mexican Med School

Divorce action

Teachers at private school.

Then husband started med school in med school. Wife supported him.



Wife thinks she should get equitable share of med license.

Rule (in NY): graduate degrees are considered to be marital property and subject to equitable distribution. Only in New York.

Holding: She gets a share of the future worth of the medical license.

Problem: This forces him to be a surgeon based on the calculation of the future worth of the license. Or, she could lose out if he becomes a brain surgeon.

**Majority Rule: Still can get contribution toward medical license—not future value.**

#### Watts v. Watts

Couple cohabitated as couple for years. Had kids. She took his name. Never married. Dissolved.

If married, they would be subject to equitable distribution.

She got none of the property accumulated during the relationship—including business.

Her Arguments;

Unjust Enrichment: She conferred benefit on him; he knew about it; and it would be unjust for him to retain it without compensation.

Ct: Good theory, prove it.

Partition: Joint venture and they worked together to provide these assets, so she should some.

Ct: Good theory, prove it.

Implied-in-law Contract:

Where two parties by implied K (or express) agree to share assets—provided relationship was not based on sex the contract is fine.

Rule: Unmarried couples: if the relationship ends, each may be able to claim a share of some of the other's property based on the above arguments.

Can be based on contract if not meretricious.

Rule prevent possibility of partner not getting married to reduce financial interest. Can argue that it is and is not keeping with party's interest.

Hewitt:

Rule: If you want the relationship, then get married. Otherwise, no benefit.

Marvin v. Marvin (California): you get the benefits of marriage if you have a marriage-like relationship. Same-sex couples?

Common law marriage: Once you meet elements, you're married (AdvPoss), but might need court declaration if one party argues against it, but they're married.

Separate Property for Death: Bequeathed and devised separately

Community: Death can devise their half 50/50. No forced share because she already has her half.

#### VI. Landlord – Tenant Relations

Lease: Contract between tenant and landlord for right to possess land in exchange

If property is alienated and it is encumbered by a lease, then new owner have to respect the lease.

Tenant gets present interest—right to possess for the duration of the time the lease is in force

#### 4 Types of Tenancies

1. Term of Years: Has a defined start and end—tenancy automatically ends at end-date, but could end sooner if event/condition *stated* in agreement happens.. Could be any length of time. When it ends, automatically reverts to property owner. (Can also be a remainder.) If parties want to prematurely end lease term, they can, but most parties must agree. No limit to lease term length, but must have fixed start and end-points. Requires action by parties to renew a new lease term—because it automatically ends. DOES NOT END AT DEATH.
2. Periodic Tenancy: Lease that renews automatically at specified periods for specified lengths. Unless either landlord or tenant choose to end the relationship. (Month-to-Month lease) No specified time. Notice is required to terminate. DOES NOT END IN DEATH The period that maps onto the amount paid. How much you pay/????? MAPS ONTO??? CREATES NEW LEASE—DOESN'T CREATE NEW LEASE.
3. Tenancy at will (holdover tenants) Same as periodic, but can be ended w/o notice. (Not common). Traditionally ends with death. (No defense to eviction?) After lease period is over, tenant stays with consent of owner and pays. Most states regulate notice, so it would end up being periodic tenancy.
4. Tenancy at Sufferance: Tenant does not leave after lease is over. Can become periodic tenancy if landlord accepts rent payment. Has more rights to trespasser. Holdover has rights over trespasser. Trespasser: Landowner has right to “self-help” Other guy does not. Must go through proper procedure to get rid of tenant at sufferance.

Heirs are liable for rent, but also have right to possess.  
Default position can be contracted around though.

If a holdover tenant does not pay, or the payment is not accepted, then landowner can sue for rents not paid or eviction. No self-help. Changing the locks???

New Rule: Transferring both actual possession and right to possess???. Landlord has duty to ensure a holdover tenant is gone. If he's not gone, landlord has breached.  
Once lease term has begun and possession has transferred, landlord is not responsible for removing squatters.

S/F: If term or period is more than a year, then it must be in writing. Deal with land for year?  
Don't need writing for month-to-month lease???. “For a term of years longer than 6 mos?????”

For notice: time of period. If notice begins on first of the month, have to give notice on last day of last month. Amount of time must be equal to period of lease. Full period can mean either?????  
For a term of years, no longer than six months.  
Advance notice used to be invalid, now, okay. For 9000 year lease, assume periodic tenancy.

### Vasquez

Glassboro: middle man for PR labor. Vasquez comes to NJ to work. Doesn't work out and is fired. Admin board says it was just to fire him. Told to leave, and goes to fed funded farm workers org.

Issue: Can they throw him out? Was he a tenant? If not, he's a licensee, and that's revocable and landowner can use self-help. If tenant, has to go through eviction process.

Common law interpretation: household servants are not tenants. Vasquez did not have to live on premises.

By Statute: No doesn't fit narrow interpretation of statute, “some other capacity” modified examples in list and not terms of provision—so since not similar to janitor or super, he is not a tenant in NJ.

Rule: When a statute gives a specific list, and then follows it with a catchall, it should be narrowly interpreted as to modify the list.

Under property law, Vasquez is out of luck. He is not a tenant, court must find another way to help him out. Which was contract. Contract did not say anything about housing once terminated, nothing about eviction rights or tenancy rights. Silent. Court found contract unconscionable. Far from home, put in position to lose their housing at moment's notice without the help. Court requires that contract provision give the workers quasi-tenant-like rights or it is unconscionable.

If contract had said, if you're fired for cause you have to vacate: if unconscionable as implied term, it's unconscionable as an express term. If they gave 30 days, could have been valid.

If Vasquez had had his own room, he would have had stronger property argument—this was just like a barracks.

### Sommer v. Kridel(1997)

Two year lease signed. Never took possession. Broke lease. 3d party was willing to rent, but Landlord wouldn't allow them because he waiting to sue breachers for damages.

Letter said, we can't lease, keep deposit, and we'll call it even.

LL didn't respond.

Does LL get money?

Traditional Rule (Majority rule at the time) No obligation to do anything—including to mitigate damages.

Rationale: LL had performed his duty and the tenant had not.

New rule from this case/Majority: LL has a duty to mitigate damages. Example of K law coming into property.

*Duty is: If you do not try to mitigate, your damages are reduced by the amount you failed to mitigate.*

**Half of states require mitigation** We want utilization of party. Don't want vacant apartment when people could be living in house. You can breach lease, and LL has duty of mitigating as well.

Landlord gets compensation for efforts in trying to mitigate.

Burden is borne by tenant/defendant. Tenant is liable for any rent not collected.

If he tries to mitigate, and it doesn't work will tenant have to pay both mitigation costs and lease?

In jurisdictions that require mitigation, if K says LL won't mitigate, then the provision could be found unconscionable.

ARGUE BOTH RULES: Mitigation and not mitigation

Damages for LL: 1) any back rent not paid up until breach; AND any FULL-MARKET value of rent + Costs of mitigation

If LL gets new renter, then gets Fair Mkt Value less new rent payments for lease term.

If rent has gone up, no damages. Increase offsets cost.

Duty to mitigate: burden of proof is on LL to show good faith effort to mitigate damages. Property is unique, so there's only mitigation if he rents your apartment. Treat all apartments in inventory the same.

LL cannot just stick to the tenant. LL has to act in good faith. Cannot rent for \$150. Court will look at fair market value of unit. LL will only get difference between amount of rent paid and fair mkt value??????

Ways landlord can treat breach:

Landlord can sue immediately for damages. Damages = Difference in Fair Market Value of Lease and the Actual Lease itself??? Charge the amount of rent to lease amount. Fair market value is issue of fact—depends on housing market.

If tenant #2 breaches, can't go after tenant #1 for breach?

Accepting Surrender: ENDS LEASE. Tenant #1 is done.

Reletting Tenant's Account: Keeps tenant #1 on hook for tenant #2's breaches. Still your lease. LL finds someone else to fulfill existing lease. Tenant #2 is only paying account of tenant #1. If tenant #2 destroys apartment, tenant #1 is liable. (But for reasons of equity courts, courts wouldn't find him liable. Tenant #2 is still liable for his own lease too.)

**Talk to him about this.**

SURRENDER IS DEFAULT

Or landlord can do nothing. In half states, since mitigation is not required, LL can wait for lease to end and then sue. LL can do this in all jurisdictions, but in mitigation jurisdictions, damages are reduced. Damages are the same for all three. Difference is who landlord can go after.

Tenant has full right to transfer.

At common law, lease terms often prevent this.

Ways to transfer:

- 1) Assignment: tenant has assigned ALL rights to a 3<sup>rd</sup> party. Retains no current or future interests. If there is a breach, landlord can sue either tenant one or tenant two. T1 on contract; and T2 under privity.
- 2) Sublease: Tenant transfers anything less than a full assignment. Not all property rights. Has right to come back or be there at same time. Under sublease, if there's a breach, can only sue T1. T2 doesn't share interest: no privity. T2 pays T1; T1 pays LL. Landlord can sue T1, and T1 can either join or sue T2.

If lease is silent, then ????

For sublease, What can landlord do given that they cannot sue T2 directly and T1 is not paying either. Sue for eviction, and that's against whoever is in possession!!!

Landlord still has to mitigate.

If lease is silent, tenant has right to sublease and alienate his interest as he wishes.

If the lease has consent provisions to sublet, they are enforceable.

Landlord's future interests is valuable.

Issue: Can consent be withheld unreasonably????

Commercial vs. Residential: If the lease is residential, then no requirement for landlord to be reasonable in withholding consent to alienate; if commercial, then trend is toward requiring landlord to be reasonable UNLESS lease states so, he may unreasonably excepting prohibited discrimination.

Kendall (Commercial)

Facts: Property used as an airplane hangar owned by San Jose. Leased to Perlitches. Perlitches hold long-term lease. Perlitches lease to Bixler for 25 years. Perlitches then assign to defendant ERNST.

Bixler wants to sell his interest to Kendall—consent is required in lease, and Bixler didn't give consent.

Perlitches refuse to consent after giving it to Kendall.

Overarching Rule: Can have multiple sublessors?

Majority Rule: If the term says you *must* get consent, you can withhold consent for any reason, and it can be unreasonable unless it is improper discrimination. (Rule used in Kendall)

Minority Rule: Reasonableness aspect: Cannot say no for arbitrary reasons. Must be legit commercial reason. Change of use; need for alteration of property; concern about the financial welfare of subletter: legitimate thing.

Party with superior lease, if they require consent, then they have to give consent for all subleases. So if original lease required consent, then all subsequent leases require consent too.

Look at language of lease! What we are looking at in Kendall is when lease is silent!

If lease in case expressly gives right to be arbitrary in their denial of consent, then they have right regardless of jurisdiction—unless improper discrimination!

Problem in Kendall is vague lease.

See notes on discrimination: burden-shifting. Pre-text.

Residential Lease Context:

Slavin v. Rent Control Board of Brookline (1990)

Facts: LL applied for eviction of tenant who violated obligation of tenancy because he allowed someone to live in apt without consent and consent was required in lease. Landlord categorically refused someone to come in.

Residential context: Majority Rule: Can be arbitrary, but trend is going to reasonableness!

Two major concerns in commercial stuff:

1. Commercial landlords may exercise their power to withhold consent for unfair financial gain
2. Limit restraints on alienation in light of the fact that “the necessity of reasonable alienation of commercial building space has become paramount in our ever-increasing urban society.”

Why would the court protect businesses but not individuals?

Majority Rule: Bad for residential renters, but bad for commercial landlords. Policy question here is why would court protect businesses and not individuals when businesses should be more sophisticated.

Given two commercial concerns that don't arise in the residential context, commercial something.

Kendall changes law. Slavin says legislature should change law.

### **Tenants Rights to Habitable Premises**

Minjack Co. v. Randolph (1988)

Water and sand and construction; dust; knocked out stairs and didn't tell them.

Tenant stopped paying % of rent. Tenant uses all of this as affirmative defense for not paying rent.

Argued Constructive Eviction.

Rule:

- 1) Landlord wrongfully acts
- 2) Substantially & materially
- 3) Deprives tenant of use & enjoyment of premises.

Traditional rule had “vacate” requirement.

Rationale:

Court reads in implied term: “Quiet Enjoyment of Habitability”

Even though not in lease.

Case of partial, constructive eviction. May be able to use the portion, just not in a substantial way.

No more traditional rule.

Potential remedies for constructive eviction: cost to find another place/move; rent abatement (very common in partial eviction); consequential damages; punitive damages; damages for injury; damage to property.

Attorney's fees!

General Rule for Constructive Eviction: get attorney's fees!

**CANNOT CLAIM CONSTRUCTIVE EVICTION IF YOU KNOW ABOUT IT WHEN YOU SIGN LEASE—UNCLEAN HANDS!**

Blackett v. Olanoff (1976)

Landlord owns two properties: apartment and nightclub. Apartment tenants cannot sleep and claim constructive eviction. LL says club is liable, not him. LL did not have INTENT to evict tenant.

Issue: Constructive Eviction as affirmative defense for suit for back rent against tenants by LL. LL did talk to club about noise at one point, and it did help for a while. (Which shows LL had power to enforce lease requirement of not disturbing community.)

If yes, they can withhold rent.

Holding: Yes. Constructive eviction.

Rationale:

Court says intent is not important. Should have known it was a probable consequence resulting from his conduct. **NATURAL RESULT OF LL'S CONDUCT!!!**

LL's failure of enforcing noise requirement of nightclub's lease is constructive eviction.

Rule: LL's omissions can create constructive eviction.

(Also could have sued for nuisance—if they came to the nuisance, then constructive eviction is harder to prove.)

**Under omission rule, LL MUST HAVE BEEN IN CONTROL OF CONDUCT THAT WAS CAUSING CONSTRUCTIVE EVICTION!**

Breach of Covenant of Quiet Enjoyment = Constructive Eviction

Sublease is a subestate???

No duty to make repairs in old rule or ensure habitability. (Feudalism.)

**Warranty of Habitability:** Didn't used to be; but now there is implied warranty of habitability in every lease.

Javins (1970)

Tenants stopped paying rent.

LL sued.

Tenants claim affirmative defense of 1500 violations of housing code.

Old rule was rule at time of case and court changed it.

**RULE: LL DOES HAVE IMPLIED DUTY/OBLIGATION TO MAKE SURE STUFF IS HABITABLE. IF LL BREACHES, TENANT DOES NOT HAVE TO PAY RENT.**

**DOES NOT REQUIRE TENANT'S TO LEAVE PROPERTY (UNLIKE CONST EVICTION)??????????**

In most jurisdictions, this is not a waivable provision in a lease!!

Rationale:

- 1) Leases adhesion Ks usually
- 2) Court is saying the justification from the old common law rules are no longer valid: housing is more complex: urbanization
- 3) Majority of jurisdictions have housing codes
- 4) Urban leases are now read as contracts—moving away from property theory

Because bargaining power differential is too great! Has to be implied or it would never be in lease.

What does habitability mean? “Livable Condition”

Proxy? Does it satisfy the housing code? This case changed everything.

Habitability might mean different things in different localities: lack of A/C in Michigan might not make a home uninhabitable, but it would in Florida. (Heat) Also, time of year might matter. Winter in Michigan would be uninhabitable without heat. Time of year/how long it takes to make repair. Reasonable period might be longer.

Totality of the circumstances to determine habitability.

Covenants of Quiet Enjoyment vs. Warranties of Habitability:

Overlap often: Apt. is flooded. Can't live there, and shouldn't be expected to live there.

One but not the other: excessive noise from lounge: (nuisance) can still live there.

Same fact pattern will often involve both.

Policy: Landlord might prefer making repairs. Habitability will increase cost of rent—might make housing unaffordable. Why don't we allow them to waive? Waiver not allowed because would benefit only the minority of people. Would disadvantage renters.

Have to maintain habitability for entire lease term.

Hillview Associate v. Bloomquist (1989)

Tenants claim that attempted eviction is retaliatory because they formed an association to deal with health safety quality of living concerns. Two meetings: went well with management; then in second meeting a renter physically assaulted manager.

Retaliatory eviction is defense to landlord action to evict.

Rule: If the eviction occurred within six months of a good faith complaint

FACTORS:

- (a) Landlord's decision was a reasonable exercise of business judgment;
- (b) The landlord in good faith desires to dispose of the entire leased property free of all tenants;
- (c) The landlord in good faith desires to make a different use of the leased property;
- (d) The landlord lacks the financial ability to repair the leased property and therefore, in good faith, wishes to have it free of any tenant;
- (e) The landlord was unaware of the tenant's activities which were protected by statute;
- (f) The landlord did not act at the first opportunity after he learned of the tenant's conduct;
- (g) The landlord's act was not discriminatory

Steps:

- (1) Tenant must show that there is a presumption of retaliation by use of factors and/or applicable statute (6 mos in Hillview)
- (2) Once tenant's burden is met, LL must show that eviction was reasonable and legitimate and not retaliatory—if there is more than one reason, the LL must show that the legitimate reason was the principal reason for eviction.
- (3) Tenant then must show that the reason given by the landlord is a mere pretext

**(Normally landlord does not have to show a reason to evict—unless they have to defend a claim of retaliation)**

Holding:

For assaulter, eviction was proper; for person who was just at meeting, eviction was retaliatory

Rationale: Assault is a legitimate and reasonable reason to evict.

If factors met, and shown under statute, then presumption of retaliation.

Based on statute, and it has showed that retaliatory conviction????

Imperial Colliery Co. v. Fout (1988)

Imperial wants to end lease and gives valid notice.

Imperial agrees to extend lease because of Fout's problems.

Fout gives \$1 to extend. (If it had been cashed, it would have been acceptance of another term)

Imperial sued for possession; Fout brought defense of retaliatory eviction because he was in a labor strike against a company that was also owned by Imperial.

Holding: Not retaliation.

Rule: whatever caused the retaliation, it has to be related to the tenancy directly. A landlord can decline to renew lease or can evict because of activity that a tenant engages in that is outside the tenancy—unless impermissible discrimination.

Rationale: if the housing had been linked to his employment, he would have had a stronger retaliation claim, so the tenancy would have been linked to the claimed retaliation.

If tenant had a current right to possess, then landlord would have to show more cause to evict, but here, they could evict.?????

Hawai'i Case: Tenants voted against rezoning and evicted. Court said retaliation because had direct effect on their ability to live there.

*When you fail to pay rent, you are illegally possessing property just as a holdover tenant is.*

Robinson v. Diamond Housing Corp. 1972

Dilapidated house. LL tried to evict for not paying rent. Tenant defends with warranty of habitability. LL says he's evicting because he cannot afford he repairs:

Holding:

Cannot evict. Retaliatory.

Rule: LL cannot decide to evict as a result of complaints of warrant of habitability. Because of good business reasons. TALK TO HIM!!!

We don't want LLs to take properties off the market because they cannot pay for repairs.

You don't want people to be kicked out of their home because they complain about habitability.

Remedies for breach of warranty of habitability:

- (1) Injunction/Specific Performance
- (2) Compensatory Damages
- (3) Abatements (Lower rent)
- (4) Administrative Remedies (Inspector may come and order repairs)
- (5) Rescission of the Lease (716)
- (6) Rent withholding (If tenant withholds rent, they should put the money in escrow because it will show the court good faith and that they intended and were able to pay—not required, but shows good faith)
- (7) Repair and deduct (If LL fails to make repairs within reasonable time, then you can repair and deduct)
- (8) Criminal Penalties

Reasonableness in making repairs is determined by LL's ability to make repairs (Katrina, couldn't make repairs in time.) (A week-A year.)



In every residential lease, there is an implied warranty of habitability.

Ways to retaliate:

- (1) Evict
- (2) No Renew

Majority Rule: If proved retaliatory, tenant has six months

Most jurisdictions presume with notice of eviction or nonrenewal was given within six months of a good faith complaint or another action having to do with tenancy. (Joining tenant organization)

Remedies for retaliatory eviction:

- (1) Damages (Transaction cost of finding new place to live; Difference in rent)
- (2) Compensatory damages
- (3) Punitives
- (4) Administrative Remedies
- (5) Specific Performance (Injunctive relief)

After six months, LL can try to evict the tenant. Presumption of retaliatory eviction is no longer there. Tenant cannot rely on the presumption and six month presumption CANNOT be waived.

## VII Real Estate Transactions

### A. Structure of the Transactions

Residential: Very little lawyer involvement. Forms: exemption from practice of law; licensed realtors.

Commercial: Lawyers needed. More complicated.

Brokers: Multi-Listing Service

Brokers list properties for sale to communicate and arrange transactions. Commission split.

Types of Broker Arrangements:

1. Exclusive Right to Sell. Owner transfers to Broker exclusive right to sell; if sold by anyone, agent gets commission
2. Exclusive Agency: Seller will only use that agent. If sold by any other broker, seller's agent gets commission. If owner sells it, then they do not have to pay commission. Also, agent might be willing to wait for better price since he is the only agent who can get commission.
3. Open/Non-Exclusive: Commission only if *he* sells it. Agent has strongest incentive to sell here.

Net Listing: Many jurisdictions have banned net listings/option listings, because incentivizes bad behavior by realtors. Gets price difference between seller price and actual price.

Option Listing: Broker buys the house and sells it.

Old Rule: If the agent puts in the work, agent gets paid whether or not the deal goes through

New Rule: Agent doesn't get paid until deal concludes, unless seller wrongfully stops the deal

Seller hires agent. Agent's job is to find a buyer. Buyers often have agents as well. Who pays the buyer's agent? The seller's agent. Who pays the seller's agent? Seller. Usually commission is split.

Contract between seller and seller's agent. Contract between buyer and buyer's agent. Contract between seller's agent and buyer's agent. No contract between seller and buyer's agent.

Process:

Putting the house on MLS is invitation for an offer.

Buyer makes an offer for purchase. Buyer puts up "earnest money" **WHEN???**

Seller may accept, reject, or counter.

Sales agreement is acceptance—Signing a K to sell the house. Seller agrees to sell; buyer agrees to buy.

Binding contract to transfer property after a certain period of time with conditions.

Sales agreement: Price agreement; property is identified; rights and obligations of parties; date for closing;

After Sales Agreement, Executory Period:

Executory Period Obligations/Rights:

Buyer: Good faith effort to obtain financing and Right to Inspections (optional; rarely a burden) Right to rescind K if inspection reveals something buyer finds wrong

Seller: (1) Vacate house; maintain property; Allow inspection; Make sure there are no holdovers; Seller three days after closing to leave; might need a surveyor's report

Find clear title; report.

TITLE????????

During Executory Period:

Financing; Inspection; research title

CLOSING:

Buyer: hand over money

Seller: Convey title; sign deed over;

Equitable Title: belongs to person who buys property; transfers when buyer and seller complete a sales contract as long as it is a binding K; sales K usually have contingencies: relieve buyer if they cannot get financing; inspection reveals bad stuff

Legal Title: Transfers at closing when seller actually transfers by deed?

If K falls through, depends on sales K, but earnest money usually goes back to buyer.

Majority Rule: Agent isn't paid if deal doesn't go through unless there is a fault by a party.

Default: both parties pay their own closing cost

Who has legal title after closing? Belongs to whoever the seller signs the deed over to. Could be bank may get title in trust. Beneficiary being the buyer. Bank has lien over the property.

S/F: Applies to sale of land because sales of land are deemed to be indefinite. Sales of property always must satisfy S/F.

Exceptions to S/F writing requirement

Burns v. McCormick (1922)

Old man. No one to take of him.

Finds couple. Couple sells their draying business (flat-bed truck) in reliance and moves to work with him. Says that they'll get his home and furnishings when he dies.

Will.

Issue: was there an actual contract? No.

S/F requires a writing.

Writing must identify the parties, the property and price, and signed by party against whom enforcement is sought.

Why? Prevent fraud.

Possible Exceptions: Part performance: Must be attributable to this contract (Parties performing under alleged terms in alleged agreement, more likely that there was an actual agreement). Was there part

performance here? No. Could have been doing what they did for room and board. Performance was not unequivocally referable to the agreement.

Part Perf Rule: Performance must be unequivocally referable to the agreement.

How do we know it was exchanged for property? Acts must be consistent with ownership. Court must believe that there was no other reason that they would have done what they did. Has to be attributable to the agreement. (Improvement of property e.g./ paying taxes)

Must be attributable to K : Improvement of property/ Paying taxes—question of fact.

Holding: They did not get property.

### Hickey v. Green 1982

Facts: Green own lot; Hickey wanted it.

Oral agreement to sell for \$15K

Green backs out; agrees to sell to other buyer for \$16K

Hickey offers to buy for \$16K; Green refuses.

Hickeys, in reliance, had moved to sell their house.

Green acknowledge that there was an oral agreement.

Issue: no enforceable writing; not signed against party against whom enforcement is sought because it wasn't endorsed.

Rule:

Factors for Part Performance:

Payment of all or substantial part of the purchase price

Taking possession of the property

Making substantial improvements on the land

Elements of Promissory Estoppel:

1. Existence of clear and definite promise which promissory should expect to induce action by promisee.
2. Evidence that promisee acted to his detriment in reasonable reliance on promise (Both parties are aware of the reliance)
3. Finding that justice can only be avoided if court enforces the promise
  1. Detrimental reliance
  2. Detrimental change in position
  3. Justice?

Holding: S/F exception was met because Green admitted to oral agreement, so there is no risk of fraud.

Rule: Courts can relax S/F when there is evidence of an agreement PE see above.

### Gardner v. Gardner (1990)

Harry has 2/3 life estate interest in real estate from his father. Mother has 1/3 fee simple.

Brother had future interest because Harry had no kids. Couldn't secure a loan with that property as collateral because he only had a present interest in the land—needed fee simple.

If siblings transferred their interest, he would get fee simple through merger.

Now that he has fee simple, had clear title, agreement with siblings to sign over interest if he doesn't get loan, he would reconvey their interest. Siblings sign over interest, but bank doesn't give loan, Harry refuses to sign interest back over to siblings.

Siblings sue, claiming they had oral agreement.

Parole Evidence of oral agreement; Harry admits to agreement

Issue: S/F No writing.

Court allows Parole Evidence.

Evidence that is extrinsic to the agreement.

If there's no writing, all you have is extrinsic evidence. Court had to say extrinsic evidence is admissible in this case.

Holding: Yes. There is an agreement. There was part performance. Siblings had fully performed their part of the agreement. **WOULD NOT HAVE DONE THIS WITHOUT AN AGREEMENT**

Summary:

**Burns** insufficient conduct for part performance. If they were family, it might have helped. If it had been a successful business, it might have helped (Reliance?)????

**Gardner:**

Part performance

Sufficient conduct for part performance: brothers did 100% of their side and got nothing in exchange.

Could have been gift or agreement. Court thought agreement was more likely. (Unequivocally referable)

**Hickey:** Green owns lot

Hickey wanted to buy lot

Oral agreement with \$500 deposit

Intent of S/F was fulfilled because Green admitted to the agreement.

PE theory

#### B. Breach of Contract (Fraud or Misrep)

**Johnson v. Davis** – (Fraud without affirmative statement)

Johnson selling a house.

Davis buying a house.

Davis pays deposit.

Davis notices some buckling of the walls, and was told it was a minor issue that had been fixed.

Johnson's broker says the leak in the window frame could be fixed for under \$1000 to make it water tight.

After closing, Davis moved in and there was a storm.

Estimate to fix it was \$1500.

Issue: Fraud/Misrepresentation

Rule: (New from this case):

A seller has a duty to disclose any material defect to buyer if that defect would not be found by buyer upon reasonable inspection. (Reasonable buyer would hire inspector.) (they know that defect will be readily apparent to the buyer). Duty to disclose latent defects not easily found, but no duty to disclose easily found defects)

What constitutes material fact?

If it would affect the price the buyer is willing to pay, it's a material fact on the property. Would a reasonable person expect price to be reduced or would they back out?

If you can find evidence that buyer would have purchased anyway, you're good.

Latent defects likely not to be discovered upon reasonable inspection.

Reasonable inspection

Holding:

There was misrepresentation.

Traditional Rule:

Caveat Emptor

Rule has changed from Caveat Emptor to

Fraud Elements:

- (1) Affirmative False Statement Concerning a Material Fact
- (2) Person making statement must know that it is false
- (3) Party making knowingly false statement must have intention to induce other party to act on reliance of the false statement. (Induce dude to buy house by lying.)

Types: Misrepresentation; suppression; nondisclosure  
(Duty to disclose)

### **CANNOT CONTRACT OUT OF DISCLOSURE REQUIREMENT**

Concealment:

If you can show that there was concealment of a material fact, it's not failure disclose, it's fraud in the concealment—affirmative conduct.

What do you have to disclose?

Many jurisdictions list what must be disclosed. Many require certain inspections.

Specific examples:

- Murder (if it decreases value)
- Crime rates are public record, so no duty (things you can find out on your own) Public Schools
- Sex offender (if it's public record—if not e.g. sealed minor)
- Loud parties Neighbors? Not a defect, so no duty to disclose.
- Stambovsky case: Ghosts with reputation for ghosts—if will negatively affect prop value, duty to disclose. Person was new to the area and didn't know reputation. Reputation is the matter and if it decreases value of property!

### C. Deeds and Title Protection

**Marketable Title** = Title free from all reasonable doubt as to who owns the property.

But some agreements require a title of record that is recorded at county records office.

Adverse possession: if you have to get record of title, you own it but you will have to get recorded.

Seller's breach of warranty of habitability: For new homes, no warranty of habitability.

Remedies for breach by buyer or seller:

Specific Performance: Buyer can demand title; Seller can demand payment.

Rescission: I want out of the deal

Damages:

- Time and Money spent to get financing and stuff; inspection
- If property has gone up in value: lost profit
- Vendee's lien? Get back deposit or rest of purchase price. Encumbrance??? Buyer can put lien on property, so that if sold, they get money back that they deposited.
- Vendor's Lien: Seller puts lien on property, so that if it's sold, they get money on purchase price from buyer?

**Deed** What is a deed? A deed is what transfers lawful title from grantor to grantee.

Elements:

- (1) Writing (S/F)
- (2) Identify the Parties
- (3) Must include purchase price (unless gift/inheritance)
- (4) Must identify property
  - a. Plat—Map of subdivision

- b. Metes and Bounds (From Landmarks: Circumnavigates the property until it goes back)(Not Common)
  - c. Survey
- (5) Intention of the grantor to convey the property—needs affirmative statement with intent to convey
  - (6) Grantor’s Signature
  - (7) Must be actual or symbolic delivery (Way of ensuring actual intent to transfer the property)
  - (8) (Acceptance is presumed) (Mom delivers to daughter’s deposit box and acceptance is constructive) No effective: no transfer. Depends whether she said “it’s yours when I die” or “it’s yours now” WHEN DEED IS TRANSFERRED/DELIVERED!!! (If put in safe deposit box or third party, usually delivered)

#### Three Types of Deeds:

- (1) Quit-claim deed: Transfers all interests you have to A. No buyer protection.
- (2) General Warranty Deed: Conveys all interests in title. Says I actually own this property, it’s free from all defects in the title, and I’m transferring it to you. (Most Buyer Protection)
- (3) Special Warranty Deed: May or may not be something that someone else did to the title, but I’m not warranting what others have done to the title. Just what I’ve done to the title.

Price is adjusted for type of deed.

(for adverse possession, for special warranty deed, if AP took place during seller’s possession, then they’ve breached their warranty)

If you weren’t the one who screwed up the title you could go after the person who did?

#### Recording a Deed:

Deed is put into the grantor and grantee index.

A deed is still effective if not reported, but may have implications for Race stuff.

Depends on who is challenging the deed. If more than one deed, then recording will determine which deed is superior.

#### Three different types of recording statutes.

- Race: Whoever records first (Minority)
- Notice: Last Good-Faith Purchaser (Actual, constructive, inquiry) Regardless of whether the deed was good or not. Last Good-Faith Purchaser prevails over prior un-recorded claims, but not recorded claims idiot—NO REQUIREMENT FOR RECORDING IN THIS JURISDICTION
- Race-Notice: Last Good-Faith Purchaser must be first to record and be a good-faith purchaser

At common law, first-in-time-first-in-right. B can sue for fraud to get his money back, but no specific performance.

Put the entire word on notice by recording—inquiry notice.

Once recorded, notice is at least constructive.

#### Sabo v. Horvath

Lowery occupied land in Alaska.

Tried to get title. Before getting title, sells land to Horvath through a quit-claim deed. Horvath recorded, then Lowery actually gets title. Horvath fails to re-record.

Race Notice jurisdiction.

Lowery sells to somebody else.

Both purchasers had acted in good faith.

Issue: was there constructive notice.

Rule: Recordings done outside of the chain of title do not provide notice and are not valid recordings.

Wild deeds! (recorded too early; too late; shelter doctrine (allows bona fide purchaser to convey property to third person even if the third person knows))

Invalid recording. Because recorded before Horvath had valid title to convey.

Rationale:

No one is expected to do a title search for wild deeds.

Are expected to:

Go to the grantees index, look at when and who the person selling to you got the property, get their name, and see where they got it in the grantors index. Go to grantors index and see who they sold it to.

Deeds recorded outside of chain of title would not be discoverable outside a chain-of-title search, so no constructive notice.

## Problems

### Zurstrassen v. Stonier (2001)

Bros own two lots and plan to develop and sell them.

Klaus goes back and forth to and from Germany.

Forged deed conveys Klaus's interest by Rolf. It's not valid because never signed.

Construction begins on house.

Klaus finds out his name is not on deed.

Rolf assures him it's cool

On the houses is built.

Rolf tries to sell to Stonier.

Klaus finds out and says no.

Issue: Forged document is void.

Rules:

Normally, forged document is void, unless one of these exceptions apply:

- Equitable Estoppel – Representation or conduct about a material fact that is reasonably relied upon by the other part to their detriment—prevents a party who by acts, words, or silence allows another to purchase title to property "under an erroneous opinion of title without making known his claim."
  - (1) Representation of a material fact later asserted by the estopped party;
  - (2) Reliance on that representation by the party claiming the estoppel; and
  - (3) The party claiming the estoppel detrimentally changed their position due to such reliance.
- Waiver of Fraud: Party waives his right to contest the forged deed.
  - (1) Existence at the time of the waiver of a right, privilege, advantage, or benefit which may be waived;
  - (2) The actual constructive knowledge of the right; and
  - (3) The intention to relinquish the right.
- Ratification:
  - (1) Knows about fraud
  - (2) Does not reject it
  - (3) Conduct shows intent to relinquish rights with respect to forged deed.

**ASK HIM ABOUT DIFFERENCE!!!!**

**Waiver is about any right? Ratification is about Fraud.**

Elliott has an undivided interest and wants to sell a small part of it. Guy wants to buy all of it.

She refuses. He agrees to buy small portion. He writes out contract and includes the land by accident.

Daughter looked over it and said it was fine. Neither can read well. Guy contacts her and told her he made a mistake. Offers to buy whole thing mentioned in deed. She wants remaining part that she didn't want to sell back. Guy reconveys the whole interest to other people.

Rule: Fraudulent deed is *voidable*, if party acts to have it voided.

Rationale:

Since a good-faith purchaser bought the interests from BG, Elliott's only recourse is to sue BG for fraud and damages, but other party retains the interest that it bought.

VOIDABLE.

If it had been a bad-faith purchaser, she could have gotten the interest back.

If she had re-recorded before the conveyance to the third party then she would have been able to keep land.

#### D. Real Estate Finance.

Mortgage company as no ownership interest in the property; however, if you default, then they have the right to force the sale of the property. LENDER DOES NOT OWN HOUSE!

Mortgage Borrower's Obligations:

- (1) Retain insurance on property
- (2) Promise to pay taxes on property
- (3) Maintain Property (Roughly condition it is in)

Mortgages generally prevent owner from encumbering land, but doesn't prevent second mortgages. But mortgages are satisfied in order.

If you default on second mortgage but not first, then second mortgage can foreclose—if house is sold, satisfy all encumbrances on house: in order of mortgages.

Still have to pay mortgage even if house is gone.

Foreclosures Problem:

Quick-turn Sale. Sell house to themselves and sell it again to make a profit.

Then can sue buyer for deficiency if they didn't get full auction price at auction. Most states prevent this.

Buyers' Protections from this:

- Right to bid at auction—at least cover amount left over on (Prevention from lender lowballing price)
- Statutory Right of Redemption: allows mortgagor to buy back the property for the price bid at the foreclosure sale for a designated period after foreclosure—usually mortgagor can keep property during that designated period.
- Equity of Redemption: Right to pay off the rest of the loan *before* foreclosure and avoid loss of the property
- Notice of Foreclosure Proceedings: Mortgagee must give mortgagor notice of the foreclosure proceedings it has commenced whether through judicially supervised sale or private sale by mortgagee.
- Foreclosure Proceedings: Can be judicially supervised—requires mortgagee to prove existence of the note and the mortgage and to prove that the mortgagor defaulted. Mortgagor has opportunity to prove that she didn't default.
- Public Notice of Foreclosure Sale: Allows any bidder—raising the price and preventing a deficiency judgment. More likely to get fair market value of property.
- Mortgagor's Right to Bid at Foreclosure Sale – see above.
- Judicial Supervision of the Price – If the bid is too low, the mortgagor may be empowered to bring a lawsuit against the mortgagee for breach of fiduciary duty. Quick-turn prevention.



- Reinstatement: If foreclosure proceedings have been initiated, borrower has opportunity to reinstate by paying what he is in arrears.

Statutory Right of Redemption is minority.

### **Deed of Trust**

3<sup>rd</sup> Party Trustee owns property. Ensures good price at public sale???

Borrower or trustor conveys title to 3<sup>rd</sup> party trustee as security of it's debt obligation to the lender.

Option to prevent court intervention? Removes some buyer protections. Duty to try to get FMV.

Proceeds that exceed debt go back to borrower. Borrower only has equitable title, not legal title. Once the note is satisfied, the trustee has to convey all lawful title.

**What's a short sale:** When borrower and lender agree, lender agrees to sell house now and only take sale price and forgive excess debt..

If foreclosure, and house sold for less than amount owed:

Most states: don't allow deficiency judgment: Bank only gets sale price

Other do, and you have to pay for difference.

### Central Financial Services, Inc. v. Spears (1983)

Guy gets mortgage with son.

Son doesn't pay.

Guy can't pay.

Foreclosure.

Bank sells it to themselves, then resells at profit.

Fraudulent transaction because they sold it to themselves.

Rule: Price paid was grossly inadequate and shocked the conscience of the court.

Even if sold by foreclosure, new buyer still has to uphold any leases.

If price paid was inadequate and shocks conscience of the court, then court can reduce the award  
Statutes sometimes can free a foreclosed property from encumbrances like leases.

### **Installment Land Contracts**

Owner of property agrees to transfer property to buyer after buyer has made payments for a number of years.

Might occur when buyer can't get mortgage or seller doesn't want to give up title just yet.

May get benefit of interest through monthly payments.

Owner gets the property back through default.

Owner doesn't get all the money now, but they have potential of getting the property back.

### Stonebraker v. Zinn (1982)

Zinns agree to sell land for \$25,000

Stonebrakers agree to pay in installments

K allowed for liquidated damages upon default

Once Stonebrakers fully paid, transferred over to the buyer.

After a year, Stonebrakers vacate because they can't make payments. Stonebrakers say the liquidated damages clause is not enforceable.

Liquidated Damages Rule:

The clause is enforceable if

- (1) Difficult to calculate the actual damages, but the liquidated damages are a good estimate
- (2) Not so disproportionate from actual damages that it would constitute a penalty

Penalties are unenforceable.

Holding:

Liquidated damages were not excessive. Monthly payments being made were close enough to FMV. This is what you would have expected for damages.

Issue:

Whether down payment should be returned or that is a penalty.

Holding:

Down payment might be more than you would otherwise get, but is close enough that it doesn't "shock the conscience"; therefore, it is valid.

Rule: No mortgage protections for land contracts, if you default, you lose everything you invested.

Sebastian v. Floyd (1979)

Sebastian was trying to buy a house from Floyd.

Land installment contract.

If purchaser were to default, would forfeit right to possess and give up money already paid.

You can lose it all depending on the contract.

Sebastian defaulted.

Issue: is this really a mortgage or a contract?

If the contract is in effect loaning a purchase price and being the lender, then all the mortgage protections would be in place.

For installment land contracts, legal title to the property remains in the seller but equitable title transfers to the buyer. Seller holds nothing but the bare legal title as security for the payment of the purchase price.

Land contracts are more-or-less like a mortgage:

- (1) Permanent improvements
- (2) Is there a penalty?

Some states implicitly or explicitly prohibit K land contracts by making mortgage statute non-waivable.

General Rule:

Some land Ks are valid, but when forfeiture provisions begin looking too much like penalties, then courts make them mortgages and apply all mortgage protections.

Equitable Mortgages

Koenig v. Van Reken (1979)

3 Ks.

1. K to buy house
2. K to re-buy house
3. K to lease house

Didn't pay rent under lease.

She's evicted.

Rental agreement breached—option to buy goes away.

She loses house.

He got \$60,000 value for a \$30,000 debt.

She loses half the value of the house.

Foreclosure. Defendant proposed for fee of 10%, he would service the mortgages and pay the delinquent taxes

Holding:

The form of the transaction was a lawful conveyance of the title.

Court says she owns house.

It was a mortgage. Van Reken was mortgagee.

Court treated it as a mortgage because she gave \$30,000 house for \$4000 loan.

Rule: if facts show that price paid was inconsistent with it being a sale of land, and is consistent with it being collateral for a mortgage/loan, court may read it as a mortgage.

Does it look like a penalty? If yes, mortgage, if no contract.

Depending on Jurisdiction, some may say contracts some may say mortgages. Look at the effing facts.

## VIII. Property and Sovereignty

### A. Zoning: Governmental Land Use Planning

Zoning is exclusionary. Relatively new exercise of police powers.

Two Types of Zoning:

(1) Use Zoning: How you may *use* property: Ag/Comm/Ind/Res

(2) Area Zoning: Spatial Parameters

If something is deemed to be a taking, (decrease in value) government must compensate. Enforced in haphazard way. Only enforced if there is a complaint.

Zoning Ordinances cannot be unconstitutional. No improper discrimination, and cannot take property without just compensation.

Administrative remedies:

Zoning ordinances come with admin remedies that must be exhausted before suit.

General Points:

- Any restriction on use will decrease the value of the property, but that doesn't mean it is a TAKING.
- If something 75% reduction might still not be enough for TAKING
- If state has little interest in the regulation, then maybe small reduction in value might constitute a TAKING

Zoning Boards to tend to plice without complaints.

#### 1. Planning Process.

*Exclusionary zoning*

Village of Belle Terre v. Borras

Zoning ordinance for single family residences.

One or more people related by blood or law living as a family unit.

If not related, only two can live in a dwelling.

Fundamental right vs. Rational Basis.

Lessees say ordinance is unconstitutional because of violation of right of privacy.

Court disagrees.

Ordinance is not unconstitutional.

If no right involved, discretion of legislature.

Rule:

If fundamental right involved, there must be a high level of scrutiny. Government needs greater interest in the regulation, and the ordinance addresses that interest.

If no fundamental right involved, just apply the rational basis test????

Rationale: There is a rational basis given the problems associated with unrelated people living together—frat houses and hippie communities.

There are legitimate interests at stake here????

Marshall Dissent: Right to privacy is a fundamental right and it's being regulated—who you choose to live with is a personal choice.

Majority said avoid problems of unrelated people living together???

Could argue that ordinance limiting family size for a dwelling would constitute a disparate impact claim for certain ethnicities.

Under constitution and majority of jurisdictions can discriminate between family and non-families

#### Charter Township of Delta v. Dinolfo (1984)

Michigan Supreme Court adopts Marshall's dissent.

Ordinance upholds traditional family values.

Facts: Bunch of families have six unrelated people living with them.

Violating ordinance: Two or more unrelated people.

Legit goals.

Issue: Does ordinance adequately address these goals?

Rule: If enforcement of the ordinance does not adequately address legitimate goals, it is not valid.

Holding:

Ordinance is capricious and arbitrary and violates Michigan's due process goals.

Goals of ordinance are not met through restriction.

Also, goals aren't met.

Fails rational basis test.

Two approaches: US Const + Maj State Rule: Can have differential number requirement for family and non-family. Some state constitutions have Michigan minority rule. No preference for family and non family.

Moore can limit number of family members, but not type of family members (cousins). Couldn't separate a family in this case.

Rational basis w/o fundamental right.

Strict scrutiny w/fundamental right?????

Health and safety issue could survive strict scrutiny requirement for fundamental rights.

#### AFAPS v. ARPE (1990)

Community didn't want AIDS hospice to open in their area.

Permit was denied.

AFAPS wanted variance on farmland to have AIDS hospice.

Board claimed they denied ordinance for health and safety reasons.

Holding: These reasons were pretext for impermissible discrimination because zoning didn't come up until after application.

Rule: If the justification arises after the fact, more likely pretext.

Cannot arbitrarily deny special use permits, if zoning board is allowed to grant special permits.

Have to have a reason to deny that is in regard to the interest of society as a whole. If it had been an actual health risk, it would have been ok.

#### Familystyle of St. Paul, Inc. v. City of St. Paul (1991)

Mentally ill patients. Trying to get a permit to add three houses to an existing group of group homes.

Ordinance required dispersal of group homes—couldn't be grouped together.

Permit denied.

Violation of ordinance.

Issue: Whether the ordinance was discriminatory

Holding: Since it was for therapy and not for reintegration, it is not discrimination. Can't use zoning to prevent integration or force integration.

(Horizon Home used it to try to force integration—not therapy, and that's not right: violates fair housing act by disparate impact or discriminatory purpose claim)

**CANNOT FORCE TOGETHER OR SEPARATE WITH ZONING.**

Limited to where licensed facilities can be built—not where mentally ill people can live!!!

Rule: Ordinance that is not therapeutic reasons and not reintegration

**Disparate Impact:** Sounds neutral on its face but tends to discriminate only one category of people

**ASK: DISPARATE IMPACT AND DISCRIMINATION**

Police Power: Protect health, welfare, safety and morals of community

4. Prior Non-Conforming Use, Variances, Vested Rights

Town of Belleville v. Parillos's Inc.

Restaurant existed.

Zoning change said no stuff.

Restaurant is non-conforming use, but grandfathered in.

Restaurant changes from restaurant to discotech.

Holding: disco was substantial change in use. Purpose changed—substantially different

Rule: Non-conforming uses are not favored. If PRIMARY PURPOSE of establishment changes substantially, then the non-conforming use becomes a violation of the ordinance.

Prior use has to be continuous use. If closed down for a period, it couldn't re-open.

Prior use has to be actual use at the time the ordinance was passed.

**NO SUBSTANTIAL CHANGE**

Look at use now compared with use at time ordinance was passed.

Cannot close down and re-open, but could close temporarily for some reason.

*If the zoning ordinance changes such that your prior use is no longer valid, you may continue your prior non-conforming use as long as you continue using it in that way. If you substantially change, it no longer applies.*

Policy goal: to bring all non-conforming uses into conforming uses as soon as reasonably possible.

Zoning board brings suit after someone complains (criminal action with penalties)

Penalties:

Sheriff can shut down bizness.

Variances:

Cochran v. Fairfax County Board of Zoning Appeals (2004)

Three Cases handled by SC.

Issue: does the board have discretion to grant or grant these variances?

Fairfax Guy wanted go w/l 13 feet of prop line in violation of ordinance for side-load garage. Zoning board granted and neighbors objected.

Pulaski Guy wanted variance to build garage along one side of property violating ordinance. Granted! Neighbors objected.

Virginia Beach Owners requested variance for larger shed than ordinance would allow. Board denied, but got it on appeal.

Holding: Zoning boards can choose to issue variances from the ordinance for substantial hardship. (Land is unique). There is no substantial hardship in any of these cases because in all of these cases, the owners could have done what they wanted within the ordinance guidelines.

None of them meet substantial hardship.

Although variances are granted all the time, most of the time, the zoning board does not have authority to grant them. Strict standard: substantial hardship. Standard for denying variances is

Zoning boards are more likely to give area variances than use variances.

Detrimental Reliance.

Stone v. City of Wilton (1983)

Stone wanted to build a project.

Most of it was properly zoned for this, when he purchased it.

Later rezoned for all family dwellings.

Stone sought to have zoning invalidated.

Or an injunction to block zoning.

Claim: zoning was racially motivated—improper use of police power.

City claimed that they didn't want to overtax infrastructure.

Issue: vested rights?

Rule: Once a right has vested, city cannot take rights away without compensation.

Reliance on the zoning can cause rights to vest.

Many jurisdictions require a permit for the rights to vest to show reasonable reliance.

But that's just one way to find reasonable reliance.

Other evidence:

Design isn't enough. Need workable blueprints.

Bought supplies on the property can be enough.

Once vested, even if ordinance changes, you can go forward (**or get compensated for a taking???**)

Vested rights are for a specific use.

PROBLEM at 935!!!

Hard to get use variances.

Vested rights can transfer with land interests.

**Move** Substantial Hardship cannot be self-induced

Non-conforming use to variance—vested rights??? For zoning issues?????

Vested rights are similar to prior use, but use has not begun!

## B. Regulatory Takings

**5<sup>th</sup> Amendment** -> Gov't is limited from taking private property without just compensation

Government may take property rights without it being a TAKING.

Government can take land by virtue of police powers.

Regulation limits the use of property and can constitute a taking.

### 1. Per se takings

Miller v. Schoene

Fungal tree thing. Apples large cash crop—valuable commodity. Economy around apples.

Regulation prevented cedar trees from being within two miles of an apple orchard

Cedar trees that had or could have rust.

Issue:

Was it a regulatory taking to have trees torn down or ordered to torn down.

Rule: If the regulation is intended to benefit somebody else, then beneficiary should pay for benefit, but if it's to prevent harm to someone else, then property owner should bare the cost.

Benefit/Protection distinction.

Penn Central v. New York City

Station was named historic site. Couldn't alter the property without permission from the board. Board wouldn't let them build skyscraper above station because would alter historic image of the building.

Issue: Taking?

Holding: Not a taking. Not deprived of all reasonable use. Still being used as train station; furthermore, just because board denied this skyscraper does not mean ALL takings.

Rule: If property is not deprived of all reasonable use, it is not a taking.

Dissent: Benefit (not harm prevention) to preserve landmarks at cost of individual land owners. Burden should be borne by society, not individual landowner. No conferring benefit?????

They don't have to pay property tax.

Pennsylvania Coal: Regulation made it commercially impracticable to mine the coal, and thus had nearly the same effect as the complete destruction of rights claimant had reserved for the owners of the land.

Keystone Bituminous Coal Association v. DeBenedictis (1987)

Had to give up 1/2 of coal to support public buildings

Different from PennCoal: Private versus public restrictions?

Protect public buildings.

Legit exercise of Police Powers. Conferring private benefit vs. Prevent public harm!

Holding: Not a taking

Rule: Ad hoc test factors:

- (1) Character of Gov't Action (Protect vs. Benefit)
  - Is it a benefit or protection from harm
  - Legit or trivial purpose
  - Burden entire community should bare or just the individual?
  - Designed to prevent nuisance?
- (2) Substantial Government Impact
- (3) How much investment was there expectation benefit?

- (1) Character of Government Action
- (2) Economic Impact
- (3) Interference with reasonable investment-backed expectations

**Summary of Takings Factors**

	More likely to be held to be a taking requiring compensation	More likely to be held to be a legitimate application of police power not requiring compensation
<b>Character of Government Action</b>	<ul style="list-style-type: none"> <li>• A forced permanent physical invasion of property (Loretto, Causby)</li> </ul>	<ul style="list-style-type: none"> <li>• Regulation of property use in a manner that achieves an average reciprocity of</li> </ul>

	<ul style="list-style-type: none"> <li>Extraction of a benefit for the good of the community or a forced transfer of property rights from A to B. (Babbitt; Hodel)</li> </ul>	<p>advantage (Euclid)</p> <ul style="list-style-type: none"> <li>A limitation on property use designed to protect the community from harm or respond to negative externalities (Keystone, Hadacheck, Goldblatt, Mugler)</li> <li>A choice between incompatible interests (Miller, Keystone)</li> </ul>
<b>Economic Impact</b>	<ul style="list-style-type: none"> <li>The regulation denies the owner any economically viable use of the land (Lucas)</li> <li>The regulation destroys almost all value of the property in a manner unjustified by a sufficient public interest</li> </ul>	<ul style="list-style-type: none"> <li>The regulation leaves the owner with an economically viable use of the land or a “reasonable return on the owner’s investment” (Keystone, Penn Central, Pennell)</li> <li>The diminution in value, even if great, is justified by a sufficiently strong public interest in protecting the public from harm (Keystone, Hadacheck, Goldblatt, Mugler)</li> </ul>
<b>Interference with Reasonable Investment-Backed Expectations</b>	<ul style="list-style-type: none"> <li>It interferes with vested rights, such as investments based on reasonable reliance on prior regulatory reliance on prior regulatory approvals or laws unless those regulations can be justified as preventing a nuisance or other harm caused by the property use (Kaiser Aetna)</li> <li>It interferes with an existing present use of the property (Stone v. Wilton)</li> </ul>	<ul style="list-style-type: none"> <li>It imposes an opportunity loss—preventing the owner from realizing the benefits of a contemplated future use (Penn Central)</li> <li>The change in the law is one that could or should have been anticipated such that the owner’s reliance on the continuation of prior law was unreasonable</li> <li>The regulation of a contractual relationship rather than a forced transfer of property interests from one person to another. (Yee; Pennell; Block)</li> </ul>

## 2. Physical Invasion

### Pruneyard



Shopping center told Zionist kids to move to sidewalk. Kids did and then sued for injunction for preventing them from being there.

California says under their Constitution that free speech rights are fundamental. They trump the owners right to exclude.

Issue:

Which right prevails?

Free Speech vs. 5<sup>th</sup> amendment property rights

Holding:

Has to be governmental regulation depriving people of their fundamental property rights.

Pruneyard fails to demonstrate that rights to exclude are so useful to the economic value of the property that the state-authorized limitation of it amounted to a taking. Free speech wins.

Pruneyard could have restricted time, place and manner of distribution of pamphlets. Not being deprived of their entire right to exclude.

Concurrence per Powell would preserve the right to exclude inflammatory KKK people's rights to speech.

**Rule: Look at totality of the property rights. Taking one stick in the bundle is not a TAKING**

Company was acting like a government here kind of.

Kaiser Aetna Dredged to navigable waterway for their marina. Once part of navigable water, part of federal navigable water act. Act prevents Kaiser from excluding people from it's thing.

Holding: Since marina owners had an investment backed expectation that they could remain a private marina—core purpose—otherwise they would not have dredged it. Complete taking.

Loretto

Facts: NY law required landlord to put coaxial cable into apartment buildings.

Issue: Is this a taking?

Holding: yes

Rule: Any permanent physical invasion is by definition a TAKING no matter how small and requires "just" compensation (Probably \$1) Permanence is question of fact.

Dissent: Not permanent, if changed land use would have allowed them to take it down.

Permanent Examples:

Mailboxes: not a taking. Owned and used by landowner.

Per se takings: Deprivation of fundamental right or Physical Invasion

Lucas v. South Carolina Coastal Council (1992)

Facts:

Intent to develop for single family home. Neighbors had single family home.

Reasonable to think he could do the same.

Waited for a while after buying.

NC legislature passed a beachfront management act—prohibited him from building the home.

Rule: Regulation that prohibits ALL economic beneficial and productive use of the land is a taking unless it's a prohibited action that would have been barred as a nuisance or other something property law.

So unless it's what you couldn't do anyway.

Old Rule: Harmful/noxious use.

New Rule:

Regulation that denies all economically beneficial or productive use of land is a taking unless prohibited action would have been barred as a nuisance or some other background principle of state's property common law.

Holding: Yes a taking. Took all economically valuable and productive use because couldn't build on it.

Dissent: Could do stuff still. Clear error.

Also, Taking is important here because he had no vested rights because he was just sitting around and not actively relying/building.

PER SE TAKINGS:

- (1) Permanent physical invasion
- (2) Prohibit all economic and valuable use
- (3) Fundamental Right

Test:

- (1) Economic Impact of Regulation
- (2) Interfere with investment backed expectations
- (3) Character of government action

Weigh the fucking factors.

Exaction and Linkages:

In exchange for permission to develop the property, the government can ask for something of value for development—building permits, etc.

Goal is to compensate society for the harm that might be caused by your further property development.

Dolan v. Tiggard

Store owned along river.

Wanted to expand and pave parking lot.

City asked in exchange for permit for a dedicated portion of her land for drainage and bike path.

City had development plan with goal to maintain flood zone and promote pedestrian bike paths.

Owner appeals

Issue: Is there a reasonable inference that that drainage and bike path offsets buildings damage?

New Rule:

Nolan/Dolan Rule:

Must be essential nexus between exaction demanded and harm that would be created. (Would the exaction have mitigated the harm). There must be a rough proportionality between the two.

Holding: No rough proportionality between the thing and the extent of the harm.

It's not an exact measurement.

(Nolan: Guy wanted three story building between two public beaches. Would have obstructed view.

California required an easement for people to walk over property to get to beach.

Holding: no nexus between harm created and benefit. Goal was to fix obstruction. Not to allow for traffic between beaches. Could have required lookout point)

Stevens: should be gross proportionality

If one and two exaction is valid, and it's not a taking. If not it is a taking.

Not an issue for zoning.

Almota Farmers Elevator & Warehouse v. United States (1972)

Facts:

Almota leased a grain elevator from railroad.

Gov't took it. And paid for the interest.

Issue: What's Fair Market Value.

Whether the present value of the remainder included the value of the expectation of the lease being renewed at the end of the 7.5 years.

Fair Market Value: What would someone pay for it on the open market? Therefore, likelihood of renewal would affect that value. Improvements too. They affect market value.

US v. 564.54 Acres of Land, More or Less (1979)

Bible camp. Government takes away.

Pay for value of land.

Bible camp wants indemnity: cost to rebuild. Would have to spend more because the times are changing. Grandfathered shizzle.

Issue: Worth less than rebuild it.

Court says NO!!!!!!!!!!!!

Rule: Grandfathered in savings is a non-transferrable value.

Fair market value is what would someone else pay for it?

UNLESS there is no market—in which case, you can get indemnity, but here, there was a market for bible camps. Like historic landmarks. Or grottos. Or tangible goods that are unique in some way.

FAIR MARKET VALUE IS A PROXY FOR JUST COMPENSATION

General Rule: Economic development -> Public Benefit -> Public Purpose -> Public Use (Constitution)

So Economic Development is a Public Use.

What is public use?

“nor shall private property be taken for public use, without just compensation.”

Hawai'i v. Midkiff

Land oligopoly. Almost all the land was owned by small number of people.

Hawai'i forced landowners to sell to tenants at fair market value to break up concentration of land ownership. Public use/benefit in fighting oligopoly.

Berman v. Parker

Large part of district blighted. Plaintiff's property was not blighted but was in that area.

Look at whole area, not individual parcels.

And look at purpose of the plan not the mechanics.

Kelo v. City of New London

Bought all land for office space for urban renewal Pfizer stuff.

Issue: is buying land so for economic benefit public use?

Plaintiffs say Gov't cannot take one person's property and give it to someone else.

Which is true

City says public use.

Public Purpose = Public Use

Holding: It's fine. It is a taking for public use.

Both dissent and majority use prior cases to argue their point.

Outcome: Fed Constitution is only limited by Kelo.

New London was in theory condemning the land and then looking for a developer, but they actually knew who that would be (Pfizer). Area is blighted.

New London needed significant development.

O'Connor says Berman was much worse off!

Thomas would re-read public use more narrowly and overturn Berman and Midkiff.  
For politics, often will stop abuses of Kelo rule. Or they won't get re-elected. Huge political cost to taking someone's house without good reason.

Dissent: No. No obligation to renew.

Hypo:

Someone wants to convert their garage into a night club. What do you tell them?

- (1) Look at zoning ordinances
- (2) Look at deed of property: Covenants or other private restrictions
- (3) Nuisance Laws
- (4) Ask the neighbors

If zoning says you can't open club, you can apply to variances.