

# Property Outline

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## Goals of Property Law:

- Predictability (rule of law)
- Fairness (justice)
- Economic efficiency preferred (wealth creation-support capitalism)
- Protection of Social & Environmental Values (wealth distribution, counterpoints to wealth creation)

## First Possession

### Terms

- An Activity: possession, use and profit from something
- Tragedy of the Commons: ex. of something that happens if there is not individual rights of property- private ownership = right to exclude other, most important component of property (understanding property = understanding the extent of private ownership)

### *Johnson v. M'Intosh*

- Act of ejection
- Issue: two sources of title, one from the United States' government, one from the Native Americans who had been residing previously on the land ("actual, legal possession")
- While Native Americans held possession, actual title belonged and could only be transferred by the government, otherwise would result in chaos

### *Pierson v. Post*

- Issue: whether a person who, with his hounds, starts and hunts a fox on waste and uninhabited ground, and at one the point of seizing his prey, acquires such an interest in the animal, as to have a right of action against another, who in view of the huntsman and his dogs in full pursuit and with knowledge of the chase, shall kill and carry him away?
- Mere chase of animal is not sufficient to gain legal title, must have intentionality, must so interfere with it that it has been deprived of its natural liberty, possession must be certain

- Dissenting Opinion: reasonable prospect test, according to these facts it was reasonable that Pierson should have assumed that Post was going to ultimately gain the fox- i.e. if chased by hunter by large dogs and hounds

#### *Ghen v. Rich*

- Issue: does an individual who kills a whale and leave his mark on the whale but does not take physical possession of the whale nevertheless have better title than a subsequent finder of the whale who takes possession of the body in accordance to local commercial custom
- Classic case of seeking to adopt a rule that maximize capital efficiency
- Custom represents an attempt among people in custom to instill the most efficient way to handle the business- want some certainty, want to know they have a property (certainty of title encourages enterprise)
- Rule: the killer of the whale leaving marks of attrition has title

#### *Keeble v. Hickeringill*

- Issue: If an individual knowingly disrupts the commercial capture of ducks by means other than equal types of competition, then even though the commercial operator does not have a property interest in the wildlife frightened away, will a cause of action be found to exist for the willful interference with a commercial enterprise
- Can interfere in a way to cause competition because can not interfere in an illegal manner

## Intellectual Property

#### *International Service v. Associated Press*

- INS was taking news posted by the Associated Press and selling it has their own
- Can we obtain a property status for those that collect and distribute news?
- News is quasi property
- D cannot reap what it has not sown

#### *Doris Silk*

- Cheney Brothers used a design that Doris had been using in their product
- If don't have property, can only argue unfair business practices
- Property in cloth, but not pattern
- Here court ruled against plaintiff because of public interest, it would be unfair to limit "duplication" of things that weren't copyrighted

# Lost Property

## Terms

- Lost Property: property that the owner no longer possesses because of accident, negligence, or carelessness and that cannot be located by an ordinary, diligent search.
- Trover: is a common law action for money damages resulting from the defendant's conversion to his own use of a chattel owned or possessed by the plaintiff. The plaintiff waives his right to obtain the return of the chattel and insist that the D be subjected to a forced purchase of the chattel from him (property = trespass)
- Replevin: lawsuit to obtain return of the goods, not damages (real property = ejection)
- Abandoned Property: items intentionally relinquished with no intent to reclaim (physical act + intentionality)
- Bailment: delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose, usually under an express or implied in fact contract → involves a change in possession but not in title

### *Armory v. Delamirie*

- Issue: who had title of a possession that was found?
- Rule: a finder has title superior to a subsequent possessor) has title superior to all except the true owner)
- Title v. Possession
  - Do not have title until the SOL has passed for that item...just have lawful possession. Once SOL passes, will gain title to that item that not even the rightful owner can dispute

### *Hannah v. Peel*

- Issue: who has title of a lost object that is found on a piece of property where the own was not aware of its existence?
- General rule: right of finder is entitled to it against everyone but the true owner (see *Amory*)
- Defendant had no knowledge of the brooch, therefore it was lost in all sense of the world and belonged to the P

### *McAvoy v. Medina*

- Issue: who has title to property that is not lost, but mislaid?
- Rule: when an item of property is deliberately placed, it is not lost in the ordinary meaning of the word, it is mislaid, and the shop owner

retains possession against all but the true owner, even if the shop owner is not the finder

### *Shipwrecks*

- Under English common law- “wreck” which referred very narrowly to cargo washed ashore from a ship lost at sea with no survivors- went to the crown
- Traditional maritime law- a ship lost at sea and settle on the ocean floor remained the owner’s property- unless title to the vessel was abandoned, anyone subsequently reducing the ship or its cargo to possession was entitled to salvage award

## Gifts

### Terms

- Three parts: Intention, Delivery, Acceptance
  - Acceptance: is presumed will accept but can be rebutted
  - Intention- present transfer of title
  - Delivery- proof of the first elements → must always put in context, physical move of property may not represent intentionality of gift
    - Constructive: handing over a key or some object that will open up access to subject matter of the gift
    - Symbolic- handing over something symbolic of the property given
- Gift causa mortis: gift made in contemplation of the donor’s imminent death- the gift must be made with a view to the donor’s present illness or peril (2) donor must actually die (3) there must be a delivery
- Inter vivos gift: gift of personal property made during the donor’s lifetime and delivered to the donee with the intention of irrevocably surrendering control over the property
- Fee Simple: highest and best title in land and personal property
- Fee Simple, subject to a life estate- possession is in one party, while you keep it

## Adverse Possession

## Terms

- Require there be (1) an entry that is (2) open and notorious, (3) continuous for the statutory period (which begins when all elements of adverse possession occur at the same point) and (4) under a claim of right
- Under MI statute cannot adversely possess against the government
- Claim of Title: way of expressing the requirement of hostility or claim of right on the part of the adverse possessor
- Color of Title: refers to a claim founded on a written instrument (deed, will) or a judgment or decree that is for some reason defective and invalid (such as when the property is improperly conveyed)
- Constructive Adverse Possession: adverse possession in which the claim arises from the claimant's payment of taxes under a color of right rather than actual possession of the land
- Tacking: joining of consecutive periods of possession by different persons to treat the periods as one continuous period; esp., the adding of one's own period of land possession to that of a prior possessor to establish continuous adverse possession for the statutory period.
- Privity: the connection of relationship between two parties, each having a legally recognized interest in the same subject matter; mutuality of interest

### *Howard v. Kunto*

- Question of what happens when the description in deeds does not fit the land the deed holders are occupying
- McCall house (now occupied by the Kuntos) was not situated on the land that the deed to the property described
- Moyers conveyed the land the Kuntos house stood on after Howard had the land surveyed,
- Issues: is a claim of adverse possession defeated because the physical use of the premises is restricted to summer occupancy?
  - May a person who receives record title to tract A under the mistaken belief that he has title to tract B and who subsequently occupies tract B, for the purpose of establishing title to tract B by adverse possession use the periods of possession of tract B by his immediate predecessor who also had record title to tract A?
- Main claim was that summer occupancy did not constitute continued occupancy
- Court ruled that summer occupancy only of a summer beach home did not destroy the continuity of possession- "requisite possession requires such possession and dominion as ordinarily marks the conduct of owners in general in holding, managing and caring for property of like nature"

- Tacking issue- general rule is that tacking of adverse possession is permitted if the successive occupants are in privity – deed running between the parties purporting to transfer the land possessed traditionally furnishes the privity of estate, which connects the possession of the successive occupants.
- “Technical requirement of privity should not be used to upset the long periods of occupancy of those who in good faith received an erroneous deed description”
- RULING- “where, as here, several successive purchases received record title tract A under the mistake belief that they were acquiring tract B, immediately contiguous thereto, and where possession of tract B is transferred and occupied in a continuous manner for more than 10 years by successive occupants, we hold there is sufficient privity of estate to permit tacking and thus establish adverse possession as a matter of law”

*O’Keeffe v. Snyder*

- Question of title
- If the paintings were stolen- the thief acquired no title and could not transfer title to others regardless of their good faith and ignorance of the theft
- Did frank acquire voidable title? – allows a person to transfer good title to a good faith purchaser for the value in certain circumstances
- Main legal question is when the cause of action occurred-which would affect the statute of limitations- action for replevin of goods must be commenced within 6 years
- DISCOVERY RULE- a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis of a cause of action
- Problem with the discovery rule is that it enables you to hold a trial on something decades later- hurts the viability of evidence
- Acquisition of title of real and personal property by adverse possession is based on the expiration of a statute of limitations
- To establish title by A.P. to chattels, the possession must be hostile, actual, visible, exclusive, and continuous...Inherent problem with many kind of personal property that will raise the question whether their possession has been open, visible, and notorious
- Shift from the elements of adverse possession to the discovery rule- not what the possessor did rather what the owner did
- Rule should not change as to real property- real property is fixed and cannot be moved or concealed

## Possessory Estates

### Terms

- Tenure: A right or mode of holding lands or tenements in subordination to a superior. In feudal times, real property was held predominantly as part of a tenure system.
- Life estate: control and possession for the rest of your life (upon death it either goes back to the originator or to a 3<sup>rd</sup> party- normally will be determined when life estate is granted)
- Words of purchase: **who** is getting the interest
- Words of limitation: **what** are they getting
- Remainder: a future interest arising in a third person- this is, someone other than the estate's creator, it's initial holder, or the heirs of either- who is intended to take after the natural termination of the preceding estate
- Waste: permanent harm to real property committed by a tenant (for life or for years) to the prejudice of the heir, the reversioner, or the remainderman
- Fee tail- life estate, but directing what happens with the life estate – without specific duration i.e. “to A and the heirs of his body” (words of limitation- create the fee tail)

### *White v. Brown*

- Holographic will (written will)
- Term that restricted the property left- **restraint on alienation**
- Testator and testees were not related, good friends
- Presumptions at law: (1) every grant shall pass all estate or interests unless the intent to pass a less estate shall appear by express terms (2) a will shall convey all the real estate belonging to the testator or in which he had an interests at his decease, unless contrary intention appear by its words and context (i.e. it is a fee simple unless it says otherwise)

### Defeasible Estates

- Condition Subsequent: a condition that, if it occurs, will bring something else to an end
- Defeasible: meaning it will terminate, upon the occurrence of some special further event. Primary purpose is land use and control
  - Fee Simple Determinable: fee simple so limited that it will end automatically when a stated event happens
    - Words of limitation alert us to it (i.e. *so long as*)
    - Ex. O → MSU- Law, *so long as* the building is used for a tax clinic

- Possibility of Reverter: future interest is retained by the transferor- may be expressly contained or arise by operation of law
  - Fee Simple Subject to Condition Subsequent: fee simple that does not automatically terminate but may be cut short or divested at the transferor's election when a stated condition happens
    - Ex. O → to MSU-Law, but if it is ever used for something other than a tax clinic, the O reserves the right to re-enter
    - Right of entry- expressly retained or may be implied if the words of the instrument are reasonably susceptible to the interpretation that this type of forfeiture was contemplated by the parties
  - Fee Simple Subject Executory Limitation: estate created when a grantor transfers a defeasible fee either a determinable fee or fee simple subject to condition subsequent and in the same instrument creates a future interest in a third party rather than himself

### Future Interest

- Presently existing interest that may become possessory in the future
  - I.e. O → to A for life, then to B and her heirs (A- Life estate, B- vested remainder in fee simple)
- Remainders: two types (Vested and Contingent)
  - A future interest in a transferee which is capable of becoming possessory at the natural termination of the preceding estate and does not divest any one except the transferor
  - Vested: to an ascertained, and not subject to a condition precedent
  - If neither of these conditions is present then the remainder is contingent
    - Ex.
      - O → to A for life, then to such of A's children as survive him, but if none of A's children survive him, to B and her heirs
        - A-PPLE
        - C- contingent remainder subject to open b/c condition prec.
        - B- contingent remainder

### Destructibility of Contingent Remainders

- Rule in Shelley's Case: provides if one instrument creates a life estate in land in A and purports to create a remainder in persons described



as A's heirs and the life estate and remainder are both legal and equitable the remainder becomes a remainder in fee simple in A

- O → to A for life, then to the heirs of B
  - A- PPLE
  - Heirs of B- contingent remainder
- Doctrine of Worthier Title: provides that where there is an inter vivos conveyance of land by a grantor to a person with a limitation over the grantor's own heirs either by way of remainder or executor interest, no future interest in the heirs is created, rather, a reversion is retained by the grantor
  - O → to A for life then to B if the Lions have won a Super Bowl, if not then the heirs of O

### **\*\*Rule Against Perpetuities**

- No interest is good unless it must vest, if at all, no later than twenty-one years after some life in being at the creation of the interest
- Life in being +21 year- must vest if at all
- Looking for logical certainty that it won't occur

### **Common Law Concurrent Interests**

- Tenants in Common: have separate but undivided interest in the property- the interest of each is descendible and may be conveyed by deed or will (no survivorship)
- Joint Tenants: have the right to survivorship, by common law both tenants are regarded as a single owner- when one joint tenant dies, the estate simply continues in survivors free from the participation of the decedent
  - Necessary Elements of JT under CL:
    - Time: interest must be acquired or vest at the same time
    - Title: must have equal undivided shares and identical interests- measured by duration
    - Possession- each must have right of possession of the whole
    - Have to add certain words, such as "in joint tenancy" → survivorship
    - All owners have right to use and access property. But also, joint tenants can't interfere with other's rights to use and enjoy property
- Tenancy in Entirety: can be created only by husband and wife. Neither husband nor wife can defeat the right of survivorship of the other by conveyance of a moiety to a third party, only conveyance by husband and wife together can do so

*Swartzbaugh v. Sampson*

- Can she stop the use of a small part of land of which she is co-owner
- Answer is no, law only gives her certain remedies:
  - Partition – why would she want to spilt up the trees? Dividing up the land makes no sense, would she even get the rental land- most likely not
  - Ouster- get better rent? Yes possible, gets ouster if he refused to allow her on the rental property- then get half the true value rental property, but this isn't what she wants either
  - Accounting- could do this, but so he owes her 300 dollars- doesn't help her either
- Remedies that she has are primarily for things outside the tenancy not issues within

## Landlord Tenant Law

### Different Landlord/Tenant Relationships

- Term of years: an estate that last for some fixed period of time or for a period computable by a formula that results in fixing calendar dates for beginning and ending, once the term is created or becomes possessory
- Periodic Tenancy: lease for a period of some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination. Under common law, half a year's notice is required to terminate a year-to-year tenancy
- Tenancy at will: tenancy of no fixed period that endures so long as both the landlord and tenant desire
- Tenancy at sufferance: arises when a tenant remains in possession (hold over) after termination of tenancy (i.e. there at the "sufferance" of the landlord
  - Two options: call the cops or receive a check (usually key point for decisions making for landlord is when they receive the check; if accept it acceptance of a periodic tenancy)
- Quiet Enjoyment: promise by the landlord that the tenant will not be bothered by interference by the landlord or third party (constructive eviction goes hand in hand with this)
- Privity of estate: original conveyance of land- transfer of interest in land creates privity between parties involved
- Privity of Contract: exchanging promises rather than land

### \*\* Michigan's Notice Law: 554.134

Different than the common law, says all estates by will or sufferance must give thirty days notice and in MI when you give your thirty day notice it is effective

on the thirtieth day- year to year, any notice must be given in one year advance notice, effective at the end of the one year

## Lease Date

American Rule:

- 1- No Duty (legal possession rather than actual)
- 2- Landlord not responsible for third party
- 3- Tenancy should be self-reliant
- 4- Freedom to contract

English Rule:

- 1- duty exists
- 2- position of tenant
- 3- knowledge of landlord

## Tenant Defaults

- Need to practice judicial remedies (i.e. *Berg v. Wiley*; where he locked her out of the premises)
- Mitigation of damages- reasonable; how they treat all units (i.e. *Riverview Realty Co. v. Perosio*)

## Duties and Rights

- Constructive Eviction: a landlord's act of making premises unfit for occupancy, of with the result that the tenant is compelled to leave
- Implied Warranty of Habitability: in the rental of any residential dwelling unit an implied warranty exists in the lease, whether oral or written, that the landlord will deliver over and maintain, throughout the period of tenancy, premises that are safe, clean and fit for human habitation (tenants must notify the land owner and allow reasonable time for its correction; must have an impact on safety)

*Reste Realty Corp. v. Cooper*

- "Crucial question, whether the landlord was guilty of a breach of covenant which justified the tenant's removal from the premises on Dec. 30, 196"—held there was such a breach
- Ordinarily a covenant of "quiet enjoyment is implied in a lease"
- Lease contained an express covenant however
- Where such a covenant exists courts have applied the doctrine of "constructive eviction" as a remedy for the tenant
- "if it's (water) recurrence follows regularly upon rainstorms and is sufficiently serious in extent to amount to a substantial interference

with use and enjoyment of the premises for the purpose of the lease, the test for constructive eviction has been met”

- “Would continue and probably worsen if not remedied... There was no obligation on the tenant to remedy it”
- “To alleviate tenant’s burden, the court’s broadened the scope of the long-recognized implied covenant of quiet enjoyment to include the right of the tenant to have the beneficial enjoyment and use of the premises for the agreed term”
- right of constructive eviction must be utilized within a reasonable time – which depends on the circumstance of each case

## The Land Transaction

### Terms

- Deed: transfers title
- Sales Contract: get what is affixed to the property, need to clearly identify the property
  - Initial earnest- money given up front, shows a sign of capacity, makes the seller feel more assured about making the sell
  - Closing of the contract is when the deed and money switch, usually involves a third party
  - Possession- transfer of title may not coincide with possession- on average person does not move in until after the closing date and transfer of deed
  - Inspection- reserved right to go in and make sure everything is in compliance
  - Attorney Review- clause that gives seller/buyer opportunity to have lawyer review contract- in MI is not required to have an attorney involved
- Broker: fiduciary duty: to act on the best behalf of the buyer, at the best price based on knowledge at the time
- Risk of Loss: from the time of the contract of sale of real estate the burden of loss is on the purchaser; even though the seller retains possession
- Mortgage: (security if you don’t pay) a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms
  - Deficiency: amount still owed when the property secured by a mortgage is sold at a foreclosure sale for less than the outstanding debt- especially the shortfall between the

- proceeds from a foreclosure sale an amount consisting of the principle debt plus interests plus the foreclosure cost
- Right of Redemption: at common law idea was that the court was trying to give someone time to catch up even though they were in default

### *Murphy v. Fin*

- Bank wanted to foreclose, put the house up for sale at auction
- P tried to get foreclosure postponed- bank refused
- Foreclosure sell was day after a big storm, lenders representative placed a bid on the house for 27,000- house was valued at more than that
- P argued that the lenders had failed to exercise good faith and due diligence in finding a sale price
- Court ruled that they had not acted in due diligence and were only concerned with them making themselves whole
- Damages was not market value, rather fair value i.e. difference between what was paid and what should have been paid

### Statute of Frauds

- To satisfy the statute of frauds a memorandum of sale must, at a minimum, be signed by the party to be bound, describe the real estate, and state the price
  - If no price was agreed upon, a court may imply an agreement to pay a reasonable price
  - Agreement is not enforceable unless the parties refer to price and indicate the method they intend to use in fixing it
- Exceptions:
  - Part Performance: allows the specific enforcement of oral agreements when particular acts have been performed by one of the parties to the agreement
  - Estoppel: applies when unconscionable injury would result from denying enforcement of the oral contract after one party has been induced by the other seriously to change his position in reliance on the contract. May also apply when unjust enrichment would result if a party who has received the benefits of the other's performance were allowed to rely upon the statute

### *Hickey v. Green*

- Hickey and his wife agreed to purchase a Lot from Mrs. Green- "orally agreed"
- Wrote Mrs. Green a check for \$500 as a deposit, then the Hickey's put their house on the market and took a down payment on it

- Then Mrs. Green refuse to sell the house to the Hickeys because had received another offer, Greens sued seeking specific performance
- Mrs. Green argued that the agreement was not enforceable because of the statute of frauds; however reliance can act as an exception
- “There can be no doubt (a) that Mrs. Green made the promise on which the Hickeys so promptly relied, and also (b) she, nearly as promptly, but not promptly enough, repudiated it because she had a better opportunity. The stipulated facts require the conclusion that in equity Mrs. Green’s conduct cannot be condoned”

### Marketable Title

A title not subject to such reasonable doubt as would create a just apprehension of its validity in the mind of a reasonable, prudent and intelligent person, one which such persons, guided by competent legal advice, would be willing to talk and would be wiling to pay fair value.

## Deed

### Warranties of Title

- **General Warranty of Deed:** warrants title against all defects in title, whether they arose before or after the grantor took title (all defects)
- **Special Warranty of Deed:** contains warranties only against the grantor’s own acts but not the acts of others (only against acts of the grantor)
- **Quitclaim Deed:** contains no warranties of any kind (no warranty)
- **Description of Tract:** deed must contain a description of the parcel of land conveyed that located that parcel by describing it’s boundaries. Methods of description include: reference by natural/artificial monuments and from the starting point, referencing to directions and distance; reference to a government survey; reference to the street and number or the name of the property
- **Forgery and Fraud:** a forged deed is void. Grantor whose signature is forged to a deed prevails over all persons, including subsequent bona fide purchasers. However, a deed procured by fraud is voidable by the grantor in an action against the grantee, but a subsequent bona fide purchaser from the grantee who is unaware of the fraud prevails over the grantor.
- **Delivery of Deed:** must be delivered with the intent that it be presently operative

## Title Assurance

### Recording System

- Grantee-grantor index: an index, usu. kept in the county clerk's or recorder's office, alphabetically listing by grantee the volume and page number of the grantee's recorded property transactions
- Grantor-grantee index: an index, " ", alphabetically listing by grantor the volume and page number of the grantor's recorded property transactions
- Chain of Title: the Golden Search Rule (sequence of documents that you are required to have notice of determinable by the rules of the state)
  - Search the grantor index for each person in the chain of title, under his/her name, from the date of delivery of the deed to that person (date in) until the date of recording of the first conveyance from that person, of all of his/her interests
  - Winner at common law, presume they are the winner unless they are protected by the recording acts
  - In MI have to go back at least 40 years
  - Root of Title: starting point, oldest document and paper you have to deal with
  - \*\*\*\*\* See Index Searching Chart
- Description by Government Survey
  - First surveyed into rectangular tracts by running parallel lines north and south and crossing them at right angles
  - Principal/Prime Meridian- the first north and south line established for any surveys areas was a true meridian
  - Range lines- lines running parallel to the principle- six miles apart
  - Base line- one for each principle runs east and west on a true parallel of latitude
  - Township lines- run parallel to base line

### *Luthi v. Evans*

- Controversy on this appeal is between Tours and Burris over ownership of what had previously been Own's interest in the Kufahl lease
- Issue presented is whether or not the recording of an instrument of conveyance which uses a "Mother Hubbard" clause to describe the property conveyed, constitutes a constructive notice to a subsequent purchaser

- Mother Hubbard clause: A provision in an oil-and-gas lease protecting the lessee against errors in the description of the property by providing that the lease covers all the land owned by the lessor in the area.
- Such a transfer is not sufficient unless subsequent purchasers and mortgagees have actual knowledge of the transfer

*Orr v. Byers*

- Orr obtained a judgment against William Elliot, written judgment identified Elliott erroneously
- Elliot thereafter obtained title to a parcel of property which became subject to Orr's judgment lien, but when Elliot sold that property a title search failed to disclose the abstract judgment
- Orr argued that a title searcher be charged with the knowledge of such alternative spelling under the established doctrine of idem sonans (doctrine that though a person's name has been inaccurately written, the identity of such person will be presumed from the similarity of sounds between the correct pronunciation and the pronunciation that is written)
- Idem sonans remains viable for purposes of identification, but it has not been applied in this state to give constructive notice to good faith purchasers
- Burden is properly on the judgment creditor to take appropriate action to ensure the judgment lien will be satisfied

### Types of Recording Acts

- Race statute: earliest type of recording act, as between successive purchasers of Black Acre, the person who wins the race to record prevails
- Notice statute: if subsequent purchaser has notice of a prior unrecorded instrument, the purchaser cannot prevail over the prior grantee- protects a subsequent purchaser against prior unrecorded instruments even though the subsequent purchaser fails to record.
- Bona fide purchaser: pay value without knowledge, cannot have knowledge of outstanding interest on the land
- \*\*\* See Class 30 Problems

*Messersmith v. Smith*

- Not a majority rule
- Issue: Whether a subsequent buyers' deed prevails over a prior unrecorded valid and effective conveyance when the subsequent purchasers conveyance was never acknowledged in fact and therefore was not entitled to be recorded under the statutory requirements



- Conveyed to Smith mineral deed containing a warranty of title, an undivided one-half interest in and to all oil, gas, and other minerals
- After had conveyed a quitclaim of deed to Messersmith
- “General rule that the recording of an instrument affecting the title to real estate which does not meet the statutory requirements of the recording laws affords no constructive notice”
- “did not appear before the notary and acknowledge that she executed the deed that was recorded, In the absence of the fact of acknowledgment the deed was not entitled to be recorded, regardless of the recital in the certificate. The deed not being entitled to be recorded, the record thereof did not constitute notice of its execution”
- “we are here dealing with a prior unrecorded valid and effective conveyance that is challenged by a subsequent purchaser to whom not title was conveyed and who claims that the recording laws vest title in him by virtue of a deed that was not acknowledged in fact and therefore not entitled to be placed of record”

## Easements

- To physically own a piece of land mean to be able to exclude others from its, most important attribute of property ownership
- Fundamental idea: A is given the right to enter upon B’s land
- Creation of Easements: express, implied, prescription (which is like adverse possession but does not have to be exclusive)
- Quasi easement: implied from pre-existing use
- Easement by necessity- more difficult burden to meet because use did not exist before diversion of two separate parcels and there is nothing in writing
- Release: formally gives back easement
- Expiration
- Merger: when lots comes back together, easement disappears
- Abandonment: disuse is not sufficient

### *Van Sandt v. Royster*

- City put in a main sewer line in the road
- Pipe goes across Van Sandt’s land
- Van Sandt found basement flooded, seeks to enjoin Royster from using the sewer drains
- Overlying question is there an easement?
- Easement of necessity? Burden on the D to show that the use is necessary, that it was a prior existing use, and must show that burdened party had notice

- Use of the easement- sewer drain- has to be necessary for the enjoyment of the use of the property of the D's

*Brown v. Voss (scope of easements)*

- What extent, if any, the holder of a private road easement can traverse the servient estate to reach not only the original dominant estate, but a subsequently acquired parcel when those two combined parcels are used in such a way that there is no increase in the burden on the servient estate?
- Easement in this case was created by express grant- extent of the right then is to be determined from the terms of the grant properly construed to give effect to the intention of the parties
- **General rule: easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant – an extension thereof to other parcels is a misuse of the easement**
- Dissenting Opinion:
  - Were entitled to injunctive relief
  - Brown's use of the easement would involve continuing trespass for which the damages would be difficult to measure- injunctive relief is appropriate remedy
  - Browns are responsible for the hardship of creating a landlocked parcel
  - They knew or should have known from the public records that the easement was no appurtenant to parcel
  - Benefit of balancing the equities is reserved for the innocent defendant who proceeds without knowledge or warning that his structure encroaches upon another's property or property rights

*Preseault v. United States (termination of easements)*

- In prior litigation Preseault's (the owners of the underlying fee simple) had filed suit that the Rails to Trails act was unconstitutional
- Now file claiming that the federal government took their property when it authorized the conversion of the former railroad right-of-way to public trail use.
- Issue: whether the conversion, under the authority of the Rails-to-Trails Act and by order of the interstate commerce commission, of a long unused railroad right of way to a public recreational hiking and biking trail constituted a taking of the property of the owners of the underlying fee simple estate?
- Determinative issues: (1) who owned the strip of land involved (i.e. did the railroad by the 1899 transfers receive only easements or obtain fee simple estates? (2) if the railroad acquired only easements,

were the terms of the easements limited to use for railroad purposes, or did they include future use as public recreational trails? (3) even if the grants of the railroad's easement were broad enough to encompass recreational trails, had these easements terminated prior to the alleged taking so that the property owners at that time held fee simples unencumbered by the easements?

- Railroad had acquired easements
- **Scope of easements: may be adjusted in the face of changing times to serve the original purpose, so long as the change is consistent with the terms of the original grant → here could not have foreseen this development of a nature trail**
- *Abandonment*: in order to establish there must be in addition to nonuser, acts by the owner of the dominant tenement conclusively and unequivocally manifesting either a present intent to relinquish the easement or a purpose inconsistent with its future existence

## Covenants

### Terms

- Real Covenant: a promise respecting the use of land that runs with the land at law (must be expressly created by a written instrument signed by the covenantor, must show intention to bind subsequent parties, must be a promise that touches concerns of the land itself, must be privity of estate, must have notice of the chain of title)
- Horizontal privity: meaning of privity of estate between the original covenanting parties (document that creates the covenant)
- Vertical Privity: meaning privity of estate between one of the covenanting parties and a successor in interest (line of subsequent owners of the respective sides of the argument) – what kind of conveyance will support burden- as to the burden have to have a conveyance of all the grantor's interest, as to the benefit any transfer of a possessory estate will do
- Equitable Servitude: is a covenant respecting the use of land enforceable against successor owners or possessors in equity regardless of its enforceability at law (interest in land that can be implied in equity within certain limited circumstances) horizontal and vertical privity don't matter, but notice does- has to be in writing somewhere, scope depend on the state that you are in
- HOA: is the rule of reasonableness, if so it is enforceable

*Sanborn v. McLean*

- Owned property in a subdivision- attempted to build a gasoline filling station of their lot
- Neighbors filed claim that the station would be a nuisance per se and was in violation of general plan fixed for use of all lots on the street for residence purposes
- D claimed that no restriction appeared on their chain they purchased without notice of any reciprocal negative easements
- “Restriction were upon defendant’s lot while it was in the hands of the common owners, and abstract of title to D’s lot showed the common owners and the record showed deeds of lots in the plat restricted to perfect and carry out the general plan and resulting in a reciprocal negative easement upon D’s lot and all lots within it scope and D’s and their predecessors in title were bound by constructive notice under our recording acts”
- The character or the lots and their use when Mr. McLean purchased should have lead him to inquire beyond his grantor whether their was restrictions
- Why not a legal covenant
- What constitutes notice of the covenants
- And burden of the covenants

*Shelley v. Kraemer (validity of covenants)*

- Public policy issues- can use legal mechanisms of covenants in a deed to do more than deal with land use- can deal with social preference issues
- 14<sup>th</sup> Amendment only applies to state action, question was could individuals agree amongst themselves on these covenants
- but courts enforcing these type of covenants constituted state action, this court says they couldn’t be upheld

*Western Land Co. v. Truskolaski*

- P brought action to enjoin the construction of a shopping center because their was a covenant which restricted the use to single-family dwellings
- Builder argued that there had been changes within the subdivision that rendered the covenants nullified- one of the significant changes was the increase in traffic in surrounding areas
- Local government cannot take away a private promise (can zone however they want, but if private promise with interest created, can not take away)
- Do not look outside the subdivision for change

*Risk v. West*

- P subdivided a lot and sold to the other P’s, his assignees
- Can force one owner out when they are relying on covenant

- Test: only upon evidence of a substantial change to condition of the development that would render the covenant not useful

*Pocono Springs Civic Association, Inc. MacKenzie*

- Trying to get out of their home owners association fees
- Tried to give back to association, refused
- Quit paying property taxes
- Weren't accepting mail from that address
- Association sued when stopped paying fees
- Cannot abandoned a piece of real property – has to be transferred

## Zoning

- Zoning- the legislative division of a region, esp. a municipality, into separate districts with different regulations within the districts for land use, building size and the like.
- Constant tension between state and self
- Non-conforming uses: dreams of development do not create legal rights, government is however limited when there has been substantial progress and vestment
- Variance: special exceptions to the terms of the ordinance in harmony with its general purpose or intent
- Personal hardship v. Land hardship- importance to the individual does not necessarily dictate the outcome
- Blighted- so run down to be approaching a health and safety problem
- Eminent Domain: the inherent power of a governmental entity to taking privately owned property, especially land, and convert it to public use, subject to reasonable compensation for the taking

*PA Northwestern Distributors Inc. v. Zoning Hearing Board*

- Store opened
- Next day a zoning issue was voted upon
- New ordinance said that they had a 90 day grace period to comply with new zoning ordinances
- Legal issue: whether a zoning ordinance which requires the amortization and discontinuance of a lawful preexisting non-conforming use is confiscatory and violative of the constitution as a taking of property without compensation
- Minority opinion
- Majority opinion is reasonable test: “each case in this class must be determined on its own facts; and the answer to the question of

whether the provision is reasonable must be decided by observing its impact upon the property under consideration..." see pg. 946

*State ex. rel Stoyanoff v. Berkeley (aesthetic regulation)*

- Issue: that restrictions placed by the ordinances on the use of property deprive the owners of their property without due process of law
- Plans and specifications were submitted for the proposed residence which was unusual in design but complied with all existing building and zoning regulations
- Question: can city restrict the design based on it affecting the property value of the surrounding area? Yes
- General welfare issue/ economical value

*Anderson v. City of Issaquah*

- Guy wants to put in a commercial building, administrative committee says building must match the façade of the surrounding area
- Changes the building design
- Statue was too vague- administrative committee needs to know what to do
- Court found it to be unconstitutional
- Has to be more concrete standards

*Kelo v. City of New London (eminent domain)*

- City in an economic downtown
- City unemployment rate twice that of the state
- Was it considered to be blighted? NO
- Number of organizations came together to create a development organization, came up with an ambitious re-development program (wanted to bring Pfizer in, as well as adding some other commercial impacts on the area)
- There are 9 petitioners and 15 properties that refuse to give their land up
- Claimed that taking the land would violate the "public use" restriction in the 5<sup>th</sup> Amendment
- Public Use: public ownership (i.e. post offices, prisons) or private ownership with public use and public regulation
- Here want to take private land; to give to private organizations for public benefit- does this pass constitutional muster?
- Taking was rationally related to a conceivable public purpose

*Loretto v. Teleprompter Mannhattans CATV Corp.*

- Cable companies use to be monopoly business within cities
- Bought the building without knowledge of the cables attached to it

- Brought suit for money
- Long standing law that permanent standing occupation consisted of taking
- Government given easement in effect, with landlords saying that they should be paid compensation for it

*Hadacheck v. Sebastian*

- Had a brick yard (imprisoned for violating the ordinance, cause of action was a writ of habeas corpus)
- Was ordinance passed prohibiting any brick yard in the city limits
- Brick yard was originally established outside the city limits, did not expect to be annexed
- Claimed that it would be huge loss of profit to only use for residential purposes, have to make bricks where there are materials (cheapest way to do it) and was not a nuisance to the residents
- Not a zoning ordinance but a nuisance ordinance
- Because the ordinance allowed him to remove his clay but not to make bricks the court ruled that there was no taking

*PA Coal Co. v. Mahon*

- Purchased land, only had surface rights
- A Company had the right to mine coal under it
- Mining so much that they were causing problems with the foundation
- Homeowners were seeking to enforce the state statute
- Diminution of value has to be a whole lot
- Voided the Kohler Act because it went to far, it destroyed the economic viability of PA Coal's property, the underground coal the Kohler Act required to be left in place

*Palazzolo v. Rhode Island*

- Owned beach front property
- Sale water marsh
- Because could still build a large residence on the property, the state had not deprived him of all economical viability

*Nollan v. CA Coastal Commission*

- Leased property, structure on it was run down and had agreed to build a new one
- Submitted a development to the CA Coastal Commission (state level zoning board)
- Proposal conformed to the other houses in the neighborhood- would approve if they gave a public easement on the beach
- Is this a taking that requires just compensation?
- Could have taken it in eminent domain, but couldn't take the easement without paying for it
- Were trying to expand what the public was already allowed to use

- Argument that it deals with aesthetic access and view
- Within the scope of police power because of beach importance in CA- but it was not rationally related to the scope of police
- Ruled that if they want the are they had to pay for it, had to issue the permit without the easement

*Dolan v. City of Tigard*

- City conditioned approval on improvable of traffic
- What is the connection between the proposed plans and the conditions imposed
- Was required to dedicate a portion of the property to improvement of the storm drainage system and to a pedestrian walkway which the city would bear the cost of upkeep
- How hard of a test were they going to impose on the city?
- Could restrict it as a flood plane, could not take the park easement without payment