

## THE CONCEPT OF PROPERTY

**WHAT IS PROPERTY?** - Legally-enforceable rights among people concerning things but not ownership of the thing itself

- **Property is a “Bundle of Sticks”**
  1. The Right to Transfer
  2. The Right to Exclude
  3. The Right to Use
  4. The Right to Destroy
- **Fundamentals**
  - Property rights are not absolute
  - Property rights can be divided (i.e. might only have some sticks)
  - Property rights evolve as law changes
  - Patent law rights (4) - Patent holder has 1) right to prevent others from making, 2) using, 3) offering to sell, or 4) selling any patented invention

**RIGHT TO TRANSFER** - Right to alienate one’s own property to anyone, promotes its efficient use

- **Restrictions:**
  - Indian tribes can only transfer land to US Government, or merely have right to occupy or possess land and NOT transfer.
  - Body organs, cells, cannot be subject to conversion for proprietary benefit
  - Insane people cannot transfer or obtain property
  - Some property may be given away but not sold (e.g. cornea of eye)
  - Law provides HOW property may be transferred / to avoid fraud
    - Property of dead people must be written, signed by owner and appropriately witnessed by two people
- **Moore** - Moore could have made an agreement to transfer his cells while they were still attached to body, but after removal, he lost any property interest in the cells he had. Moore still needed to give consent but Right to Transfer for proprietary benefit is still prohibited
  - Uniform Anatomical Gift Act - allows gifting cells, organs but not sales
- **DISCOVERY** - discovery establishes a unique right to possess an unclaimed thing; discovery doesn’t necessarily mean that you have taken possession.
  - **Rules:**
    - Nemo dat - One can only transfer property that one owns; Once you transferred the property, it’s gone
    - Sovereign Title: Dominion - established by discovery/conquest, trumps right to occupancy
    - Occupancy - possession
    - Labor Theory of Value - Possession through use and labor - did the person do anything with the property to take actual possession of it
  - **Pedis Possession** - Someone who is exploring *diligently and in good faith* for minerals has the exclusive right to work a given spot even before he makes a discovery or acquires a mineral claim establishing formal rights against the government and third parties.

- ***M'Intosh*** - Two chains of title poses a problem - 1) US as conqueror of land and US Courts as court of the conqueror will only acknowledge US right to transfer and not 2) Indian's chain of title / right to transfer title of land when it is incompatible with US' exclusive title. Thus, Indians are mere occupiers, possessors of land and do not have Right to Transfer title despite the chain of ownership.
  - ***Prior payment*** - US bestowed ample payment to Indians by giving civilization and Christianity onto them
  - ***Abandonment*** - as the white population advanced, that of the Indians necessarily receded
  - ***Undue delay in claiming title*** - if property of great mass of the community originates in it, it becomes law of the land

**RIGHT TO EXCLUDE** - Owner has broad right to exclude any other person from his property (deviates from Traditional English common law view that provided much of agricultural land in England was held in a form of common ownership.

- **Cause of Action (Tort)**
  - Intent to enter land, or cause a thing or third person to do so
- **Exceptions to Right to Exclude**
  - ***Consent***
  - ***Necessity*** - e.g. police officer trespassing in hot pursuit, forced landing of plane onto someone's property.
  - ***Landlord/Tenant Law*** - Tenants can consent to visitors without LL/owner's consent
  - ***Utilitarian Balancing*** - Social policy interest outweighs property right to exclude interest
  - ***Implied Statutory Right to Access*** - Property owner cannot interfere with statutory right of a non-profit, governmental organization's right to access property in order to fulfill organization's statutorily recognized goal.
  - ***Constitutional Arguments*** - Company owned towns, malls, may not infringe Constitutional right of free speech even with the general right to exclude as a business
- **Why Recognize Right to Exclude?**
  - Trespassers may interfere with efficient use of one's land
  - No incentive to own land when it can easily be overtaken by someone else
- ***Jacque*** - Mobile home company delivers mobile home across P's property against their express wishes, no physical harm to property but P still recovers damages. Trespass alone, even without damages, is enough damage itself to support a recovery. 1) D intentionally went against P's wishes/Right to Exclude. 2) Was not a necessity for D to take that delivery route.
- ***Shack*** - Implied statutory right of access and utilitarian balancing permits court to restrict owner's Right to Exclude.
  - D's non-profit status gave him statutory right to serve the migrant workers' interests who resided on owner's land.
  - Migrant workers were entitled to legitimate protection of their economic, political power in an otherwise rootless group of isolated migrant workers.
  - ***Fair Adjustment of the Competing Needs of the Parties" Test***: If access to the land helps the migrant workers and does not harm the owner, fair reason to allow person onto land.

If it neither helps nor hurts the migrant workers or the owner then no reason to allow person onto land. If it helps workers but harms land owner's rights then no reason to allow person onto land.

**RIGHT TO USE** - Landowner has right to use property in any way he wishes- as long as it doesn't harm the rights of others

- **Exceptions to Right to Use**
  - **Private Nuisance Elements**
    1. *Intentional*
    2. *Non-trespassory* - no crossing physical boundaries necessary
    3. *Unreasonable* - gravity of the harm of the nuisance outweighs the utility of the actor's conduct
    4. *Substantial Interference with* (e.g. affects one's property value)
    5. *The Use and Enjoyment of the P's Land*
  - **Local Ordinance, Zoning Statutes**
  - **Split Fence Doctrine**
    - *Objective, Commercially Reasonable Standard* - to determine if the structure serves no purpose other than disrupting someone else's use of their property
    - *Role of Intent* - is the sole purpose of one's intent in installing an extra large structure solely to spite their neighbor? (not every court uses intent as factor)
    - *Structure is Otherwise Useless Than to Spite Neighbor* - Doctrine is not applied if there is *some* productive use of the structure. (e.g. trees not applicable to doctrine, environmentally useful)
- ***Sundowner***: Abnormally large fence/structure that serves no apparent useful purpose to owners and is erected because of ill-will toward neighbor or competitor, is not a protected right to use property. Structure was 18ft tall, 85ft in length, obscured competitor's building and restricted light, air to its rooms (used to spite competitor). Additionally the sign had no real advertising purpose, and bigger than any "sign" in several state (objective commercial standard)
- ***Prah***: P's interest was unobstructed light to provide his solar panel with energy. D's interest was the development of his land he purchased adjacent to P and satisfies local ordinances, and claims he doesn't need to concern self with P's wishes in his right to use his own property.
  - Utilitarian interest for renewable energy development, not merely an aesthetic interest but investment for alternative energy.
  - "Unreasonable" prong of Private Nuisance Doctrine - D's construction of property was an unreasonable obstruction of access to sunlight, it will not prevent D's land development or unduly hinder D's land to respect that

**WHY RECOGNIZE PROPERTY** - Five theories

1. **Protect First Possession**
  - Who had it first? "First come first serve" justifies theory
2. **Encourage Labor**

- Acquiring property through one's labor (i.e. B's labor into a tree becomes intertwined with his ownership)
- 3. Maximise Societal Happiness**
  - Allocating valuable resources in order to maximize one particular facet of social happiness - wealth. *Economic efficiency* is a public good.
  - Three essential components to reach full economic potential:
    - *Universality* - all valuable, scarce resources must be owned by someone
    - *Exclusivity* - owner of property must have exclusive right to do something to benefit their right
    - *Transferability* - since exclusivity in property exists, in order for trade to prosper, there must be availability to transfer property rights.
- 4. Civic Republican Theory - Ensure Democracy**
  - If there are no property rights, the citizen is dependant on government officials to provide for them and therefore right to private property is a necessary basis for democracy.
  - *Contemporary perspective* - Farming is not key to prosper in society anymore, but giving each person a "stake in society" through property ownership still provides political and social benefits to all.
- 5. Personhood - Facilitate Personal Development**
  - Tangible things (i.e. property) are necessary for individual's personal development
  - Right to personhood property should be given priority over non-personhood property
    - e.g. a tenant's right to apt should be viewed as personhood and LL's stake is more of a non-personhood investment
  - **Pierson v. Post - Rights Arising out of Possession and Capture**
    - *Rule of Capture* - One must deprive fox of its liberty. First to occupy (possess the fox) and deprive it of its liberty has right to possess fox.
    - Pursuit of animals ferae naturae (unowned animals) without wounding it severely, circumvented or ensnared them, as to deprive them of their natural liberty and subject them to control of pursuer, should not afford basis of ownership or occupancy of fox

**CREATION OF A PROPERTY RIGHT** - Protects people who create an entirely new thing, such as an invention, book or song

- **Right of Publicity - Elements of a Claim**
  - D's use of P's identity
  - The appropriation of P's name or likeness to D's advantage, commercially or otherwise
  - Lack of consent, AND
  - Resulting injury
- **White v. Samsung Electronics America, Inc.** - Vanna White was featured in Samsung's ad to promote their product, as a blond robot next to a Wheel of Fortune-like board without consenting to Samsung. The court reversed TC's holding that ad did not satisfy "appropriation of P's name or likeness" prong because Samsung used a mere "caricature" of a Vanna-like figure.
  - Appeals court found that appropriation of P's identity, by impersonation that exploits their identity commercially, is an invasion of their right whether or not "name or likeness" is used. D's actions implicate comm. interest of right to publicity, whether they

avoided the most obvious ref. to Vanna or not. If court did not recognize this right of P, then law would fail to protect P and their protection of their right to promote own product

- Section 3344 statute in dispute: “Any person knowingly using another’s name, voice, signature, photo, likeness in any matter for purposes of advertising or selling without such person’s prior consent shall be liable for any damages sustained by person(s) injured as a result thereof”

- **First Amendment Arguments**

- *First Amendment*: Right to publicity draws away from public domain and can restrict creativity. Some will argue the effect of limiting right of publicity in a single case is negligible and significantly outweighed by society’s interest in freedom of artistic expression

## OWNING PROPERTY

**OWNING PROPERTY** - Two broad categories

- **Real Property** - Rights in land and things attached to land (e.g. buildings, fences, trees)
- **Personal Property**
  - *Tangible Things* (e.g. chairs, pens, computers, moveable things)
  - *Intangible Things* (e.g. patents, shares of stock)

**ACQUISITION OF REAL PROPERTY:**

- **Adverse Possession** - Required Elements:
  1. **Open and Notorious Possession**
    - Claimant’s possession must be visible and obvious, so if owner inspects land they would know adverse claim occurred (e.g. posting signs, clearing brush, cultivating crops, construction of fences, structures)
  2. **Continuous for Required Period**
    - Claimant’s possession *must be continuous as a reasonable owner’s would be*, given the character, location, and nature of land (e.g. sporadic uses of wild lands can still be sufficiently continuous)
  3. **Exclusive Possession**
    - Claimant’s possession must not be shared with owner, a third party, public in general
  4. **Actual Possession**
    - Claimant must physically use land in same manner that reasonable owner would, given character, location and nature of property (e.g. gathering firewood, cutting small amounts of timber, grazing cattle, removing minerals)
    - Some states say recreational use alone is not sufficient
  5. **Non-Permission**
    - Subjective: Some states require “claim of right”, or that claimant must believe in “good faith” that he owns land, but in most states claimant’s state of mind is irrelevant

- Objective: (Majority): Owner cannot consent to adverse possessor's use of land, must be adverse and hostile
- 6. For the Statutory Period
  - State statutory periods in AP range from 5-40 years (typically 10, 15, 20 years)
- **Purposes of Adverse Possession:**
  - Preventing Frivolous Claims and Security of Title
  - Correcting Title Defects - Errors might exist in deed descriptions, lengthy possession is proof of title
  - Encouraging Development - reallocates title from an idle owner to industrious squatter, promotes economically productive development
  - Protecting Personhood - A thing you have enjoyed, used for a long time, is rooted in your being
- **Adverse Possession Causes of Action:**
  - Quiet Title Action - Lawsuit brought by Claimant to establish title to a land. Typically, P sues all persons who claim any right, title or interest in land and court issues judgment that resolves controversy
    - ***Judicial action, however, is NOT REQUIRED for Adverse Possessor to obtain title***
  - Tacking Doctrine - Two or more successive occupants may be added together to meet statutory period for AP (e.g. G occupies owner's land for 3 years, H occupies for the next 8 years = 11 years and may obtain title, assuming it meets statutory provision.
    - Must have privity:
      - from deed
      - quitclaim deed or
      - the previous owner mistakenly not including prop in deed
- **Howard** - Same land was deeded to two different parties; one party used the land seasonally (they thought it was theirs but it was actually deeded to other party) and the other party never used the land.
  - Tacking from previous owners is permitted if it was intended to be in the deed and mistakenly omitted from the description, no further need of privity
  - Seasonal Occupancy- Sufficient If the land is occupied during a period of time during the year it is capable of use. Reasonable person standard of use. Ds used land for 10 successive Summers, including predecessor occupiers.

## **ACQUISITION OF PERSONAL PROPERTY:**

- **Capture**
  - Pierson v. Post
    - Rule of Capture - One must deprive fox of its liberty. First to occupy (possess the fox) and deprive it of its liberty has right to possess fox.
    - Pursuit of animals ferae naturae (unowned animals) without wounding it severely, circumvented or ensnared them, as to deprive them of their natural liberty and subject them to control of pursuer, should not afford basis of ownership or occupancy of fox

- **Finders** - Four Categories
  - Lost Property
  - Mislaid Property
  - Abandoned Property
  - Treasure Trove
- **Gifts**
  - During life, inter vivos
    - Typical gift, transferred
  - After death, causa mortis
    - Revoked upon death
  - Main analysis: is the gift valid?
- **Creation**
  - Copyright
  - Patents
  - Trademarks

**FINDERS (A.K.A. BAILEE)** - Finder has a right of possession *but not unqualified ownership*

- **Finder has a) clean hands (obtained thing legally) and b) took actual possession**
- **Found Chattels - Four categories**
  - Lost
    - Owner unintentionally, involuntarily parted with thing
    - Finder becomes bailee, only has to give up property right to possess to the true owner if found
  - Mislaid
    - Owner voluntarily and knowingly places it somewhere but unintentionally forgets it
    - Owner of the locus quo or property/premises owner gets possession and not the finder.
  - Abandoned
    - Owner knowingly relinquishes all right, title and interest to the thing
    - Abandoned chattel becomes property of first finder and becomes true owner
    - Analysis:
      - Low value items (likely to be abandoned) v. high value (not likely)
    - Salvage law:
      - Provides finder with a reward (abandoned shipwrecks underwater)
  - Treasure Trove
    - Owner concealed it in a hidden location long ago
    - Typically limited to gold, silver, coins, currency
    - Treasure becomes finder's unless rightful owner claims it
      - Judge may decide between two parties (in a trover action) who gets it, if parted again, it can become another finder's possession
      - Thief still gets property right over someone who potentially takes stolen property from him

- Subsequent possessor's full payment to finder (ie. if sweeper boy took money from goldsmith on his treasure instead of keeping it) bars later action by true owner against the possessor (but true owner may compel successful finder to transfer the payment itself to him)
- **Bailee - Obligations**
  - Keep the chattel safe
  - Return it to the prior possessor on demand
- **Bailments - Three types**
  - Mutual Benefit
    - Bailee has duty to take reasonable care of the property (valet is liable for negligent driving that results in car damage)
  - Primary Benefit of the Bailee
    - Extraordinary care is required (e.g. borrowing friend's laptop, return it in the condition it was lent to them)
  - Primary Benefit of the Bailor
    - Bailee is only liable if property is damaged because of gross negligence or bad faith (e.g. neighbor watching a dog would be liable if he left it in the car on 100 degree F day)
- **Armory - (Treasure Trove)** Determining possession, competing claims is determined by who is the finder, possessor etc. Priority: 1. True owner (if known) 2. Finder/bailee 3. Present possessor. Prior possessor trumps subsequent possessor.
- **Hannah v. Peel (Lost Property)**- Peel owns a house but never moves in a soldier quartered therein finds a brooch and tries to claim ownership. Court gives judgment/value of brooch to Hannah (finder). Where a person has possession of a house or land, with manifest intention to exercise control over it and things which may be upon or in it, then, if something is found on that land, whether by an employee of owner or by stranger, the presumption is that possession of that thing is in the owner of the locus in quo. The brooch was "embedded" in the property that Peel owned but he was never physically in possession despite being a freeholder of the property.
- **McAvoy (Mislaid)**- Court finds that wallet was mislaid (left voluntarily but forgotten) because it was left on a table beside the barber. Shop owner has a duty to use reasonable care for safe keeping until owner of the thing should come and take possession of it again. Theory is that if someone mislays something (ie. intentionally leaves it but forgets it) they will go back to the shop where they think they might have lost it (ie. shop owners property)
- **Haslem (Abandoned property)** - One abandons something only if a reasonable time has passed since it is knowingly left there and based on the context, circumstances of the thing and location. Horse poop, on a public street, is likely a nuisance rather than a useful farming fertilizer so 24 hours is a reasonable time (but D took it even sooner).
- **Benjamin v. Linder Aviation (Mislaid)** - Money found in a wing on a plane- chances are money was left there intentionally. Court looks at place and manner in which money was hidden (bills were carefully tied, wrapped, concealed in a location that could only be dismantled by screwdrivers etc.) so it was found as "mislaid" and therefore owner of the plane's premises gets to keep money for safekeeping. Also, no finders fee for the finder because of its mislaid status.

## **GIFTS:**

- **Inter Vivos Gift - Elements**

- Donative Intent

- Focuses on state of mind of giver
- No contractual arrangement
- Conditional gift - may refute any donative intent

- Delivery

- Actual - manual, physical delivery
- Symbolic - not necessarily tangible thing, but perhaps writing or instrument of the gift (see: Gruen v. Gruen)
- Constructive - to give access to a thing (e.g. keys to a car)

- Acceptance

- Sometimes gifts are not accepted (e.g. excessive taxes on luxury item, nowhere to put or maintain item, item may have been illegally obtained)

- Irrevocable once transferred

- **Gruen v. Gruen** - Father wrote letters of intent to transfer rights to painting in the future but not presently. Mother argued there was no inter vivos delivery, so no inter vivos gift. Court stated that even though there was no delivery, it was symbolically delivered which is sufficient b/c it would be impractical to transfer the physical tangible thing when the future rights vested in Michael is symbolic.

- **Gift Causa Mortis - Elements**

- Donative Intent

- Delivery

- Acceptance

- Donor's Anticipation of Imminent Death

- State of mind question: Did the donor genuinely have fear of imminent death

- Effective when made

- Revocable before death

- Substitute for a will (but not popular with courts, bc lack of witnesses, does not have to be in writing and a high chance of fraud)

- *Colorado Rule*: Person has to die of thing in which they feared for Gift Causa Mortis to be effective (most courts are more lenient, bc this rule is fine line)

**INTELLECTUAL PROPERTY** - Non-tangible personal property; creations of the mind used in commerce; legal protections are available to encourage innovations; different types of intellectual property have different types of protection

- IP Premises

- Creation often requires considerable effort
- Intangible products often easier to copy than create (as opposed to real estate, for exp)
- Non-rivalrous - consumption by one consumer does not mean others cannot use too

- **Copyright - Protections Provided to...**

- Original works of authorship (lit, music, drama, choreo, visual arts, movies, sound recordings, comp programs, architecture...)
- Fixed in any tangible medium of expression
- In both published form and unpublished form
- No need to register - copyrights automatically imbued at the moment of fixation (registration does give a few additional rights when enforcing copyright, however)
- Rights - Owner of CR has exclusive right to...
  - Reproduce copyrighted work
  - To prepare derivative works (ie. sequels)
  - To perform the copyright work
  - Display the copyrighted work publicly
- Term: Life of the author plus 70 years / 120 years after creation for corps
- Restrictions on Copyright Rights:
  - Only prevents copying (not independent creation of identical work - unlike patent)
  - Only protects expression - not the idea
  - Protects the form of expression rather than subject matter of writing (ie. idea of a movie concept, Romeo and Juliet, star crossed lovers ,is not protected)
- Infringements - Royalties provided to original copyright owner
- First Amendment Defenses
  - Fair Use
  - Parody
- **Feist Publications, Inc.** - D copied work even down to P's intentional errors in a phone book (names in alphabetical order with phone numbers). No copyright infringement because no copyright (lacking originality). Names, phone numbers are FACTS and are not original. The only possible originality would be the arrangement and an alpha arrangement is not original but rather practical.
- **Patents**
- **Types:**
  - Utility - protects an apparatus, method or material (vast majority of patents)
    - 20 year term from date of filing
  - Plant - protects some types of plants
    - 20 year term from date of filing
  - Design - protects an ornamental design
    - 15 year term from issuance
  - Provision Application - placeholder
- **Rights:**
  - Negative Right - A patent is a right of an invention that permits an owner of patent to exclude others from:
    - making, using, or selling patented invention in the US
    - importing patented invention to US
  - Example: Jack invents pencil, Sophie invents eraser but as long as both hold the patents, jennifer cannot invent her pencil with an eraser

- **Patent Requirements:**
  - Patentable subject matter
  - Novelty
  - Utility
  - Enablement/Written Description
  - Non-obviousness
- **Infringement test** - Infringing use must embody **ALL** elements of claimed invention
- **Trade Secret** - Least formalized of the types of IP protection, often used as alternative to patent
  - No registration
  - No official gov. doc. memorializing secret
  - No set term
  - Wider scope of protection than patent
    - Manufacturing process, business method, chem formula, computer program (ie. a popular recipe for KFC, Coke etc.)
    - Customer lists, marketing strategy, financial data such as amounts paid by customers, pattern, design
    - If you can keep it a secret, then it can be a trade secret
- **Diamond** - New bacteria created by inserting a gene to break down oil into existing bacteria-living organisms are patentable. Anything under the sun, **made by man**, is patent eligible under subject matter.
- **Trademarks**
- **Rights**
  - Prevent use of confusingly similar mark by another party selling similar products but does not prevent use/sale of even an identical product or service under a different mark (e.g. Pioneer (Electronics) v. Pioneer (Seed)... identical products are for patents and copyrights)
- **Purpose**
  - To prevent customer confusion, to protect the customer
- **Protections provided to...**
  - Any word, name, symbol, device, or any combination thereof that is used by a party to indicate source of its goods and to identify and distinguish goods sold from one person to another
  - Word marks (e.g. Coca-Cola)
  - Non-word marks (e.g. curly Coca-Cola logo)
    - Trade Dress - Overall product design packaging (e.g. curvy contours of a Coca-Cola bottle)
    - Service Marks - Word, name, symbol or device used in connection with the service
    - Other, less conventional trademarks include Sounds (e.g. NBC chimes), Scents, Shapes, Holograms
- **Spectrum of Distinctiveness:**

- *Fanciful*
  - *ie. Reebok, Exxon*
- *Arbitrary*
- *Suggestive*
  - *ie. Home Depot, Coppertone*
- *Descriptive*
- *Generic*

***Inherently Distinctive***

***Acquired Distinctiveness / Secondary Meaning***

- *Successful company becomes so generic, risk of losing trademark rights*
  - *ie. escalator, Google, kleenex*

- **Process of Acquiring Trademark**

- Use a distinctive mark in commerce (TM)
  - Sell a product or service under a mark
  - Common law rights immediately apply
    - Valid ONLY in geographic area where product is sold
  - Register with PTO (circled 'R') and get Federal rights

- **First Amendment Defenses**

- Nominative Use
  - Generics use all the time - "compare to active ingredients in Advil"
- Parody - "Whole Foods, Whole Paycheck"

CONCURRENT OWNERSHIP AND MARITAL PROPERTY

**CONCURRENT OWNERSHIP-** Each co-owner or cotenant has the right to use and possess the entire property and not just a particular portion of it

- **Concurrent Estates - 3 Types**

- Tenancy in Common
- Joint Tenancy
- Tenancy by the Entirety (JT + Marriage)

- **Tenancy in Common**

- Default Tenancy
- Separate but undivided interest
  - Each party can sell, devise, etc. in own interest
  - Each party has right to use the entire property
- Divide profits, losses and obligations based on percentage of ownership

- **Joint Tenancy**

- Joint tenants in common with **right of survivorship** and not as TIC
- **Four Unities** - Required
  - Time - all tenants must acquire their interest at the same time
  - Title - they must acquire title by same instrument, unity of title must be from same deed
  - Interest - they must have same share in estate (ie. fee simple, determinable, etc, must match, and ***equal in duration but not necessarily equal fractional share***)

- Possession - must have equal right to possess, use, enjoy the whole property
  - Tenancy in Common Rights PLUS
    - Survivorship - at death, deceased owner's interest disappears and surviving owner's interest expand to take full ownership
    - If one party sells her share, JT is severed into tenancy in common
  - James v. Taylor - Grantor devised property to "jointly and severally..." in hologram will (written by deviser themselves); what result? Presumption is Tenancy in Common, but evidence looked at is the Grantor's intent and within the four corners of the document, will/deed.
- **Tenancy by the Entirety**
  - "As tenants by the entirety" is the express language
  - 4 Unities (from JT) PLUS co-owners must be married to each other at time of transfer (must re-transfer property to themselves to go from JT to TBTE)
  - Same rights as Joint Tenancy
  - Severance requires divorce or consent of both parties
- **Severance**
  - Tenhet - Does a lease by one co-owner destroy JT? Majority rule is NO. When no tenant expressly states their desire to terminate estate, and transfers a temporary, or term of years, lease, it contradicts court's aim to avoid ambiguity.
- **Partition**
  - If cotenants can't agree how to end cotenancy, sue for partition
    - Action for judicial termination of co-tenancy and distribution of assets
  - Three types:
    - Partition of kind (default) - divide land into smaller parcels
    - Partition by sale - sell land split proceeds
    - Partition by allotment (not all jurisdictions allow) - one person gets land but has to pay other co-owners
- **Rights and Duties of Cotenants**
  - Contribution - Action seeking reimbursements from co-tenants for expenses paid
  - Accounting - Action seeking to share rents or profits generated by property

### Rights and Duty of Co Tenants

|   |   |
|---|---|
| Obligation to share maintenance costs, aka carrying charges? (mortgage, taxes, insurance) | YES   |
| Obligation to share cost of necessary repairs   | NO<br>But once sold, co-tenant who paid get credit for \$ spent on repair       |
| Obligation to share cost of unnecessary improvement?                                      | NO<br>But once sold, co-tenant who paid gets credit for value added to property |
| Co-Ts share rent from 3rd party   | YES   |

|  |  |
|--|--|
| Co-T in possession pay rent to other Co-T? | Majority of States Say<br>NO<br>Unless there is ouster |
|--|--|

- **Ouster** - co-tenant in possession refuses to allow another co-tenant to occupy the property
  - E.G. A occupies Blackacre and prevents B from using it
    - A is an adverse possessor of B's interest once ouster happens.
      - If no ouster, A's sole possession does NOT start adverse possession clock
- **Sawada** - Is one's transfer of their real prop to sons, in anticipation of creditors taking it over suing in car accident dispute fraudulent or not when there is no consideration for the exchange? No. Creditors cannot attach property that is owned in TBTE. There is a public policy advantage to the real property being owned by the family instead of vulnerable to creditor interests. Creditors may do a title search and get parties to consent but cannot be free to attach TBTE owned property.
- **Hypo:** A leaves in her will a grant "to C for life" of her interest in Blackacre. What result?
  - Tenancy in Common
    - C owns 1/2 interest in Blackacre for life; A's estate retains a reversion
  - Joint Tenancy
    - At A's death, her interest disappears; C gets nothing (B gets whole interest)
  - Tenancy by the Entirety
    - Same result as JT

**MARITAL PROPERTY:**

|  | Traditional Approach                | Separate Property  | Community Property  |
|--|-------------------------------------|--|---|
| How many states?                                     | <i>Abolished (0)</i>                | <i>Majority (41)</i>   | <i>Minority (9)</i>   |
| Basic idea   |                                     | Separate property: Tenants in Common, Joint Tenancy or Tenancy by the Entirety | Everything is co-owned  |
| <b>During marr: prior</b> assets belong to           |                                     | Property is separately owned   | Property is separately owned  |
| <b>During marr: new</b> assets/earnings belong to    |                                     | Separately owned by spouse who acquires it                                     | All assets distributed to both spouses equally <i>unless</i> it is a gift or inheritance (owned separately) |
| <b>Divorce:</b> property acq. <i>during</i> marriage |                                     | Equitable distribution of property owned by each spouse                        | Some states: equal share<br>Other states: Equitable distribution factors                                    |
| <b>Divorce</b> property acq. <i>before</i> marriage  |                                     | Retains same property from before marriage                                     | Retains same property from before marriage  |
| Death  | 1/3 of husband's property when died | Surviving spouse has option: accept amt. in will or forced                     | Devise as you wish, but otherwise half of the   |

|  |  |   |  |
|--|--|---|--|
|  |  | share<br><br>In TiC (where third property is willed etc) <b>Dour:</b><br>Surviving spouse inherits 1/3 of all the freehold land owned by decedent | community property belongs to surviving spouse |
|--|--|---|--|

- **Guy v. Guy** - a Professional degree is NOT marital property in most jurisdictions. There is a limited personal “right to use”, not to a third person (ie. spouse), innate in a professional degree that makes it merely an intellectual product of an individual’s own hard work, and it is not transferable, divisible, inheritable, conveyable and terminates at death. Still, most courts will look into the equitable considerations of money a spouse puts into another spouse’s degree to invest for marriage sake, that is for other spouse’s benefit, and come up with a judgment
- **Same Sex Couples**
  - 2013: SCOTUS holds that DOMA violates Fifth Amendment. If your state bans same sex marriage, you are not compelled to pay higher taxes

### LEASING REAL PROPERTY

#### **FAIR HOUSING ACT-**

- A. Unlawful to refuse to sell or rent after making of a bona fide offer, or refuse to negotiate for the sale or rental, or otherwise make unavailable/deny, dwelling, to any person because of...
    - a. Protected Classes:
      - i. Race, color, religion, sex, familial status or national origin
  - B. Unlawful to discriminate against any person in terms, conditions, or privileges of sale or rental of dwelling, or in the provision of services, or facilities, in connection therewith, because of any protected class
  - C. Unlawful to indicate preference or restrict advertisements to certain protected classes
  - D. Must make reasonable accommodations in rules, policies, practices, or services, for handicapped persons
  - E. Unlawful to, for profit, induce or attempt to induce any person to sell or rent dwelling by representations regarding entry into neighborhood of person or persons of particular protected class (ie. can’t say 80% of our neighborhood is jewish to try and get someone to sign for apt)
- Exceptions:
    - All but (C) should NOT APPLY to:
      - Any single-family house sold or rented by owner - provided that private individual owner does not own more than three such single-family houses at one time and doesn’t use as real estate
      - Rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of such living quarters at his residents
    - Shared Housing Exemption - May indicate preference on sex if shared living/common area



- Governed by statute
- Requires notice- notice should be given in the amount of time that is equal to the rollover time
- Exp. if it is a month to month tenancy, notice should be given a month in advance
- *Advantages-*
  - *Tenant-* He is free from any further obligation once proper notice of termination is given to the landlord- different housing arrangements can be made more quickly
  - *Landlord-* He may decide to no longer rent to the tenant if the same proper notice is given
- *Disadvantages:*
  - *Tenant-* landlord, with proper notice, can also raise rent
  - *Landlord-* he is not provided with any certainty as to how long the tenant will remain

**C. Tenancy at Sufferance/Holdover Tenancy** - when an individual, who once in a rightful possession of property, holds over after this right has ended (*person is just short of being considered a trespasser*)

- If person doesn't pay rent after the end of the term, THEN it is considered tenancy at sufferance (but if they do pay, it is a periodic tenancy)
- *Elements:*
  - the tenant entered into possession lawfully
  - the tenant's legal right to possession has ended, and
  - the tenant remains without the landlord's consent
- *Termination*
  - Landlord can evict at any time without notice

DELIVERING POSSESSION- What to do when lease is silent on delivering possession

- American Rule
  - Legal right to possession (landlord did his part, tenant's burden)
- English Rule
  - Physical Right to Possession (landlord has to ensure transfer legal and physical right)
- Court in *Keydata Corp.* opts for English rule for following policy considerations:
  - Landlord has capacity, knowledge to evict holdover tenant compared to a layperson who has legal right to move in but cannot attain physical possession as easily

CONSTRUCTIVE EVICTION

- In re. Clark
  - Abysmal conditions because of power imbalance, lack of knowledge of rights, small penalty for landlords/slumlords for substandard housing, cheaper housing causes more safety and health risks
- Development of Constructive Eviction
  - Implied Covenant of Quiet Enjoyment
    - A promise by landlord that he would not wrongfully interfere with tenant's possession
  - Actual Eviction

- Landlord physically evicts tenant
    - Constructive Eviction
      - Conduct other than actual eviction 1) so substantially interfere with tenant's possession and use and enjoyment of premises that it was functional equivalent of actual eviction, and when the 2) LL did not actively try to resolve issue
      - Considerations:
        - Was LL proactive in trying to resolve situation?
        - Could T have mitigated the poor conditions?
        - Length of time T stayed on premises, when he could have leased somewhere else etc. when interference was occurring?
- Fidelity Mutual v. Kaminsky
  - LL (Fidelity's) inaction in preventing abortion protesters from entering building, lobby, office etc., was constructive eviction as Kaminsky's affirmative defense in lawsuit
  - Factors that court considered:
    - Kaminsky repeatedly complained to LL about issue, and LL made notices to protesters but never actually handed them out or actively pursued solving the substantial interference of Kaminsky's business or that his contract granted (security personnel on Saturdays when the protesters came)
  - Rule:
    - Court rejects that third party interference does not bear on LL's duty to act or at least attempt to resolve issue; an omission by LL can still result in constructive eviction
- JMB Properties Urban Co
  - Wrongful conduct:
    - LL does not act in removing noisy neighboring stereo store, or moving them to other location in mall, reducing sound intensity in jewelry store
  - Substantially interferes with T's use and enjoyment of the premises?
    - T waived constructive eviction by staying on premises for so long
    - Although there may be mitigating circumstances (trouble finding different location etc) but T renewed their lease for six year term that gave little sympathy for the court to T
    - Some states allow to remain in possession and sue for constructive eviction, by putting rent in escrow
- Implied Warranty of Habitability
  - Does not need to be expressed in lease, but courts will uphold these basic levels of habitability
  - Warranty applies to:
    - Cleanliness
    - Safety, health
    - Also look into what lease agreement promises (e.g. "no smoking facility" etc.)
  - Warranty does NOT apply to:
    - Amenities (e.g. dishwasher)

ASSIGNMENT AND SUBLEASE- Three parties (LL, T, third party) have different rights

- Assignment - convey the whole term, leaving no interest nor reversionary interest in grantor or assignor
- Sublease - T grants an interest in leased premises less than his own, or reserves reversionary interest in term
- CL Rule (Objective)
  - If instrument shows less than full term conveyed (even a day less) -> SUBLEASE
  - If instrument shows full term conveyed -> ASSIGNMENT
  - Objective - Instrument is the binding agreement - INTENT USED TO NOT MATTER
- Modern Rule (Subjective)
  - Ascertain the intention of the parties
- **Ernst v. Conditt**
  - Document expressly stated “sublease”, and T agreed to remain liable to LL, but was actually an assignment because Rogers (T) 1) did not retain a reversion 2) nor a right to re-enter.
  - Thus, court used MODERN RULE, because it looked into INTENT over instrument
- Two Different Relationships:
  - Privity of Contract - Rights arising due to contract between two parties
  - Privity of Estate - Rights arising due to transfer of property itself (mutual or successive relation to same right in property) - duty to perform all covenants in original lease which “run with the land”
  - LL can sue either T or TP for either PoC or PoE
    - Novation - LL may release T from Priv. of Contract as part of assignment
- Original Lease:
  - L and T have both Priv. of Estate AND Priv. of Contract
- Assignment:
  - L and T have Priv. of Contract (still on the hook if TP doesn't pay)
  - L and TP have Priv. of Estate
  - T and TP have Priv. of Contract
- Sublease
  - LL and T have Priv. of Contract AND Priv. of Estate
  - LL and TP have NO PRIVITY
  - T and TP have Priv. of Estate and Priv of Contract.

EVICITION

- Traditionally, could evict for any reason
- Limitations in Modern Rule:
  - Discriminatory Eviction (FHA)
  - Retaliatory Eviction
    - T complains about problem (ie. violation, vermin) and LL evicts T because of dispute
- Hillview Associates v. Bloomquist
  - Retaliatory Eviction

- Group of angry Ts about poor conditions of complex, punches thrown with housing manager, confrontation, Ts for tenants union.
  - Court's Burden Shifting Formula:
    - Lawful to evict T who was violent to manager
    - Unlawful to retaliatory evict the others:
      - Evidence of Ts' complaint within six months prior to alleged act of retaliation creates presumption that LL's conduct was retaliation
      - Shifts burden to LL evidence of legitimate non-retaliatory reasons to overcome presumption
      - Fact finder determines if retaliatory termination has been proven by preponderance of evidence.
- Retaliatory Eviction (potential) examples:
  - Complaints about raising rent, code violation complaints, breach of implied warranty of habitability, states can add statutes to add more RE grounds, but it never covers everything
- Eviction Procedures:
  - Self Help - Go in and change locks, tenant can no longer get in
    - LL is *legally entitled to possession*, such as where tenant holds over after lease term or where tenant breaches a lease containing re-entry clause, and
    - LL's means of re-entry are *peaceable*
  - Judicial process

## SELLING REAL PROPERTY

PURCHASING AGREEMENT - Parties negotiate and sign a written purchase contract, prepare to consummate the transaction

- Statute of Frauds
  - Essential Terms in writing
    1. Identity of the parties
    2. Price
    3. Property description
  - Written contract can be formal or informal
  - Writing must be signed by party sought to be bound
- Purchasing Agreement's failure to comply with SoF does not make it void, but rather prevents contract from being enforced
- Hickey v. Green - Was there a writing that satisfied SoF?
  - Check from Hickey - not satisfied by SoF
    - Not all essential terms
      - Payee line blank - seller not identified
      - Purchase price not listed
      - Vague property description

- Green did not endorse
  - Check to Hickey - satisfied SoF
    - Essential terms
    - Hickey endorsed check
- Would the court have reached the same result if Green denied that any contract existed?
  - Even if Green denied contract existed- Court would have looked at other evidence of a transaction (e.g. the check, parties' actions relevant to an agreement)... but Green would likely say check was merely part of the negotiation and payee line was blank.
- Exceptions SoF Requirements
  - Part Performance
    - Buyer takes possession
    - Buyer pays at least part of the price
    - Buyer makes improvements to property
  - Equitable Estoppel
    - Reasonable reliance
    - Serious injury would result if contract not enforced

MARKETABLE TITLE - Seller expressly or impliedly promises that she will deliver marketable title (also known as merchantable title) unless the contract specifies otherwise; marketable title is title reasonably free from doubt as to its validity

- Unmarketable Title
  - The seller's property interest is less than the one she purports to sell (ie. has life estate instead of promised fee simple)
  - The seller's title is subject to an encumbrance; or
  - There is reasonable doubt about either of the above.
- Encumbrances
  - Mortgage, mechanic's lien, private easement (e.g. neighbor has legal right to walk across land)
  - Public Easements - Statutes, ordinances, other public restrictions do **NOT** render title unmarketable, even if they severely restrict use of property.
- Marketable Title to Property vs. Physical Condition of Land
  - Marketable Title only applies to the seller's title to the property and not the physical condition (ie. hazardous waste, valueless land does not render land to be unmarketable)
- Lohmeyer v. Bower
  - Private Encumbrance - Presence of any encumbrance makes title unmarketable
    - Covenant required 2 story house when this is 1 story house
    - Lohmeyer (buyer) agreed in contract to accept existence of private encumbrances, he did not agree to accept the seller's violation of them
- Hypos:
  - After signing contract, B learns that the property is worth less than the purchase price because it is located in a flood zone.
    - MARKETABLE - marketability of title has nothing to do with value but whether seller owns estate or if it's subject to an encumbrance

- B sees electric lines crossing part of the land. After signing B learns that the local electric company has an easement across the property for these lines
  - UNMARKETABLE - Even though B saw electric lines, he did not necessarily know of the easement, so it is unmarketable title under the encumbrance
- S claims title to the land by adverse possession; The original owner P brings quiet title action against S. S tells B: “Don’t worry! There’s no chance that our side will lose this case. Go ahead and close the deal”
  - UNMARKETABLE - if there is a court action underway, then there is reasonable doubt of the validity of the marketable title of who owns or has right to the land

## FIXTURES

- Chattel/Property - goods not affixed to real property - furniture
  - Attaching it to real estate transforms it into fixture
- Fixture - goods that have become so related to particular real property that an interest in them arises under real property law
  - Examples: Light fixture (e.g. chandelier, permanently mounted, not light bulb), door knobs, bathtub, built-in oven, mirror bolted in the wall, built in book case
  - Any physical property permanently attached (fixed) to real property (usually land), especially if removal would permanently damage real property
  - Doesn’t matter if affixer seller intended on keeping it in his possession once he left when he affixed it (unless it’s listed in lease as removeable)
- Default rules
  - Fixtures stay in transferred property, with exception of any enumerated fixtures a purchase agreement might reserve seller to take with them

## DUTY TO DISCLOSE

- Traditional Rule - Caveat emptor (“buyer beware”)
  - Seller was only liable if she
    - Affirmatively misrepresented condition of property
    - Actively concealed defects
    - Owed a fiduciary duty to buyer
- Stambovsky v. Ackley
  - P sued for relief from Purchase Agreement of house (NY court under minority jurisdiction), Court finds equitable decision
  - “Stambovsky exception” - Non-disclosure constitutes a basis for rescission as matter of equity where a condition
    1. Has been created by seller (seller created this reputation of house being haunted, publicized it)
    2. Materially impairs value of the contract (most would not buy a house they knew was haunted)
    3. Is peculiarly within knowledge of seller or unlikely to be discovered by prudent purchaser exercising due care (out of towners would not have known about the

haunted house unless seller disclosed, which seller made point of publicizing before yet does not to the buyer)

- Modern Rule (Majority)
  - Seller of residential real property is obligated to disclose defects he knows about that
    - Materially affect the value of the property, and
    - Not known or readily discoverable by buyer
  - What is “Material” effect in value?
    - Objective Approach (majority) - Affects a reasonable person’s decision to purchase home, as in it either:
      - a. *Decreases market value*, or
      - b. reasonable person *view defect as important* in decision to purchase
    - Subjective approach (minority):
      - Does the defect affect the particular buyer’s decision to purchase home
      - Only has to disclose if seller was one who caused defect
- Hypo: S strongly suspects that the prior owner of his house used lead paint when she repainted the living room, but S has never done any testing to confirm this suspicion. S knows that B has a five year old son.
  - Argument Duty to Disclose: Lead paint materially affects value of property, and is especially dangerous to young kids, depends how sure he is of the knowledge of presence of lead
  - Argument for Non-Disclosure: He doesn’t have knowledge per se, and just suspicion, so majority rule is that he doesn’t need to report a mere suspicion
- Statutory Reforms
  - Majority jurisdictions require seller of residential property to provide written disclosure statement to buyer of defects
    - Examples of defects must be disclosed:
      - Building code and zoning violations
      - Structural defects
      - Drainage issues
      - State statutes often enumerate what DOESN’T have to be disclosed
  - Does BUYER have duty to disclose to seller (e.g. a profitable oil reserve under property he is buying, unbeknownst to seller)
    - BUYER = NO DUTY TO DISCLOSE
  - Implied Warranty of Quality (exception in caveat emptor states)
    - Developer of newly constructed residential property - like houses - are to give implied warrants that the property is fit for intended use.
    - Thus, developer may be liable even if he has no actual knowledge of defects in the houses he sells
- Professional Sellers of Residential Real Estate Duty to Disclose
  - Builder - Developer of residential real estate or broker representing it is liable for non disclosure of off site physical conditions known to it and unknown and not readily observable by buyer if existence of those conditions is sufficient materiality to affect habitability, use or enjoyment of property

- Conditions to be disclosed:
  - Not transient social conditions, like changing nature of neighborhood or school in decline
  - Physical conditions and some non-physical are to be disclosed:
    - Sex offenders (or availability of registries)
    - Plans for development in area, gang activity in nearby schools, nearby properties which suffer from stigmas
    - Some jurisdictions: property being sold is near a group home or high crime area
  - Materiality: Affects the “habitability, use or enjoyment of property, and therefore

#### CLOSING

1. Buyer pays purchase price to seller and executes mortgage, promissory note for lender
2. Lender advances loan funds
3. The seller transfers title to buyer by delivering deed

#### DEED

- Only effective upon delivery - grantor must manifest intention to immediately transfer title to grantee
- Rosengrant v. Rosengrant
  - Manual delivery is not necessarily = requisite intent to immediately transfer interest to grantee
  - Delivery elements
    - Intend to immediately transfer an interest to grantee, and
    - Provide some objective manifestation of that intent
  - Evidence AGAINST Intent to Transfer Land
    - Grantor continued to occupy land
    - Offered to sell it after deed in issue
    - Paid taxes on land
    - Retaining power of revocation by instructing banker to return it if grantor requested it back in their life time
    - Grantor’s name being on promissory note instead of grantee
    - No surviving witnesses to deed other than grantee to corroborate his story
- Hypos: Adequate deliveries?
  - “I have now transferred Greenacre to you. Give the deed back to me, and I will keep it in my bedside drawer until you graduate from law school” - YES. Transfer is immediate, Grantor is merely possessing it until law school graduation.
  - “I want you to have Greenacre, but I want to live there until I die” - Could go either way. Shows intent for immediate transfer but depends on grantee agreeing to give up life estate to grantor. However, Possessing the property until death does not negate the transfer.
  - “Here’s my deed to you. Please hold it safe until I talk with my wife, and then you can record it when I say it’s OK” - NO. no immediate transfer, contingent on wife’s OK
  - “Place the deed in our safety deposit box and when I die Greenacre will be yours” - NO. No immediate transfer and keeping in safety box is possibly revocable on grantor’s part
- Vasquez v. Vasquez

- Grantor gives deed to escrow agent, and grantor has no right to recall deed
- Grantor possesses house until her death, but irrevocable delivery on her part is sufficient delivery to manifest the intent for immediate transfer required

## THE MORTGAGE

- Gives the lender the right to use special remedy if borrower defaults: the lender may sell the property and use the sales proceeds to pay off the loan
  - Mortgagor = borrower
  - Mortgagee = lender
- Title Theory (Traditional, Common Law)
  - Transfer of title from the mortgagor to the mortgagee
- Lien Theory (Majority)
  - Security interest - which gives mortgagee the right to foreclose the property while mortgagor has title
- Deficiency Judgment
  - Borrower must repay difference between sales price of house and amount owed

DEED OF TRUST - If trustor/borrower defaults, trustee puts land on sale for foreclosure to pay back the beneficiary/lender

- Three-party relationship:
  - Borrower (trustor)
  - Gives deed of trust to third party (trustee)
  - For benefit of the lender (beneficiary)
- Wansley v. First Nat'l Bank of Vicksburg
  - Farmer brothers took out a loan for growing season and brothers could not pay it back
  - Duty of trustee in deed of trust- do they have traditional trustee duties?
  - No. Trustee here is nothing more than acting as intermediary agent, don't owe the same fiduciary duty as traditional trustee, but merely the power to convey in the event of a default

## INSTALLMENT LAND CONTRACT

- Seller finances loan - people who do this typically can't obtain bank loan
- Buyer takes possession and makes payments, in installments over period of time
- Seller retains title until loan is paid off
- Foreclosure may be spelled out in contract (see statutes, if silent)
- Not a good idea if seller has mortgage on property

## FORECLOSURE

- Applies to both Mortgages and Deeds of Trust
- Borrower goes into default - missed payments
- Reinstatement exception - ability to repay missed payments, regain possession (rare)
- Right to Redeem Period
  - Statutory right of redemption period, mortgagor must repay sales price, plus interest, and costs (length of time differ in each state, bank typically holds onto foreclosed hom for statutory redemption period)

- **Commonwealth v. Fremont Investment & Loan** - Unfair Practices / Driver of Recession
  - Subprime loan practices
    - Fremont makes mostly subprime loans for borrowers who were doomed to foreclosure
    - Subprime loans are premised to only produce benefit for borrower if property goes up in worth
  - Teaser rate
    - Introductory interest rate (often low) that goes up to a higher percentage in the next few years and continues to do so
  - Unfairness of Fremont's practices:
    1. When the only way a borrower can pay back their loans if value of property goes up (bad ethical practice)
    2. Predatory (these subprime loans often offered to low-income population)
    3. Discriminatory (targets minorities for the subprime loans, disproportionately)
  - Industry Standards v. Presumptive Unfairness
    - Irrelevant that it is industry standard, given the unfairness
  - Robosigning
    - Lender signed hundreds of loans per day, clearly this was not a selective, fair practice

#### NONJUDICIAL FORECLOSURE (Most common today)

- Mortgage allows for "power of sale," and foreclosed property himself (notice plus set time for repayment)
- Must be commercially reasonable sale
  - fair market value, proper notice, make sure offer period is long or that there is sufficient notice for the auction period
- Insufficient Sales Price
  - Even if the sales price is less than fair market value, unless as the price is so low as to shock the conscience of the court, it will be upheld

#### JUDICIAL FORECLOSURE

- File a complaint, prove his case, receive a judgment authorizing him to foreclose on property
- Governmental official would then sell the property at a public auction

#### TITLE ASSURANCE - Three methods of title assurance

1. Title Covenants - Grantor promises in the deed that he has good title to convey
2. Title Opinion Based on Search of Public Records: an attorney or other professional renders opinion about state of title after searching public land records
3. Title Insurance - a title insurance company issues a policy that insures grantee's title

#### TITLE COVENANTS

- Express promises by grantor about the state of the title
- S-B contract, B learns of an easement, does B have any claim against S? Depends...
  - the type of deed B received

- the scope of any promises that S made
- Doctrine of Merger (Common Law, benefitted seller over buyer)
  - Once the grantee accepted the deed all prior promises were extinguished; the contract was “merged” into the deed
- Three types of deeds with different promises from buyer:
  - General Warranty Deed - grantor warrants title against all defects, whether they arose *before or after* he obtained title
  - Special Warranty Deed - grantor warrants title against all defects that arose *after* he obtained title
  - Quitclaim Deed - Grantor makes no warranties about title so grantee only receives what grantor has, if anything
- Specific Title Covenants (contained within GWD and SWD)
  - Present Covenants - If breached, at all, they are breached at moment deed delivered
    - Covenant of Seisin - promise that grantor owns estate he purports to convey; for example this covenant is breached if grantor purports to convey a fee simple but only owns a life estate
    - Covenant of Right to Convey - Promise that grantor has the right to convey title; for example this covenant is breached if grantor is trustee who lacks authority to transfer title to trust property
    - Covenant Against Encumbrances - Promise that there are no encumbrances on title, other than those expressly listed in deed for example, this covenant is breached if there is a prior mortgage on property
  - Future Covenants - breached, if at all, after closing
    - Covenant of Warranty - A promise that grantor will defend grantee against any claim of superior title; for example if third party holds better title than grantee does, grantor must defend grantee’s title
    - Covenant of Quiet Enjoyment: Promise that grantee’s possession of property will not be disturbed by anyone holding superior title; for example, this covenant is breached if grantee is evicted because of defect in her title
    - Covenant of Further Assurances: promise that grantor will take all future steps reasonably necessary to cure title defects that existed at closing
- Brown v. Lober
  - All present covenants, including the covenant against encumbrances, are breached, if at all, at time of closing
    - Problem for Browns due to statute of limitations and defect they didn’t know about, so their otherwise valid claim against Lober is unenforceable
  - Covenant of Quiet Enjoyment - Browns have no claim here either
    - Interference with the grantee’s enjoyment and possession that constitutes a breach of quiet enjoyment, not the mere existence of a better title in someone else. Must amount to constructive eviction caused by third party.
  - Could Browns claim Adverse Possession?
    - Possession of the surface does not carry possession of the minerals

## TITLE OPINION BASED ON SEARCH OF PUBLIC RECORDS

- Recording System
  - Public system of land records to give notice to the world that buyer owns piece of property
  - Allows potential buyer to determine if seller owns a property purporting to sell
    - Grantor-Grantee Index (majority) - Every recorded doc is indexed in two places: grantee index and grantor index
    - Tract Index - easy. Every parcel of land is assigned to unique identifier like a parcel identification number
- How does second buyer know that sale isn't legitimate? Notice
  - Actual Notice - Buyer's knowledge about prior sale
  - Inquiry Notice - Person is living on the land
  - Constructive Notice - Recording of prior sale - shifts some of burden to prior buyer to actually record.
- Recording Acts - Determines which buyer gets land
  - Absent Recording Act - First in time purchaser wins
  - Other buyers might be able to sue seller for damages
- Luthri v. Evans
  - Recorded deed. Lack of constructive notice? Yes.
  - Mother Hubbard Clause
    - Gave grantee (first buyer) title in any "working interests and overriding royalty interest" that assignors owned in the county, "whether or not they were specifically enumerated" in assignment
    - Typically upheld for deathbed transfers of property, when there is lack of description of property available
  - Improper Indexing - Burris (second buyer) would have to look at grantor's index of all of his conveyed property, which would have been difficult, but not fault of first buyer either
  - Improper indexing alone - STILL Constructive Notice to second buyer, but lack of specificity required for property is primary reason for lack of Constructive Notice here.
  - Policy:
    - It is not appropriate for that much of burden to be on second buyer to look at every possible recorded deed, library etc. recorded property when it would be unreasonable.
  - Rule:
    - Inadequate description of property in first buyer's purchase insufficient, too much of a burden on second buyer to gain constructive notice here
- Recording Acts - 3 Types
  - Pure Notice (half of states adopted this)
    - Subsequent purchaser of land will be protected from claim of prior purchaser if the subsequent purchaser acquires land...
      - For value - second purchaser is bona fide purchaser
      - In good faith

- Without notice/ knowledge of prior title claim
- Pure Race
  - Subsequent purchaser of land will be protected from the claim of prior grantee if subsequent purchaser
    - Acquires land for value
    - Records his/her deed before prior claim is recorded
  - If no recording act, first purchaser wins
  - Rare - NC and LA
- Race-Notice
  - Subsequent purchaser of land will be protected from claim of a prior grantee if subsequent purchaser acquires land
    - For value
    - In good faith
    - Without notice of prior claim
    - Subsequent purchaser also records his/her deed before claim is recorded
  - Subsequent purchaser cannot qualify for the protection of the recording act unless the he records his deed before the prior grantee records (subsequent purchaser must "race" to record his deed first)
- Shelter Rule
  - Any grantee (by purchase or gift) from a bonafide purchaser is protected as a bonafide purchaser, even though the grantee would not otherwise qualify for this status with the exception that grantee is original grantor
- Hypos:
  - O conveys to A. O then conveys to B, who is **unaware** of the conveyance to A. B records immediately. Then A records.
    - Race- B
    - Notice- B
    - Race/notice-B
  - O conveys to A. o then conveys to B, who is **aware** of the conveyance to A. B records immediately. Then A records.
    - Race- B
    - Notice- A
      - Bc B hasn't fulfilled good faith/non-awareness requirement
    - Race/notice- A
      - Bc lack of good faith
      - *Nemo dat applies*
  - O conveys to A, who does not record. Then O conveys to B, who also does not record. Then O conveys to C, who does not record. First assume that B and C are each **unaware** of the previous grants from O.
    - Race- A
      - A wins by *nemo dat either way*.
      - *But B or C could record* and trump the others. MUST RECORD TO TRUMP FIRST IN TIME

- Notice- C
  - If unaware, C wins. If aware, A wins.
- Race/notice- A
  - A wins either way -- to trump you must record
- O conveys to A, who does not record. Then O conveys to B, who also does not record. Then O conveys to C, who does not record. First assume that B and C are each *aware* of the previous grants from O.
  - Race- A
    - A wins by *nemo dat either way*.
    - *But B or C could record* and trump the others. MUST RECORD TO TRUMP FIRST IN TIME
  - Notice- If unaware, C wins. If aware, A wins.
  - Race/notice- A
    - A wins either way. MUST RECORD TO TRUMP
- O conveys to A. O then conveys to B, who has no knowledge of A's deed. Then A records. B then records and sells to C
  - Race- A
  - Notice- B C
    - B wins and after purchase C would win (shelter rule, even though C would be able to find the deed to A when C looks in the records).
  - Race/notice- A
    - Bc requires you also to be the first to record
- O conveys to A. O then conveys to B, who has no knowledge of A's deed. Then A records. B then records and sells to O
  - Race- A
    - Bc a is 1<sup>st</sup> to record
  - Notice- B A
    - B wins and after purchase C would win (shelter rule, even though C would be able to find the deed to A when C looks in the records).
    - Bc B sold back to the original owner, cant use shelter rule
  - Race/notice- A
    - Bc A was first to record
    - B beats A before the conveyance to O, but O loses to
    - A (owner exception to Shelter Rule – too much danger of collusion).
    - If B conveys back to O, O cannot use the shelter rule; A beats O.
      - B cannot convey back to O freed of A's claim. That is, B is not barred from conveying to O, but O cannot take advantage of the shelter rule
  - Race-Notice: A wins.

- O conveys to A. O then conveys to B who has actual notice of deed from O to A. B records, and then A records. Then B sells to C.
        - Race- B
          - When B sells to C, then C will win
        - Notice- A
          - B had notice and so, through records, did C. Because B loses, no shelter rule.
        - Race/notice- A
          - Bc B had notice and so did C
- Messersmith v. Smith
  - Smith was first to give notice but his deed but there was no valid acknowledgement on corrected mineral deed

#### TITLE INSURANCE

- If buyer suffers loss from title defect that existed on effective date of policy, he receives compensation from title company
- Duty to Defend
  - Company must pay attorneys fees and costs necessary to protect owner's title as guaranteed by policy. Protection here is broad, even if defect isn't specifically in policy.
- Duty to Indemnify
  - Obliges insurer to compensate owner if loss occurs

#### PRIVATE LAND USE PLANNING

#### REGULATING PROPERTY

- License
  - Informal permission to use land of another
  - Freely revocable / not for a definite period
  - Not an interest in land
  - Generally for a profit
- Servitudes
  - Easements
    - Non-possessory right to use land of another person
    - Non-revocable
    - Actually a stick in bundle (as opposed to mere permission like a license)
    - Easements don't go away as property is transferred

#### EASEMENTS - Types

1. Express Easement (with owner's agreement, unlike 2-5)
  - a. Grant
  - b. Reservation - one can reserve an easement in their deed conveying property
2. Easement by Implication
3. Easement by Necessity
4. Easement by Prescription

## 5. Easement by Estoppel

### Terminology

- Appurtenant
  - Easement that benefits another piece of land (e.g. pipe from one piece of land for utility of next door house)
- In Gross
  - Not connected to holder's use of any particular land, rather it is personal to holder
- Profit a Prendre
  - Extracting something from the land (e.g. fish, foxes, herbs etc)
- Affirmative Easement
  - Allows holder to perform an act on servient land (most easements are affirmative)
- Negative Easement
  - allows holder to prevent servient owner from performing an act on servient land
- Parties
  - Dominant Owner - easement holder
  - Servient Owner - owner of servient tenement

### EXPRESS EASEMENT

- Express easement by grant
  - Arises when servient owner grants an easement to dominant owner
- Express easement by reservation
  - Arises when dominant owner grants servient land to servient owner but retains or reserves easement over that property
- Statute of Frauds - express easement must comply with SoF
  - Identify parties
  - Describe servient land and dominant land (if any)
  - Describe exact location of easement on servient land
  - State purposes for which easement may be used
- Millbrook Hunt, Inc. v. Smith
  - Does Smith have a license (revocable right) or easement (irrevocable right to use land), to use as a hunting area despite the land owner being against it as a wildlife preservation area?
  - Possible easements:
    - En gross?
      - Chasing foxes is for benefit easement holder over servient owner
  - Questions to determine Easement:
    - Owner's right to exclude user?
      - Agreement reserves to grantor "absolute right to develop his land" and right to redirect Hunt's trails, it does not render the grant revocable however.
      - Paragraph 6 gave Hunt a particular one-quarter acre and absolute right to fox hunt on remaining parcel of land

- Fox hunter had a term of years interest of 75 years
        - License are NOT for a definite period, because they are revocable
- Easement and Conveyances
  - Easement remains attached to land like any other encumbrance, unless grantee is bona fide purchaser (in case of Millbrook Hunt, the easement holder had recorded before Smith purchased, so he could not claim bona fide purchaser)

#### EASEMENT BY IMPLICATION

- Elements
  - Severance of title to land held in common ownership
  - An existing, apparent, and continuous use of one parcel for the benefit of another at the time of severance; and
  - Reasonable necessity for that use
- Van Sandt v. Royster
  - Type of Easement
    - Appurtenant
    - Implied
  - Common Ownership & Severed title? Yes.
    - Original easement holder had common ownership of all three lots to run her pipes for her house
    - She severed title when she sold one of the lots
  - Existing, Apparent and Continuous use for benefit of another? Yes.
    - Sewer pipe ran underneath Lot 19, linking original owner's house on Lot 5 to public sewer main under Highland Avenue, this continued and remained to benefit Lot 4
    - Sewer, pipes, considered to be apparent to subsequent buyers
  - Reasonably necessary? Yes.
    - Otherwise Bailey would have been required to install an expensive new sewer line

#### EASEMENT BY NECESSITY

- Elements:
  - Severance of title to land held in common ownership; and
  - Strict necessity for the easement at time of severance
- Necessity (three approaches)
  - Strict Necessity (majority)
    - If your parcel isn't landlocked then it is not necessity
    - Landlocked - easement holder is surrounded by privately owned land of others
  - If easement is reasonably practical for access (Berge court) - changes through time (e.g. telephone lines easement for land lines not that necessary anymore)
    - Ease, frequency and scope
    - Easement ends as soon as a public road appears accessible to Berge's property
  - Reasonable necessity (minority / Restatement)

- The easement must be beneficial or convenient
- Berge v. State of Vermont
  - No *practical means* for Berge to reach house in winter, on pond, bad weather conditions, court finds Easement by Necessity, Berge should be able to cross private property to use proper road for transportation

#### EASEMENT BY PRESCRIPTION

- Elements
  - Open and Notorious
    - Open and apparent use, land improvements etc.
  - Adverse and Hostile
    - Without consent from property owner, and non-concurrent use with the owner
  - Continuous
  - For the Statutory Period
- O'Dell v. Stegall
  - Church converted to home in late 90s, D's property is landlocked, surrounded by property they don't own, D's don't know who owns gravel lane but it's on way to highway so they use it
  - Landlocked property owner, seeking easement, has burden given policy against prescriptive easements (basically rewards trespassors)

#### EASEMENT BY ESTOPPEL (aka "Irrevocable License")

- Elements
  - Landowner allows another to use his land, thus creating a license
  - The licensee relies in good faith on license
    - usually by making physical improvements, incurring significant costs
  - The licensor knows or reasonably should expect such reliance to occur
- Kienzle v. Myers
  - Licensee gains permission by land owner to bury sewage pipe and use for land- it can be inferred that neither party anticipated burying sewer pipe in deep trench would be transient or temporary.

#### TERMINATION OF EASEMENTS

- Expiration (ie. term of years expiration)
- Release by Deed
- Merger
  - Dominant and servient tracts come under common ownership
- Adverse possession
  - Can adversely possess easement back, blocking access of another for statutory period
- Abandonment
- Changed Circumstances
  - Only if easement is stated in terms of particular purpose that has become obsolete
- Condemnation of Servient Land

- Easement holder is entitled to just compensation, taking by the government
- Estoppel
  - If servient owner substantially changes his position in reasonable reliance on the holder's statement that easement will not be used in future
- Misuse
  - If holder seriously misuses easement, it may be ended through forfeiture (in some jurisdictions)
- Release
  - Easement holder may release easement to servient owner by executing and delivering righting that conforms to SoF

#### ABANDONMENT

- Preseault v. United States
  - Railroad used to go through land, Ps own three tracts of land in fee simple that tracks went through
  - Railroad track dissipated into trail
  - Ps not happy about all those people walking through their tracts of land
- Easement or Fee Simple
  - Easement can be abandoned and terminate, fee simple does not terminate
  - Easement was for "transport of goods and people for transportation"
- Abandonment Considerations
  - Non-use of easement PLUS
  - Acts by owner manifesting "either a present intent to relinquish easement or purpose inconsistent with its future existence"
    - Company actively took out railroad, track, no steps were taken to do anything with railroad
    - Potential future plans for train company to reconnect tracks with other track nearly mile away, not enough for the court
  - Non-Use of easement alone is not enough

#### NEGATIVE EASEMENTS

- Owner of dominant land to prevent servient owner from performing act on servient land
- Most Common Neg. Easement - Conservation Easement
  - Restricts development and use of servient land in order to preserve open space, farmland, historical sites or wild and undeveloped land

#### LAND USE REGULATION BY GOVERNMENT