**PROPERTY**

**KEYED TO DUKEMINIER-7th Edition**

**FUNDAMENTALS**

1. **Property rights**: are instruments of society; they convey the right to benefit or harm oneself or others and they specify how persons may be benefited or harmed. They were developed to internalize externalities when the cost of internalization is less than the gains produced. [Bundle of sticks]
   1. **Externalities-**the misuse or misallocation of property; when property used in another way would be more beneficial to society as a whole.
   2. **Forms of ownership**
      1. **Communal**-a right that can be exercised by all members of the community (sidewalk)
      2. **Private**-implies that the community recognizes the right of the owner to exclude others from exercising the owner’s private rights
      3. **State**-implies that the state may exclude anyone from the use of a right as long as the state follows accepted political procedures for determining who may not use state-owned property
   3. **Public Policy on Property Law**
      1. Property law regards relationships b/w people not just person and property.
      2. Property rights are relative (first in time).
      3. Goal of property law is certainty.
2. **First Possession: Acquisition by Discovery**
   1. ***Johnson v. M’Intosh***

**Facts**: P sues to eject U.S. land grant owner from land he purchased from Indians.

**Issue**—Who had legal right to the land?

**Holding**-U.S. government inherited its title to the land from England’s discovery of the land. Indians had aboriginal title – the right to occupy the land but not title to the land, “mere occupancy.” Classified as “domestic dependent nations” in *Cherokee v. Georgi*a. This case sets precedent that U.S. government has the only right to convey land (and this ability was retroactive in that all land “possessed” by Indians was taken). This precedent is important because it legitimized the power of the U.S., and it established a standard for organization of land.

* 1. **First in time:** the first person who takes possession of a thing owns it
  2. **Discovery:** entails the sighting or finding of unknown or uncharted territory
  3. **Conquest:** the taking of possession of enemy territory through force
  4. **Occupancy theory:** person who first captures and puts it to reasonable use
  5. **Property and Power:** property confers and rests upon power
  6. **Labor Theory and John Locke:** when land is mixed w/ man’s labor, it becomes his property and excludes the common right of other men

1. **Acquisition by Capture**

First person to take physical possession of a wild animal through (1)physically capturing it, (2)mortally wounding it, or (3)depriving it of its natural liberty, has property rights in that animal.

* + 1. “Mere pursuit” does not constitute possession.
       1. Ancient legal scholars determine that **capture** and **mortal wounding** constitutes possession. DISSENT said a **reasonable prospect** constitutes possession.
    2. Peace and order will be preserved if a very clear rule is established (reduce litigation and shape people’s behavior). DISSENT pushed for an instrumental outcome – to encourage socially useful behavior (killing the awful beasts).
    3. ***Ratione Soli*** (“right of soil”)- The landowner would have the primary right to capture and it protected the owner’s land from trespassing. At the time the fox left a landowner’s land, the fox was no longer that owner’s property. Since the fox was not on someone’s land, it was subject to the right of capture.
       1. *Animous revertendi*-For animals that have the intent to return, then the rule is that it remains yours even though it has left your land. Problem: How is a hunter to know what is in an animals mind.
       2. *Rule of increase*-The person who owns the parent, owns the offspring.

1. ***Pierson v. Post***

**Facts –** Π (Post) hunted fox with dogs and a horse, through the wild. Δ (Pierson), knowing the fox was hunted, killed it and took possession. Δ eventually wins the fox.

**Issue -** Whether Π, by pursuit and intent to possess, took possession

**Rule –**  An entitycan only become property through occupancy*.* Pursuit alone cannot grant occupancy or right to the property.

**Reasoning** – By only pursuing the fox, Π had not deprived the fox of its “natural right” to liberty. The fact that the fox could still get away; he hadn’t demonstratably removed it from the realm of “*ferae naturae.”*

**Notes** – the dissent wanted this argument to go before arbitration instead of a court, by having the regulators of the industry’s rules apply.

* 1. ***Ghen v. Rich***

**Facts** - Π (Ghen) shot (bomb-lanced) and instantly killed a whale with a bomb-lance. Days later when the whale washed ashore, Δ bought, at auction, the remains from Ellis, some joe who found the dead carcass. Finding out that his kill had been sold, Π brought suit.

**Issue** – Whether Π took the necessary steps towards possession to sustain a claim for conversion

**Rule** – Ownership requires physical possession, except where the normal means of possession cannot practically be applied. In such cases taking those steps to appropriation customary to the trade will be sufficient for possession.

**Reasoning** – In an industry such as whaling, the nature of the hunt is such that to effectively capture a whale, one can only hope to initially kill the whale and hope that its remains will rise for tow or be washed ashore. By killing the whale with the intention of possessing it, Π effectively established a future claim to the whale. Δ seeing that it had been mortally wounded should have known it wasn’t his to sell.

* 1. ***Keeble v. Hickeringill***

**Facts** – Π built a decoy pond for catching wild fowl, which he sold for profit. Δ, spitefully, tried to scare the wild fowl away effectively hurting Π. Π sues Δ for conversion.

**Issue** – Whether Δ’s malicious interference with Π’s opportunity to catch the wild fowl is a cause for action.

**Rule** – Where one maliciously hinders another in his pursuit of possession, he will be held liable.

**Reasoning** – He who at his own expense performs a trade, and furnishes the market place for his livelihood, should be awarded encouragement for so doing, for he provides a valuable service to the world.

*Ratione Soli* – an owner of land has possession (constructive) of wild animals and nature while they are on that land.

Tortious Interference – the malicious imposition on someone else’s business will impose liability.

Animus revertendi – (the intention of returning) Where an animal is domesticated that it will return to ones property, then that person has a property interest in that animal.

Rule of Increase – if A has animal which has offspring, the offspring belong to A.

**Rule of Capture and Other Fugitive Resources**

* + 1. Oil and Gas—follows the rules of ferae naturae unless legislation looks to reduce excess drilling.
    2. Water—household use has prominence over artificial use; groundwater governed by English rule of absolute ownership.
    3. Externalities—costs associated with usage of property (esp. in communal property).

1. **Acquisition by Creation**

Property in One’s Ideas and Expressions: Intro. to Intellectual Property

* + 1. ***International News Service v. Associated Press***

**Facts** – The INS was taking news reports produced by AP and pirating by copying news from bulletin boards and from early editions of complainant’s newspapers and selling this, either bodily or after rewriting it to Δ’s customers (also was bribing to gain stories, but this was allowed injunction by District Court)

**Issue** – Whether there is any property in news once released, such that would support an injunction.

**Rule** – The news is *quasi* property irrespective of the rights of either as against the public, but with merit against competing reporting. **[Note-quasi property doesn’t make any sense-either you have rights, or you don’t]**

**Reasoning** – The news itself isn’t property (knowledge). How it is presented (the story, video footage) is protected. INS was engaging in unfair business practices (similar to a tortious interference), which gives rise to the injunction.

* + 1. ***Cheney Brothers v. Doris Silk Corp.***

**Facts** – Π, a corporation, manufactures silk patterns, which Δ copied one of the designs, undercutting Π’s price.

**Issue** – Whether the patterns designed by Π may be protected by law

**Rule** – a man’s property is limited to the chattels which embody his invention. Others may imitate these at their pleasure

**Reasoning** – If designs are protected, the court wouldn’t be able to stop there. Processes, machines, and secrets would have equal claim.

* + 1. ***Smith v. Chanel, Inc.***

**Facts** – Δ’s perfume claimed in advertisements to be the equivalent of the more expensive Chanel No. 5.

**Issue** – Whether Chanel could exclude Δ from using the same scent and so advertise

**Rule** – Without a patent, others are free and encouraged to copy

**Reasoning** – A large expenditure doesn’t create legally protectable rights without a patent. The “free ride” taken by Δ serves an important public interest by offerning comparable goods at lower prices.

1. **Right to Include/Exclude**
   1. **Include-**right to give or sell to another;
   2. **Exclude-**law of trespass protects the right to exclude. Laws of conversion protect exclusion from chattels.
      1. ***Jacque v. Steenberg Homes, Inc.***

**Facts** – Δ had to deliver a mobile home and the easiest route was across Π’s land. Despite adamant refusal, Δ plowed a path through their property. Π sued for trespass

**Issue** – Whether Π’s right to exclude supports punitive damages where nominal damages are awarded.

**Rule** – Private landowner’s right to exclude others from his/her land is one of the most essential sticks in the bundle of rights that are commonly characterized as property.

**Reasoning** – The right to exclude people from one’s property has no value unless protected by the state (where nominal awards don’t constitute state protection).

* + 1. ***State v. Shack***

**Facts** – Δ entered Π’s farm (unauthorized) to aid migrant farmworkers employed and housed there. Δ were convicted of trespassing to which they appealed.

**Issue** – Whether the Π’s right to exclude may stand between the migrant workers who live on his land and those who they would wish to be on the property

**Rule** – A man’s right in his property isn’t absolute. It was a maxim of common law that one should so use his property as not to injure the rights of others.

**Reasoning** – The migrant worker must be allowed to receive visitors of his own choice, so long as there is no behavior hurtful to others.

**\*Note**-These two cases present two legal rules and a unique set of facts. As a laywer, have to determine which side of the line a case falls on…either no right to exclude (State v. Shack) or absolute right to exclude (Jacque)

1. **Acquisition by Find**

|  |  |  |
| --- | --- | --- |
| Lost | Misplaced | Abandoned |
| 1) unintentionally | 1) voluntarily placed in a particular place, | 1) intentionally and |
| 2) involuntarily parted with it through neglect or inadvertence, and | 2) intending o retain ownership | 2) voluntarily relinquished |
| 3) does not know where it is | 3) but the failing to reclaim it or forgets where it is |  |
| **Lost property:** finder IS entitled to possession against everyone except the true owner. *See exceptions on page 120* | **Mislaid property:** a finder of property acquires NO rights in mislaid property. | **Abandoned property:** the finder IS entitled to keep abandoned property. |

* 1. **Abandoned**—Owner has discarded or *voluntarily* forsaken with the intention of terminating his ownership, but without vesting ownership in any other person. FINDER has right to it against all other claim except the true owner.
  2. **Lost Property**—Property which the owner has *involuntarily and unintentionally* parted with through neglect, carelessness, or inadvertence and does not know the whereabouts. FINDER of property has right to it against all other claims except the original (true) owner.
     1. ***Armory v. Delamirie***

**Facts** – Π being a chimney sweeper’s boy found a jewel and carried it to Δ’s shop to figure out what it was. He gave it to apprentice who weighed it, removed the stone, and gave back the empty socket after three pence was refused.

**Issue** – When one finds something, do they have rights to that property (including the right to exclude it from others)?

**Rule** – The title of the finder is good as against the whole world but the true owner…

**Reasoning** – Because the jewel isn’t recoverable, the most valuable jewel it could be, will be given in the amount of damages.

*Theft*- the rule of prior possession is said to be explicitly invoked only in support of honest claimants.

*Trover* (British version of *conversion*) is a common law action for money damages resulting from the Δ’s conversion of the chattel.

*Replevin* a lawsuit to obtain return of the good, not damages.

*Bailment* is the rightful possession of goods by one person (bailee) who isn’t the owner. Imposes a standard of minimal care (an ordinary negligence standard of reasonable care under the circumstances)

* *Voluntary Bailment* = Me→Pawn Shop→You
  + the true owner cannot go after the current possessor, only the prior possessor.
* *Involuntary Bailment =* TO→Sweep(P1)→Jeweler (P2)
  + If the true owner can attempt to recover the item from both the current and prior possessor.
    1. ***Hannah v. Peel***

**Facts** – Freehold Estate was conveyed to Δ (Peel) who never occupied the house. It was used for quartering soldiers. Π (Hannah) while being quartered there, found a brooch which was not known of by the Δ.

**Issue** – Whether the owner of a house possesses all objects within that house even if that owner has never resided in that house.

**Rule** – A man possesses everything which is attached to or under his land, but does not necessarily possess a thing which is lying unattached on the surface of his land even though the thing is not possessed by someone else.

**Holding** – Judgment for Π.

**Reasoning** – Since he was never physically in possession of the premises at any time, the brooch was never his since he had no prior possession. He had no knowledge of it until it was brought to his attention by the finder. Since the brooch was “lost” the finder has the superior claim to title.

*Animus Possidendi* – Possession with knowledge and intent to hold for ones own benefit.

**Mislaid**—That which the owner has intentionally set down in a place where he can again resort to it, and then forgets where he put it. The OWNER OF THE PREMISES (*locus in quo*) has the duty to safeguard the property for the true owner. The owner of the property has a right over the finder to property.

* + 1. ***McAvoy v. Medina***

**Facts** – Π (customer in Δ’s (barber) shop) found a pocket book which was lying on a table. He informed the Δ who came over, counted the money, and retained the pocket-book at Π’s request in hopes of finding the true owner. After advertising no one claimed the pocket book, so Π made three demands for the money which directly to this cause of action.

**Issue** – Whether Π may invoke the property right of a finder since the true owner never claimed his lost property.

**Rule** – The finder of lost property has a valid claim to the same against all the world except the true owner, with the place found, generally, creates no exception, but property intentionally placed by an owner who subsequently forgets to take it before leaving isn’t lost, it is instead misplaced which gives the finder no right to ownership

**Reasoning** – Where the true owner placed the pocket-book on a table and forgot remove it before leaving, a rule which better supports the true owner’s interest in the property is needed. Π acquired no original right to the property, and the Δ’s acts in receiving and holding the property in the manner he did does not create any.

**Treasure Trove**—A category exclusively for gold or silver coin, plate, bullion, and sometimes its paper money equivalents, found concealed in the earth or in a house or other private place. (It carries with it the thought of antiquity-at common law, it went to the king.) PROPERTY OWNER has right above all finders.

**Embedded**—Personal property which has become a part of the natural earth, such as pottery, the sunken wreck of a steamship, or a rotted-away sack of gold-bearing quartz rock or partially buried in the ground. The PROPERTY OWNER has possessory right to it.

**ADVERSE POSSESSION**

1. **Acquisition by Adverse Possession**

**Theory :** The taking of land which one doesn’t own (promotes taking care of land, protects the interests of those who have become attached to it). It requires that one maintains

**Elements:**

1. **Actual entry giving exclusive possession**
2. **Open and notorious**
3. **Adverse, under a claim of right** (adverse = adverse to the interests of the true owner)
4. **Continuous for the required period** (elements 1-3 have to have been done for the full time period, i.e acting like a true owner for the timeframe)

\*Note-In Idaho, a fifth element is required. *Taxes.* Idaho requires this rule because if someone pays taxes on the land, the true owner will conceivably be put on notice when they are notified by the IRS. This rule is more common in western states that have large swaths of private land because open entry would be more likely to go unnoticed.

1. **Three views of Adverse Possession**

Claim of right/Intent interpreted in three ways:

1. Good faith
2. Aggressive trespass
3. Irrelevant [this is preferred/correct way]
   * 1. ***Van Valkenburgh v. Lutz***

**Facts** – (Yonkers Adverse Possession Driveway) The Lutz’s bought at auction two wooded lots in Yonkers (1912), and built a driveway on another lot along with a garden, a chicken coop, and stored some junk. Van Valkenburgh, a feuding neighbor, bought the land at foreclosure (1947) and fenced off the property, blocking what the Lutz’s claimed to have a prescriptive right (right to use, without claiming ownership) to as his only access to his property (1948). He then claims Adverse Possession (1950). Trial court awarded Lutz the right away, and the Appellate court upheld the decision. Van Valkenburgh appeals to this court.

**Issue** – Whether there is evidence showing that the premises were cultivated or improved sufficiently to satisfy a claim to adverse possession.

**Rule** – To acquire title to real property by adverse possession it must be shown by clear and convincing proof that there was an “actual” occupation under a claim of title by cultivating or improving the land.

1. **Color of Title and Constructive Adverse Possession**
2. **Color of Title** – a deed or other instrument of conveyance that purports (but fails) to convey title to the land described in it. Advantages:
3. Makes it easier to satisfy the elements of adverse possession
4. Constructive possession (get all the land in the title, not just what was occupied/possessed)
5. **Law of Prescription** - Statute of Limitations for Adverse Possession
6. **Quieting Title** – an action to resolve title against adverse claims
7. **Mistaken Improvers** – Courts used to order mistaken improvers to remove their property. Now: decide if property owner was irrevocably damaged, if not, usually force a conveyance. (See case below)
   * 1. ***Manillo v. Gorski***

**Facts** – (Stairwell encroaching on neighbors property) Gorski built an outside stairwell connected to his mom (Δ’s) house, which encroached on the property of Mannillo by some 15 inches. Δ states that she has title to said land by adverse possession, while Π asserts that the requisite hostile nature is lacking

**Issue** – Whether an entry and continuance of possession under the mistaken belief that the possessor has title to the lands involved, exhibits the requisite openness necessary for a successful adverse possession claim.

**Rule** – Intent is irrelevant to a claim of adverse possession (Connecticut Doctrine). Where the encroachment is not sufficiently open (hidden), the owner will NOT be presumed to know of its existence. Where a boundary encroachment is shown to be executed in bad faith, the encroacher may be forced to remove it regardless of the cost entailed.

**Reasoning** – Allowing adverse possession of a tiny portion of a property puts an undue burden of constant surveying of land by the true owner, while it may put undue hardship on the adverse possessor who under an innocent belief of title put in extensive work on home improvement.

**The Maine Doctrine** – states that an intention to claim the land not embraced in title is a necessary element of adverse possession. Largely abandoned by courts.

**The Connecticut Doctrine** – Motives are of no importance in determining whether an adverse possession claim has been made. Instead the very nature of the act is an assertion of one’s own title and the denial of the title of all others (protects those who mistakenly take land).

1. **Mechanics of Adverse Possession**
   * 1. ***Howard v. Kunto***

**Facts** – (Summer home built on wrong lot) Prior owner’s deed to Δ’s property described a neighboring lot to the one the house was built on. Δ (The Kuntos) took possession of the disputed property under a deed from a family who procured the lot from the original prior owner. The neighboring Howards (Π) desiring to convey half of their land had their land surveyed. This survey indicated the error, and revealed that the Kunto’s house lay on the Howard’s land. Action was brought to quiet title in the Howards, and the court upheld this action stating that the Δs failed to prove their continuous possession sufficient to tack onto the adverse possession of the preceding owners. The Kuntos appeal.

**Issue** – (1) Is the continuous requirement of adverse possession defeated by only summer occupancy? (2) Can receiving title from one who successfully completed adverse possession succeed in creating adverse possession in he/she who received it?

**Rule** - (1) Requisite possession requires possession and dominion conforming to ordinary conduct of owners in general holdings, managings, and caring for property (2) No rule exists, but if extra land may be “tacked” on, there is no reason that tacking on cannot be completed from previously completed “adverse possession” conveyors.

**Reasoning** – It is not good for policy to make all landowners have to have a survey done whenever buying property.

1. **Privity**—The mutual or successive relationship to the same rights of property, by which a “tacking” claim may be successfully pleaded.
2. **Tacking—**the summation of an interest in a property by successive relationship to the same rights of property (adverse possession cases may use it when a statute of limitations is either partially fulfilled by one and then voluntarily surrendered to another who in turn completes the statute of limitations requirements to achieve actual adverse possession, or where one fulfills the adverse possession requirement and then transfers the property to another who in turn receives full ownership rights from the first)
3. O →A→B→?

If A trespasses against O in 2000, and then B subsequently takes possession from A in 2007, who owns it in 2010?

* + - If there was privity between A and B, B owns it in 2010.

1. O →A→B→A→?

If A has possession in 2000, but B forcibly takes the property in 2007, but then A regains possession six months later, by what year will A adversely possess?

* + - 2010.5

1. **Disabilities**

The statute of limitation is extended if specified disabilities (age of minority, of unsound mind, or imprisoned) are present.

* 1. Disability must exist *at time of* adverse possession.
  2. Cannot tack disabilities.
  3. Disabilities end with death.

1. **Adverse Possession Against the Government**

Can’t do it.

1. **Adverse Possession of Chattels**

Def: Implies all of the elements of adverse possession except open and notorious, since chattels are not likely to be open and notorious like property, the discovery rule is usually applied. There is nothing to put the true owner on notice.

* + 1. ***O’Keefe v. Snyder***
       1. Discovery Rule-the statute of limitations does not start to run until the injured party discovers or should have discovered through reasonable diligence (due diligence), the facts that cause the cause of action.
       2. The purpose of this rule is to mitigate harsh results of the statute of limitations.
       3. The discovery rule shifts the burden of proof on the true owner. They have an obligation to not sleep on their rights.
       4. Due diligence includes taking all reasonable measures available to the owner.
       5. Void Title-if the true owner has never intended to give title away it is void. Good faith purchaser can’t get a void title.
       6. Voidable Title-title which may be voided by true owner, good title—title was meant to be passed on, it is voidable and you can only get damages. Good faith purchaser can get a clean title for a voidable title.

1. **Acquisition by Gift**
   1. **Intent** to make a gift—may be shown by oral evidence.
      1. Intent can be express or implied by what is said and done.
   2. **Delivery** of gift—must be shown by objective acts-shows intent to give and helps prevent fraud. Generally, actual delivery is required.
      1. Actual—if an object can be handed over, it must be actually delivered.
      2. Constructive—if an object cannot be delivered because it is impractical (too large or heavy) or it is inaccessible, constructive delivery is allowed. Generally, it is handing over a key or some object that will open access to the subject matter of the gift.
      3. Symbolic—delivery is handing over something symbolic of the property given. Normally, it is a written instrument declaring a gift of the subject matter.
   3. Acceptance.
   4. Types of gifts:
      1. ***Inter vivos***—gifts between the living.
      2. ***Causa Mortis***—gifts made in contemplation of the donor’s eminent death (i.e. on deathbed).
         1. Requires one witness.
         2. If donor lives, the gift is revoked.
         3. If donee already has possession of item, it must be redelivered to be a valid gift.
         4. Substitutes for a will.
   5. ***Newman v. Bost***

**Facts** - Intestate of D allegedly gave P all his furniture and property in his dwelling as a gift in preparation of death. He gave P his private keys and pointed at the bureau, the clock, and other articles of furniture in the house by pointing in the direction of various rooms.

**Issue** - Was giving the keys only a constructive delivery of items the keys open or a more symbolic delivery—giving everything in house?

**Holding -** Court ruled it was only constructive delivery as the items could not be manually delivered, and P was entitled to things the keys opened, but not what was inside those items—those items would have to be physically delivered).

**Rule** – Two things are necessary to make a gift: intention and delivery.

* 1. ***Gruen v. Gruen***

**Facts –** Father wanted to give his son painting so he wrote letter expressing that intent. However, he wanted his son to have the painting after he died because he wanted to keep it for the duration of his life.

**Issue** – Whether a valid inter vivos gift of a chattel may be made where the donor has reserved a life estate in the chattel and the donee never has had physical possession of it before the donor’s death.

**Rule** – The delivery necessary to consummate a gift must be as perfect as the nature of the property and the circumstances and surroundings of the parties will reasonably permit.

**ESTATES IN LAND**

1. **Intro and Historical Background: The Fee Simple; Fee Tail**

**A. History-Up from Feudalism**

* 1. Estates started in 1066 with William the Conqueror**.**
  2. He divided up the land to Lords and Tenants

1. **Tenure**:
   * 1. **Feudal hierarchy**: pyramid scheme w/ the King at the top
        1. Land held by those below; owed duties to those above
     2. **Freehold tenure**: tenure of free men
        1. As close to ownership as holders of the land
        2. Developed into our concept of ownership of land
     3. **Non-Freehold tenure**: tenure of peasant work land (surf/villein)
        1. Akin to renting. Possession of land & in possession they owed duty to those who had freehold tenure.
        2. Feudal incidents where a lot like property taxes.
2. **Vocabulary:**
   1. Heirs:
      1. if a person dies intestate (without a will) the decedent’s real property descends to his heirs. Heirs are persons who survive the decedent and are designated as intestate successors under the state’s statute of descent.
      2. A living person has no heirs (yet).
   2. Issue:
      1. Definition: lineal descendants; offspring.
      2. It does not refer to children only but also includes further descendents.
      3. If the descendent leaves issue (lineal descendents) they take to the exclusion of all other kindred.
      4. If any child of the decedent dies before the decedent leaving children who survive the decedent, such child’s share goes to his or her children by right of representation (*per stirpes*, “by the stocks”)
   3. Ancestors:
      1. By statute, parents usually take as heirs if the decedent leaves no issue.
   4. Collaterals:
      1. all persons related by blood to the decedent who are neither descendants nor ancestors are collateral kin. This includes brothers, sisters, nephews, nieces, uncles, aunts, and cousins.
      2. If a decedent leaves no spouse, no issue, and no parents, the decedent’s brothers and sisters (and their descendants by representation) take in all jurisdictions.
   5. Escheat:
      1. If a person died intestate without any heirs, the person’s real property is escheated to the overlord in feudal times.
      2. Now, such property escheats to the state where the property is located.
   6. Heritability: Concept of someone who owns land can give the land to heirs when they die; ownership can be in perpetuity
   7. Alienability: Right of owner to separate himself from the land and give it to another while they are alive
   8. Descendable = can be given away without a will. Intestate = without a will
   9. Devisable = to give away in a will
   10. Numerus Clausus **–** Must give away land in a legally recognized way (owner can not make up his own estate and interest i.e. to A and the heirs on her mothers side would turn into a fee simple absolute).
   11. Holographic wills – hand-written wills
   12. Seisin – possession. Used to connote that the people with freehold estates had something greater than those with leasehold estates.
3. **Creation of Estates**
   1. Words of limitation – describe what type of estate is created
   2. Words of purchase – identify person in whom estate is created
   3. Ex. To A and his heirs
      1. To A – words of purchase
      2. And heirs– words of limitation
4. **General Types of Estates**

**Freehold v. Non-Freehold**

**Freehold** = full ownership of the property for a period of time.

1. Fee Simple
2. Fee Tail
3. Life Estate

**Non-Freehold Estates** (leases)

1. Term of Years
2. Periodic Estate
3. At Will
   1. **Fee Simple Absolute**
      1. “to A and his heirs” – lasts longer than life. “To Heirs” no longer needed- as this is the default estate. It is assumed the testator or owner was trying to give away as large an estate as he himself had.
      2. Exclusive right to possession, use, and enjoyment without condition or limitations.
      3. Freely transferred, given by will or through intestacy.
      4. Perpetual duration.
      5. No restraints on alienation
      6. The estate will pass to a succession of heirs. If there are no heirs, the estate escheats to the state.
   2. **The Fee Tail**
      1. An estate in land that passes from one generation to the next only in one family line; has a restraint of alienability.
      2. Can be specified: fee tail male, female, etc.
      3. Always followed by a future interest - reversion or remainder.
      4. “A and the heirs of her body”
      5. Generally looked at as a FSA now. Fee tail = largely unrecognized or enforced.
4. **The Life Estate** 
   1. At early common law- “To A.” Modern language – “To A for life.”
   2. **Factors**
      1. Finite duration
      2. Right to exclusive possession, use, and enjoyment for life.
      3. Right to alienation of the land – many interests can be created out of it, but it ends at the death of the life tenant.
      4. The life tenant may not be reimbursed for improvements beyond general care. Similarly, there is no duty to insure the premises.
      5. The grantor of a life estate can control who takes the property at the life tenant’s death. [i.e. “To A for life, then to B.”]
      6. A life tenant cannot sell a fee simple to someone unless all other persons having an interest in the property consent or unless a court of equity orders sale and reinvestment of the proceeds.
      7. Obligation not to “waste”:
      8. Life estate ***pur autre vie***: Life interest measured by the life of another

EXAMPLES:

* + 1. O conveys to A for life.
       1. Example: “to A for life.” This gives the property to A for life, and then back to the grantor upon A’s death (a reversion).
    2. To A for the life of B = life estate pur autre vie.
  1. **Valuation of a life estate**

This is a present value calculation. If the home is worth 100,000 and the life expectancy table says you have 10 more years to live then the present value is N = 10 years, I = 6 % (average ror), pmnt = 6000/year, PV = about 45,000 or 45% of current value. Remainder is 55%.

***White v. Brown***

* **Facts --** Testatrix dies with will stating for P to have her home to live in and “not to be sold.”
* **Issue –** This is a life estate if life estate then there must be an implicit reversion (to whom and how???) or it is a fee simple with a restraint on alienation
* **Rule –** absolute restraints upon alienation are void, it is just a fee simple.
* In ambiguous cases, courts
  1. try to carry out the **intent of intestate** – look to language of instrument in light of surrounding circumstances
  2. ***presume a fee simple*** *over a life estate*
  3. ***Dis-favor partial intestacies***.

***Baker v. Weedon***

* **Facts --** Weedon and Anna worked the farm together (W married A when she was 17). Told Anna to remarry when he died, she did. Weedon’s will left everything to Anna and her children (if she had any). If she dies w/o kids, all go to his grandchildren. He left nothing to his children.
* **Issue –** Anna has life estate. W’s grandchildren have **contingent remainder** (contingent upon fact that she has no kids…if there were no contingency and just passed from Anna to the grandkids, it would be a **vested remainder**).
* **Rule –** Court must look at what is in the **“best interests of both parties”**

1. **Defeasible Estates**
2. **Defeasible Fees –**

Fee Simple Defeasible – May last forever like a fee simple absolute BUT it may also end if a certain event happens in the future.

1. **Three types of defeasible fees**
   1. **Fee simple determinable**
      1. O to A, so long as X
      2. If transferred the condition remains
      3. automatically ends and reverts if condition happens
      4. Possibility of Reverter, is the remaining future interest
      5. SOL for Adverse possession starts to run when the condition happens.
      6. **Language used -** Words of limitation
         1. “so long as”
         2. “while used for”
         3. “until”
         4. “during”
         5. Words that merely state a motive, like “…for school purposes” merely create a fee simple absolute.
   2. **Fee simple subject to condition subsequent**
      1. O to A, but if X, the grantor has the right to reenter and retake
      2. Does not terminate automatically
      3. Allows owner to cut short or divest the owner if the event happens by exercising his “right of reentry.”
      4. Statute of Limitations begins upon the stated event or within a reasonable time thereafter.
      5. **Language used**
         1. but if
         2. provided that
         3. on the condition that
         4. however
   3. **Fee Simple Subject to Executory Interest** 
      1. Executory interest
      2. Automatic

***Mahrenholz v. County Board of School Trustees***

* **Facts --** Hutton wrote deed “This land to be used for school purposes only; otherwise to revert to Grantors herein” to give property to School Dist. Same year conveyed their reversionary interest to Jacqmain, conveyed to P later. (**all of these are void**). Harry = only legal heir. (**Harry gets reversionary** 1977 HH conveyed any possibility of reverter or right of entry to P. Later in 1977 HH disclaimed any interest he had in the land to the School Bd. By 1973 land used for storage (not school?).
* **Issue –** If Harry had right of re-entry for condition broken, he can’t be the owner until he legally re-entered the land. Since he took no steps to re-enter, he only maintained the right of re-entry and that can’t be conveyed by sale.
* If Harry had possibility of reverter in the property, then he automatically owned the property as soon as it ceased to be used for school purposes. Therefore the P could have acquired an interest in the school grounds if Harry inherited a possibility of reverter
* **Rule –** Court interprets “only” to have a time duration and “otherwise to revert” to mean immediate reversion - together the 2 ambiguous pieces imply a **Fee simple determinable**. Remands to determine what the effect of H’s double conveyance and also notes that storage still = school purposes.

***Mountain Brow Lodge v. Toscano***

* **Facts --** a) required only one fraternal group to use b) prohibited sale. Court allows 1st, disallows 2nd b/c restraint on alienability.
* **Rule –** I**ntent of grantor will form FS Condition Subsequent**. “No formal language is necessary to create a fee subject to a condition subsequent as long as the intent of the grantor is clear.” Court uses extrinsic evidence to find that grantor made deed with love and affection of lodge.

***Ink v. City of Canton***

* **Facts –** State took park land for a highway from the city, land had been given condition on the use as a park. How much is the land worth to the city as a park and how much is the possibility of a reverter worth? The city gets the fair market value of the land as a park and the heirs of the reverter get the remainder.
* **Issue – Valuation** of a **Possibility of Reverter**
* **Rule –** Is the future interest of a grantor in a determinable fee extinguished when the property in question is appropriated by eminent domain? No. Especially in a case like this where the grantee did not pay for his determinable fee, it would be unjust to allow the grantee to retain the eminent domain award outright. P will retain a possibility of reverter in the eminent domain award should the grant condition cease to be met. P are entitled to that portion of the award which represents the value of the possibility of reverter held by them.

**Waste** - A should not be able to use the property in a manner that unreasonably interferes with the expectation of B (the one who has the remainder).

**Types of Waste**:

* + 1. **Affirmative**: life tenant acts affirmatively to damage land permanently
       1. Voluntary waste - Ex: cutting down trees
    2. **Permissive**: life tenant fails to act reasonably to protect the deterioration of the land
       1. Involuntary waste - Ex: failure to fix a leaky roof
    3. **Ameliorative**: life tenant acts affirmatively to change the principal use of the land and increased the value of the land

If actions that are creating waste preceded the life tenant’s interest, they may be continued.

* + For example, mining a property is acceptable as long as it was being mined prior to the grant.

**3 Obligations not to Waste:**

* + forbids any action that diminishes the value of the property.
  + possessor is required to act fairly and reasonably in maintaining the property. This includes paying the current taxes and charges and preventing deterioration.
  + possessor cannot use the property any more than is required to maintain it.

**Remedies:**

* + Injunctions
  + Accounting – collection of the value.
  + Forfeiture (used very sparingly)

**Crux**: One interest holder should not be able to use the property in a way that unreasonably interferes w/ the expectations of the other

**Sale**

\*\*\*When you have present and future interests in land, and external circumstances change so that the current use of land has become unproductive, the court can order a sale of the land in order to preserve *all the interest in the land*.

* Courts weigh balance according to respective **strengths in interest** the parties have in the land
* The longer a person has an interest
* The more certain the interest the person has in the land: more likely to internalize externalities and protect land

1. **Future Interests; Trusts**

**Future Interest:** The right to the enjoyment of property at a future time.

* 1. A future interest is not a mere expectancy, like the hope of a child to inherit from a parent. It gives legal rights to its owner. It is a presently existing property interest, protected by the court as such.

**6 possible future interests**

**3 in transferor**

* + - 1. Reversion
      2. Possibility of reverter
      3. Right of reentry

**3 in transferee**

* + - 1. Vested remainder
      2. Contingent remainder
      3. Executory interest

1. **Reversion** = The interest left over when the owner gives less than the estate that he has and does not provide for who is to take the property when the lesser estate expires.
   1. The interest remaining in the grantor who transfers a vested estate of a lesser quantity than that of the vested estate which he has
   2. Examples
      1. Example: “O to A for life.” O has a reversion in the property.
      2. Example: “to A for life, then to B and his heirs if B survives A.” O still has a reversion interest here of some degree. B has a contingent remainder in fee simple absolute.
   3. A reversion is transferable during life and descendible and devisable at death.
   4. A reversion always follows a contingent remainder. This is because the condition precedent may not happen, and in the event it does not, O gets his reversion.
   5. A reversion is not a remainder because it is not received by anyone other than the transferor. Remainders are for the transferees.
   6. Note: There is no such thing as a “possibility of reversion.” Or reversionary interest just reversion!
2. **Possibility of Reverter**
   1. Correlating present interest – Fee Simple Determinable
   2. Interest remaining in grantor created using durational language
   3. “to Hartford School Board so long as used for school purposes”
3. **Right of Entry**
4. Correlating present interest – Fee Simple on Condition Subsequent
5. Interest remaining grantor created using conditional language
6. “to Hartford School Board, but if it ceases to use the land for school purposes, O has the right to re-enter and retake the premises”
7. **Vested Remainder**
   1. Any future interest in favor of a transferee that can become a present possessory interest immediately upon (but no sooner then) the natural expiration of all prior interests simultaneously created and cannot divest or cut short any interest other than an interest in the transferor.
   2. A present interest of future possession - “To A for life, then to B and his heirs.”
      1. Must have:
         1. a known or ascertainable person
         2. not subject to a condition precedent
         3. Occurs at natural expiration of estate; certain to become possessory.
         4. Can be transferred, willed, and inherited.
         5. If Remainder created in a class of persons; (A’s issue) is vested if at least one member of the class is ascertained and there is no condition precedent
      2. If another interest follows a vested remainder in fee simple, it is an executory interest.
   3. **Sub-Categories of Vested Remainders:**
      1. **Indefeasibly Vested** –
         1. the remainder is certain of becoming possessory in the future and cannot be divested. It is free of precedent conditions.
      2. **Vested Remainder Subject to Partial Divestment (Open)** –
         1. The holder of the remainder is a class of people, which may expand. For example, it may go to the children, but not all the children are born yet.
      3. **Vested Remainder Subject to Divestment** -
         1. If vested remainder is subject to being divested by the occurrence of a condition subsequent or there is an inherent limitation of the remainder. O conveys “to A for life, then to B, but if B fails to build a house by 2010, to C.”
8. **Contingent Remainder**
   1. Must have:
      1. an unascertainable person and/or
      2. subject to a condition precedent.- condition precedent must first occur before we know whether it will become possessory
   2. Example:
      1. “O to A for life, then to the heirs of B.” – the heirs of B are not known until B dies, so B’s heirs have a contingent remainder.
      2. “to A for life, and if B survives A, then to B and her heirs.” There is a condition precedent to B taking the property – he has to outlive A.
   3. **Alternate Contingent Remainders**: when there are two contingent remainders and the vesting of one will mean the other will not vest.
      1. Example:
         1. “To A for life, then to A’s surviving children, but if A has no surviving children, then to B and his heirs.”
   4. May be transferred during life, devised, or inherited.
9. **Executory Interest -** can only divest vested interests
   1. Defenitionn: a future interest in a transferee, which must, in order to become possessory -
      1. Cut short or divest some interest in another transferee (shifting) or
      2. Divest the transferor in the future (springing).
   2. Example: O conveys the property “to A for life, then to B if B gives A a proper funeral.”
      1. B has an executory interest because B must act by divesting O through giving A a proper funeral. This is a “springing” executory interest because it divests the transferor.
   3. Must either . . .
      1. divest or cut short an interest in another transferee – shifting
      2. divest or cut short the transferor in the future – springing
   4. All executory interests are contingent remainders because there is a condition precedent.
   5. *Mesne Profits*: recover a reasonable rental value. If during an automatic divestment, A doesn’t leave right away, O can sue for “rent” or the time on land.
   6. Additional Examples
      1. “O to A for life, then to B if B gives A a proper funeral.” - B has an executory interest because he must act to divest O. O will be divested in this case if B gives A a proper funeral.
      2. “O to A for life, then, one day after A’s death, to the heirs of A.” - Creates a springing executory interest in those who will be A’s heirs.
      3. “O to A and his heirs five years from the date of this deed.” - A owns a springing executory interest.
      4. “O to A and his heirs, but if A marries X, to B and his heirs.” - B owns a shifting executory interest.
      5. “O to A for life, then to B in fee, but if B or his successors sell liquor on the premises, then to C in fee. - A has a life estate. B has a vested remainder in fee subject to an executory limitation. C has a shifting executory interest in fee.
   7. An executory interest is a future interest in a *transferee* that can take effect only by divesting another interest. **The difference between taking possession as soon as the prior estate ends and divesting the prior estate is the essential difference between a remainder and an executory interest.**

**General Future Interest Rules:**

* + An executory interest must follow a vested remainder. It can never follow a contingent remainder.

A contingent remainder must follow another contingent remainder.

1. **Destructibility of Contingent Remainders**

**Rule Against Perpetuities (intended to destroy contingent future interests)**

a. “No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest”

i. If a grant fails the Rule Against Perpetuities then the contingency is void at the outset (even if it is very likely to vest within the required time)

b. When do we apply the Rule?

i. Consider the interest when the grant is made:

1. At the time of conveyance (for inter vivos transfers), OR

2. At death (for a will)

ii. Ask what might happen don’t worry about what does happen

c. Age doesn’t matter when considering RAP

i. Any living female is capable of having children

1. Fertile octogenarian & precocious toddler

d. Interests covered by RAP\*

i. Contingent remainders

ii. Executory interests

iii. Class gifts

1. Vested remainders subject to open (the class is open)

**Approach to RAP**

1. Identify interest subject to rule\*

2. Identify when interest will vest (or when it will fail to vest)

3. \*\*Identify everyone associated with that vesting event (they might not all be alive)\*\*

4. Determine if any of them are currently alive

5. Must the vesting (or failing) even occur within 21 years of that person’s death

a. If person’s death has no effect on whether the gift vests or fails to vest, there is no reason to consider that person

b. When does the interest vest?

i. Contingent remainders – when condition precedent occurs and/or the person is ascertained

ii. Executory interests – when the limitation (or condition subsequent) occurs

iii. Class gifts – when all people in class die

c. If individuals directly connected to vesting event *are not yet* alive AND the gift does not contain a specific 21-year (or less) limitation it most certainly fails the RAP

i. “to A for life, then to the first child of A to land on the moon” (FAILS)

ii. “to A for life, then to the first child of A to reach 21 years of age” (GOOD)

d. Who are lives in being? (Potential Validating Lives)

i. Someone specifically mentioned in the conveyance who is alive at the time of the conveyance (either inter vivos or will)

ii. Someone not specifically mentioned, but who is necessarily a part of the conveyance, who is alive at the time of conveyance

e. Charity-to-Charity Exception (public policy consideration)

i. If both gifts are to charity then RAP isn’t applied

E.g. “to the Moscow School District so long as it is used for school purposes, otherwise to the Latah County Conservancy.”

a. This gift violates the RAP but we’ll allow it

1. **Common Law Concurrent Interests**

**CONCURRENT OWNERSHIP**:

1. **Tenancy in Common**: basic form of co-ownership
   1. Presumed in ambiguous cases – it is presumptive
   2. No magic words necessary to create tenancy in common
   3. Tenants in common own a ***separate*** but ***undivided*** interest in a piece of land/property
   4. Freely **alienable, descendible, and transferable** (no survivorship rights)
   5. Only need unity of possession
   6. **Ex**: *If Blackacre is given to A&B. A devises property through will to E&F*.
      1. A & B are tenants in common
      2. E, F, & B would be tenants in common, with E&F having a quarter share a piece.
2. **Joint Tenancy**:
   1. Two differences of form:
      1. Must have **unity** of the following: *If one of the unities is severed, so is the joint-tenancy.* *Tenants are made tenants in common*. (Best way to do this is to unilaterally sell off interest in land – title is broken)
         1. **Time**: joint tenancy must be created at the same time
         2. **Title**: have to receive interests by the same document/title
         3. **Interest**: ownership stake has to be equal, identical, and undivided
         4. **Possession**: each tenant must have the right of possession to the whole
      2. **Magic words**:
         1. “***to A and B as joint tenants and not tenants in common***.” – something less than this might not count
         2. “***to A and B as right of survivorship***.” – To A and B “jointly” will not cut it
   2. **\*\*\*Key distinguishing feature**: **Right of survivorship** – *If A dies his share goes to B, if B dies* *her share goes to A*.
   3. Unity is not broken if there is a divorce.
   4. **Example:** To A, B, and C as joint tenants. Subsequently A conveys his interest to D. Then B dies intestate, leaving H as his heir. What is the state of the title?
      1. A, B and C have 1/3 undivided interest in FSA as JTROS
      2. D 1/3 undivided interest in FSA as tenant in common with A and B
         1. A and B remain JTROS as with each other
      3. B’s 1/3 interest dissolves and C now has 2/3 undivided interest in FSA as tenant in common as with D
3. **Tenancy by the Entirety**:
   1. Exists in about half the states
   2. Only created b/w husband & wife: Exact same requirements as joint tenancy except there is a fifth unity – **unity of marriage**
   3. Divorce leads to tenants in common
   4. Neither spouse can lease property w/o other’s consent.
   5. *Neither husband nor wife can sever their interest and thus defeat survivorship by a conveyance* *of an ownership interest to a third party* – both spouses must consent to the sale

***Riddle v. Harmon***

**Facts**- P sought to enforce a joint tenancy right of survivorship against D, the executrix of his wife’s estate, after the wife had deeded her ½ joint tenancy interest in the Riddle property to herself in order to sever and terminate P’s right to succeed to the whole.

**Issue**- Can a joint tenant unilaterally terminate a joint tenancy without the use of a strawman?

**Rule**- A joint tenancy may be terminated by the conveyance by one joint tenant of his interest in the joint tenancy property to himself.

***Harms v. Sprague***:

**Facts**- Π and brother, John, took title to land as joint tenants. John gave mortgage on interest in joint property for piece of property Sprague was buying. Harms died, and Sprague was devisee of his entire estate.

**Issue**- Does a mortgage on interest terminate a joint tenancy (does it convey a title) and does the lien survive the death of a joint tenant?

**Rule:** A mortgage on a joint tenant’s interest does not survive the mortgagor.

One requirement for a joint tenancy is unity in title. If a mortgage constituted a change in title (this is how it was in the common law), it would destroy this unity. However, this state recognizes that a mortgage will not constitute a change of title until foreclosure plus the running of any redemption period (this is the modern **lien theory** of a mortgage). Since a mortgage does not sever a joint tenancy, the entire estate of the decedent joint tenant passes to the survivor. This effects a nullification of any liens thereon. For this reason, D’s interest was extinguished upon John’s death.

**Rule**: Where a joint tenant gives a mortgage on his interest in joint property, that mortgage is treated as a cause of action, and thus at death it is extinguished along w/ decedent’s interest.

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**REMEDIES** for Tenants in Common & Joint Tenants:

1. **Partition**: Any joint tenant or tenant in common can ask for partition of property; ends the cotenancy in one of two ways (equitable action):
   1. **Partition in kind**: draw a line – left half to one tenant, right half to the other
      1. Favored by the courts; tenants have emotional attachment to their lands
      2. Problem arises when parts of the same property are more valuable that other parts of the same property. Who gets which part?
   2. **Partition by sale**: sell the whole thing and give proceeds of sale to two parties
      1. Easier for the courts because they don’t have to value the property; the market values the property
2. **Tenancy by Entirety**: No right to partition – divorce would end marriage and two tenants by entirety would become tenants in common
3. **Dissolution by Partition** (*Delfino v. Vealencis*)
   1. Partition is the division of a tenancy in common or a joint tenancy. It can be accomplished either by **partition in kind**, which is dividing the land according to percent of ownership (for a TC, or by ½’s for JT’s) or through **partition by sale**, where the property is sold and then the assets are divided according to the ownership %. Courts tend to favor partition by kind rather than sale. Note that concurrent owners can terminate a JT or T/C by voluntary agreement, and partition is only used when they cannot decide.
   2. General Rule – partition in kind. The exceptions are when it is not feasible or it would prejudice their interests. Then we use partition by sale. But, there is actually a bias toward partition by sale
   3. Partition by sale should be ordered only when two conditions are satisfied:
      1. the physical attributes of the land are such that partition in kind is impracticable or inequitable.
      2. the interests of the owners would be better promoted by a partition by sale. (In order to analyze this, the consequences of a partition in kind must be compared with those of a partition by sale.)
   4. What if only one cotenant wants it partitioned?
      1. The court will use partition in kind if possible, otherwise it is up to their discretion what to do.
      2. What about if O conveys property to A for life with a remainder to B and his heirs. If A and B cannot agree on the management of the property, can A sue for partition?
         1. No – they do not have a concurrent ownership!
4. **Ouster** - Sharing the Benefits and Burdens of Co-Ownership
   1. When concurrent owners enter into an agreement concerning their rights and duties, contract law applies. But, when a problem arises that is not discussed in any agreement, there is a need for independent property rules to determine how the benefits and burdens of ownership are to be shared by co-owners.
   2. General Rule – one concurrent owner does not owe any value to another owner for the exclusive use of the property. But, when one owner precludes the use of the other, this is an infringement on the injured cotenant and he can seek relief, such as by partition. This exclusion of one party is called an “**ouster**.”
      1. The burden rests on the other cotenants to prove that they have been ousted.
      2. Just asking for rent is not enough. There must be exclusion of the other cotenant.
      3. If one person is running a lucrative business on the property, he is obligated to owe the other a portion of the profits or rents. The net profits or rents have to be shared with the other cotenants.
      4. Repairs and Improvements – the tenant that makes the repairs/improvements bears the risk and gets the increased value of the repairs. You can’t stick the non-occupying party with the costs if he does not voluntarily agree to it, but he also can’t get the increased value if he does not pay his share.
      5. Accounting for Benefits, Recovering Costs (Improver to property is entitled to the value raised in the property, not the costs of the improvements.)
5. Accounting for Benefits, Recovering Costs
   1. Rents and Profits
      1. A cotenant who collects from third parties rents and other payments arising from the co-owned land must account to cotenants for the amounts received
   2. Taxes, mortgage payments, and other carrying charges
      1. Cotenant paying more than his share has a right to contribution from the other cotenants, at least up to the amount of the value of their share in the property
   3. Repairs and improvements
      1. *Necessary repairs* - cotenant has no right to contribution in the absence of an agreement; however, cotenant does have a credit in case of partition
      2. *Improvements* - cotenant has no right to contribution in the absence of an agreement and no credit is given in the event of a partition
         1. Improver retains value of improvement in partition by sale and conversely also bears downside risk of improvements
         2. If partition in kind, payments called **owelty** are made to improver by cotenants to offset the difference in increased value.

***Delfino v. Vealencis*:**

Facts- Π and Δ were tenants in common. Δ was only one who lived on the property, and she maintained a garbage and waste removal on one part of it. Π’s want to develop property into 45 residential building lots.

Issue- Which partition should the court use, in kind or by sale?

Rule- Partition sales are employed only where partition in kind is unworkable.

**Notes:**

* Partition in kind – a separation of undivided interests in land so that the parties may possess their interests separately.
* Partition sale – a court-ordered sale of property held in joint tenancy, as a cotenant or in tenancy by the entirety, if the property is incapable of being divided; the income is distributed in proportion to the parties’ interests in the sold property.
* A sale should be ordered if it is in the best interest of both of the parties and if a physical partition would result in unequal shares or is physically impractical. Originally the CL only allowed partition sale in emergency conditions.
* A sale may be ordered if it appears to the satisfaction of the court that the value of the share of each cotenant, in case of partition, would be materially less than his share of the money equivalent that could probably be obtained for the whole. A sale is justified if it appears that the value of the land when divided into parcels is substantially less than its value when owned by one person.
* Although it is usually said, as in Delfino v. Vealencis, that partition in kind is preferred, the modern trend is to decree a sale in partition actions in a majority of cases, either b/c the parties all wish it or b/c the courts think the sale is the fairest way to resolve the conflict.
* if co-owners cannot agree on a division of the property or the proceeds of its sale, they must go to the equitable action of partition. Available to any joint tenant or tenant in common. Not available to tenants by the entirety.

***Spiller (D) v. Mackereth***

Facts- Spiller & Mackereth are tenants in common. Spiller entered and used structure as a warehouse. Mackereth wrote a letter, demanding Spiller vacate or pay half the rent. Spiller did neither, but did put locks to protect his merchandise.

Rule: Co-tenant has the right to occupy the whole property. Unless he denies entry to “aggrieved” party or agrees to pay rent there is no claim.

* As a general rule, a cotenant has the full right to use a premises and cannot be liable to cotenants for rent. The only exception to this occurs when there is an ouster. For there to be an ouster, a cotenant must physically bar the other cotenant from entry. Merely ignoring an order to partially vacate does not constitute ouster.
* What would D need to show to prove ouster? Ouster by using the property or refusing to let the other person in
* A few jurisdictions take the view that a cotenant in exclusive possession must pay rent to cotenants out of possession even in the absence of ouster.
* Generally, cotenants are not fiduciaries with respect to each other. Each cotenant is expected to look after his or her interest. But the courts sometimes say they have fiduciary duties. Maybe if they are related.
  + A fiduciary duty is imposed most commonly in one of two situations:
  + One cotenant buys in concurrently owned property at a mortgage foreclosure or tax sale and then asserts a superior title against cotenants. Courts normally make the buyer hold the superior title for the benefit of all the cotenants if they reimburse the buyer.
  + Where cotenants are kindred, courts often treat the cotenant in possession as a fiduciary, who can claim adverse possession only where his claim of sole ownership is so unequivocal and notorious as to put his cotenants on actual notice of a hostile claim.

***Schwartzbaugh v. Sampson***

**Facts**- Schwartzbaugh’s owned land as joint tenants w/ right of survivorship. Mr. Schwartzbaugh negotiated lease for small fraction of land for a boxing pavilion. Π (wife) objected to lease and did not put her name on them. Sampson erected boxing pavilion. Π received no rent from that.

**Issue**- Can one joint tenant who has not joined in the leases executed by her cotenant and another maintain an action to cancel the leases where the lessee is in exclusive possession of the leased property?

**Rule-** Joint tenants are free to alienate their interests and have the right to possess the property as a whole. Joint tenants are free to convey their interests.

* In effect, lessee gets same rights as joint tenant
* Joint tenant out of possession can maintain no action against a lessee that she couldn’t maintain against a lessor or cotenant
* If Π is excluded from using the property, she can claim **ouster**, and collect rent
* Neither partition-in-kind nor partition by sale work in this instance: court would divide land around the ring, and Sampson would buy back the sale
* **Accounting**: Π can account for the rent and receive rental payments from her husband. However, this would not allow her to do anything on the leased land.
  + **Accountant**: A co-tenant who receives rental payment from a sub-tenant can be called to account by other tenants for proportional share of value
* If husband dies, Π takes husband’s interest through right of survivorship

**LEASEHOLDS**

1. **Leaseholds**

1. The Term of Years – An estate that lasts for some fixed period of time or for a period computable by a formula that fixes calendar dates for beginning and ending

a. A term must be for a fixed period, but it can be terminable earlier upon some happening of some event or condition.

b. Because it’s for a fixed period of time, no notice of termination is necessary to bring the estate to an end

2. The Periodic Tenancy – A lease for a period of some fixed duration that continues for succeeding periods until either the landlord or tenant gives notice of termination

a. E.g., month-to-month, year-to-year

b. If notice is not given the period is automatically extended for another period

i. Under common law – half year’s notice required to terminate a year-to-year tenancy

ii. Anything less than a year – notice of termination must be given equal to length of the period (but not to exceed six months)

c. Notice must terminate the tenancy on the final day of the period NOT in the middle of the tenancy

3. The Tenancy at Will – A tenancy of no fixed period that endures so long as both landlord and tenant desire and ends when one party terminates it (or at the death of one of the parties)

a. If lease provides that it can be terminated by one party, it is necessarily at the will of the other as well *if* a tenancy at will has been created

i. Modern statutes ordinarily require a period of notice

b. ***Garner v. Gerrish*** – Lease said "tenant has the privilege of termination of this agreement at a date of his own choice." Landlord executrix tries to get tenant out saying the lease created a tenancy at will.

i. Court rejects that a tenancy at will is created. The lease simply granted a person right to tenant to terminate on date of his choosing

1. Otherwise, it would violate the intent of the parties

ii. A lease agreement that grants tenant the sole right to terminate creates a "determinable life tenancy" for the tenant

4. The Tenancy at Sufferance: Holdovers

a. Arises when a tenant remains in possession (holds over) after termination of the tenancy

i. In this situation, landlord has 2 options:

1. Eviction (plus damages), OR

2. Consent (express or implied) to the creation of a new tenancy

b. Usually subject to same terms and conditions as those in original lease unless parties agree otherwise

5. An arrangement that resembles a lease might nevertheless be held by the courts to amount to something else, such as a license, of a life estate

a. Considerations include: intention of parties, number of restrictions on use, exclusivity of possession, degree of control retained by granting party, presence or absence of incidental services, et.

b. It matters whether or not an arrangement amounts to a lease

i. Leases give rise to the landlord-tenant relationship

1. Carries certain rights and duties and liabilities and remedies that do not attach to other relationships

6. Notes

a. Conveyance Versus Contract

i. Both – lease transfers a possessory interest in land and also contain a number of promises (covenants) such as a promise by the tenant to pay rent or a promise by the landlord to provide utilities

ii. Courts commonly rely on contract principles to reshape the law of leases

b. The Statute of Frauds

i. American statutes provide that leases for more than one year must be in writing

ii. All but a few jurisdictions permit oral leases for a term less than a year

c. Form leases and the question of “bargaining power”

i. A lease contemplates a continuing relationship between the landlord and tenant and can be wordy, full of clauses to handle various contingencies

ii. Landlords typically use *form leases* – standardized documents offered to all tenants on a take-it-or-leave-it basis, with no negotiation over terms

1. In times of shortages of rental housing courts can respond by policing lease terms on grounds of “unequal bargaining power”

**XVIII. Unlawful Discrimination**

1. Rules of Construction (Statutory Interpretation) – Stevens, J.

a. think Leg. Reg.

2. Selection of Tenants (Herein of Unlawful Discrimination)

a. Federal Fair Housing Act – U.S.C.A. §§3601-19, 3631

b. §3604. Discrimination in the Sale or Rental of Housing and Other Prohibited Practices

i. Deny any person because of race, color, religion, sex, familial status, or national origin

ii. Discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling because of race, color, religion, sex, familial status, or national origin

iii. Refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises

c. Proof of discriminatory impact or disparate treatment is sufficient

i. The defendant must then justify the action as one taken in pursuit of a bona fide, compelling governmental purpose, with no less discriminatory alternative available to achieve the goal,

ii. Or one taken pursuant to a rational and necessary business purpose

d. Amendments

i. Sex discrimination was added to Fair Housing Act in 1974

1. **Delivery of Possession:** 1. ***Hannan v. Dusch*** – holdover tenants aren’t forcibly removed by defendant when plaintiff is ready to take possession of lease

**Issue:** Whether a landlord, who without any express covenant as to delivery of possession leases property to a tenant, is required under the law to oust trespassers and wrongdoers so as to have it open for entry by the tenant at the beginning of the term

There is an implied covenant on the part of the landlord to assure to the tenant the legal right of possession

i. At the beginning of the term there shall be no legal obstacle to the tenant’s right of possession

c. Two irreconcilable rules:

i. English Rule: implies a covenant requiring the lessor to put the lessee in possession

1. The premises shall be open to entry by the tenant at the time fixed by the lease for the beginning of his term

2. There is no duty that extends beyond the day when the lessee’s term begins

ii. American Rule: recognizes the lessee’s legal right to possession, but implies no such duty upon the lessor as against wrongdoers

1. Remedy is against the holdover tenant – the landlord has not covenanted against the wrongful acts of another

d. The court goes with the American Rule

i. There is no other instance in which a person is responsible for the wrongdoings of another in which has neither participated nor concurred and whose misdoings he cannot control

ii. The tenant has sufficient legal and equitable remedies available to protect himself against the third party wrongfully in possession and a greater incentive to use them than the landlord would have

**XX.**  **Subleases and Assignments:**

1. Sublease versus Assignment

a. **Sublease** – grants the sublessee an interest in leased premises less than his own (less than his term), with a reversionary interest remaining with the lessee

i. Lessee (current tenant) still maintains privity of estate with lessor (landlord)

1. Lessee maintains liability in case of sublessee’s default

b. **Assignment** – conveys the whole (entire remainder) term, leaving no interest or reversionary interest in the estate, no right to re-enter

i. Lessee has no liability in case of sublessee’s default

ii. Lessee (current tenant) also no longer has privity of estate with the lessor (landlord)

c. ***Ernst v Conditt*** – P approved modification to a lease that allowed D to sublease premises and left lessee (current lease-holder) personally liable. D ceased paying rent and P sued to determine whether instrument was sublease or assignment.

i. Intention of parties governs characterization of instrument

1. Words used in instrument are not conclusive

d. ***Kendall v Ernst Pestana*** – provision in *commercial* lease that lessee may not assign lease or sublet premises without lessor’s prior written consent

i. Growing minority rule: where a lease provides for assignment only with the prior consent of the lessor, such consent may be withheld only where the lessor has a *commercially reasonable* *objection* to the assignment

1. Denying consent solely on basis of personal taste, convenience or sensibility is not commercially reasonable

ii. Lessor’s have a duty to mitigate damages upon the lessee’s abandonment of the property by seeking a substitute lessee

**XXI-Tenant in possession and who has abandoned possession**

1. The Tenant in Possession

a. ***Berg v Wiley*** – sub-lessee opened and operate restaurant on property; dispute arose over continued remodeling with first procuring written permission

i. Landlord may rightfully use self-help to retake leased premises from a tenant in possession without incurring liability for wrongful eviction provided that:

1. The landlord is legally entitled to possession, and

2. The landlord’s means of reentry are reasonable and peaceable

ii. Tenant evicted by landlord may recover damages for wrongful eviction where the landlord either:

1. Had no right to possession, or

2. Used forcible means to remove the tenant

iii. Growing trend (modern view):the potential for violent breach of peace inheres in any situation where landlord attempts by his own means to remove a tenant who is claiming possession adversely to the landlord

1. Judicial proceeding are the *exclusive remedy* by which a landlord may remove a tenant claiming possession

2. The Tenant Who Has Abandoned Possession

a. ***Summer v Kridel*** – renter (Kridel) was to be married, broken off, and is now without any income and couldn’t pay rent to landlord

i. Landlord has obligation to make a reasonable effort to mitigate damages where he seeks to recover rents due from defaulting tenant

1. Must treat the apartment in question as if it was one of his vacant stock

b. Notes and Questions

i. Surrender – a tenant’s offer to end a tenancy

1. Terminates lease when landlord accepts tenant’s offer

2. Extinguishes lessee’s liability for *future* rent

ii. Abandonment constitutes implied offer of surrender

iii. Common law rule (now minority): landlord has no duty to mitigate

iv. Security deposits – landlord is obliged to return to tenant upon termination of lease

1. Deposit less any amounts necessary to compensate for any defaults by tenant

v. Rent acceleration – upon tenant’s default all rent for entire term is due and payable

**XXII Landlord Duties**

1. Landlord’s Duties – Tenant’s Rights and Remedies

a. Early common law – landlord’s were under no obligation to warrant the “fitness” of the property

i. Tenant took premises “as is”

b. **Quiet Enjoyment and Constructive Eviction**

***Reste Realty v Cooper*** – tenant’s office space flooded after rains due to faulty driveway and never subsequently fixed

1. Covenant of Quiet Enjoyment is implied in a lease

2. If latent defect exists and is known to landlord at time of executing lease they have duty to disclose

3. Constructive eviction – occurs when act by landlord renders premises substantially unsuitable for the purposes for which they are leased or seriously interferes with beneficial enjoyment of property

a. Right to claim constructive eviction will be lost if tenant does not vacate premises within reasonable time

i. Reasonableness determined by facts and circumstances of particular case

b. Landlord must have notice of defect and be given chance to cure

c. Tenant cannot consent to defect that makes property unsuitable

c. **Implied Warranty of Habitability**

***Hilder v St. Peter* –** slumlord apartment with substantial defects

1. Tenant can withhold rent, repair defects and deduct cost from rent payments, seek rent already paid, and/or seek punitive damages (where landlord’s behavior is wanton, willful or fraudulent)

2. Implied warranty of habitability – requires landlords to deliver and maintain premises that are safe, clean and fit for human habilitation

a. Covers latent and patent defects in essential facilities of residential unit

i. Essential facilities – facilities vital to use of the premises for residential purposes

3. Tenant cannot assume risk by acknowledging defect

a. Implied warranty of habitability cannot be waived by tenant nor signed away in lease

4. To bring claim:

a. Tenant must give notice to landlord

b. Give landlord reasonable time to correct defect

ii. Notes

1. Many ways housing may become uninhabitable:

a. Continued loud noise in apartment building

b. Failure of central air conditioning system

c. Bedbugs

d. Second-hand smoke

2. Tenant’s Duties – Landlord’s Rights and Remedies

a. Duty to not commit waste

i. Breached is tenant makes “such a change as to affect a vital and substantial portion of the premises…

ii. As would change its characteristic appearance, the fundamental purpose of the erection or the uses contemplated…

iii. Or a change of such nature as would affect the very realty itself…

1. Extraordinary in scope and effect, or unusual in expenditure”

**XXIII. Servitudes and Easements:**

1. **Servitudes** – private agreements creating an interest in land, binding and benefiting the parties to the agreement and their successors

a. **Easement**

*i. Easement appurtenant* – gives right to make some specific use to whomever owns a parcel of land that the easement benefits

1. Benefits easement owner in the use of land belonging to that owner

2. Courts construe in favor of this if the type of easement is unclear

3. Dominant tenement – easement attaches to and benefits the dominant tenement

4. Servient tenement – easement is granted/enforced against servient tenement

*ii. Easement in gross* – give right to make some specific use to some person without regard to ownership of land. There is no dominant tenement since it is connected to a person rather than a parcel.

* 1. Benefits easement owner personally rather than in connection with the use of land which that person owns
  2. There is no dominant estate, only a servient state (no benefit to any land)
  3. May be alienable or inalienable

**Five Types of Servitudes:**

i. Easement – *A* is given the right to enter upon *B*’s land

ii. Profit – *A* is given the right to enter upon *B*’s land and remove something attached to the land

iii. Negative easement – *A* is given the right to enforce a restriction on the use of *B*’s land

iv. Real covenant/Equitable Servitude – *A* is given the right to require *B* to perform some act on *B*’s land (depending on remedy sought)

v. Equitable Servitude/Real Covenant – *A* is given the right to require *B* to pay money for the upkeep of specified facilities (depending on remedy sought)

2. **Creation of Easements**

a. ***Willard v. First Church of Christ, Scientist*** – former land owner sold land with agreement that adjacent church be allowed to use unoccupied lot for parking (easement). P was unaware of easement, which was not on deed and brought suit to quiet title.

i. Common law rule rejects conveyances that vests interest in third parties (court abandons this rule)

ii. Courts primary objective in construing a conveyance is to give effect to intent of the grantor deduced from “the four corners” of the document

iii. Courts examine the injustice of refusing to give effect to the grantor’s intent versus the result of failing to give effect to an individual’s reliance on old common law

iv. Rule: A grantor may, in a deed to real property, reserve an interest in that property for third parties

b. Notes

*i. Reservation* – a provision in a deed creating some *new* servitude which did not exist before as an independent interest

1. E.g., *O* conveys Blackacre to *A* reserving a 20-foot-wide easement of way along the south boundary of Blackacre. The easement did not exist as an independent interest prior to the conveyance by *O*

*ii. Exception* – a provision in a deed that excludes from the grant some *preexisting* servitude on the land

1. E.g., *A* conveys Blackacre to *B*, except for the easement previously reserved by *O*

*iii. Regrant theory* – an easement “reserved” by the grantor was not a reservation at all (which would be void), but a *regrant* of an easement by the grantee to the grantor

1. Convey land, then regrant it back, but it worked like an easement

*iv. License* – oral or written permission given by the occupant of land allowing the licensee to do some act that otherwise would be a trespass

1. A license is revocable whereas an easement is not

3. **Easement Created by Estoppel**

*a. Easement created by estoppel* – if a licensor grants a license on which the licensee reasonably relies on to make substantial improvement to the property, equity requires that the licensor be estopped from revoking the license.

b. License made irrevocable through estoppel continues to exist until the reasonable expectations of the parties have been satisfied

c. ***Holbrook v. Taylor*** – P permitted D to use roads across his land to access another property where D is building a house. D widened road and graveled part of it to help use it

i. No easement by prescription – no prior adverse use; use was with Ps permission

ii. Easement by estoppel – licensee reasonably relied on P’s permission, and made improvements, so “ can’t revoke the license given

iii. Rule: An oral license is just as valid, binding, and irrevocable as a deeded right of way

4. **Easement Created by Implication**

*a. Quasi-easement* – you can’t have an easement on your own property, but you can make use of one part of your land for the benefit of another part

*b. Implied easement* – arises where the prior use was or might have been known of by the parties and it is reasonably necessary to the use of land such that the parties can be assumed to have contemplated its continuance

i. Elements necessary to establish an easement implied from prior use:

1. Common owner prior to division

2. Prior use must be reasonably necessary for the use and enjoyment of the “quasi-dominant” estate

3. Prior use must be continuous, not sporadic

4. Parties must intend, at time of division, to continue the prior use

5. Prior use must be existing at the time of division

6. Prior use must be apparent, but doesn’t necessarily mean that it is visible

c. ***Van Sandt v. Royster*** – P discovered his basement filled with sewage from D’s house. D had been draining sewage across P’s land. P sued to stop this practice.

i. Prior owner of both lots had created a quasi-easement, so easement by reservation implied from prior use had been validly created when she conveyed title to each of the purchasers

ii. Rule: if dominant and servient tenement come into same ownership, easement is extinguished, and will not be revived by the land being divided again

iii. But new easement by implication may be created, if intended

5. **Easement by Implied Necessity**

*a. Easement by Implied Necessity* – where a common owner has divided property in such a manner that an easement for access is necessary (if you’re landlocked)

i. Only permitted for right of way – ingress & egress between landlocked parcel & public road

ii. Common owner prior to division

1. An easement implied by necessity cannot burden property never owned by the common grantor who created the problem

*iii. Necessity* must exist *at the moment* the property is divided. No prior use is needed

b. ***Othen v. Rosier*** – Hill owned a large parcel of land, which he divided up & sold. One of the parcels was landlocked and acquired by Othen (P), who would cross Rosier’s (D) land to reach a public road

i. When Hill had conveyed parcel to Rosier, he had owned other land that was contiguous to Othen’s parcel and a public roadway. Othen had an easement implied by necessity across some other property, but not Rosier’s

c. Easement by necessity *lasts as long as the necessity exists*; if necessity is removed (by creating a new public road), the easement is terminated

d. The servient estate owner is permitted to select a reasonably convenient location for the easement because he can best minimize the damage to the servient estate

6. **Easement by Prescription**

*a. Easement by Prescription* – adverse use for a sufficient period of time can ripen into an easement by prescription

i. Required to establish prescriptive use: adverse use under a claim of right that is open and notorious, and continuous for the prescriptive period

1. Adverse – when owner objects, some courts say that owner must effectively interrupt or stop the adverse use

a. A permissive use can become adverse if user does things that are inconsistent with permission

2. To be open & notorious, the adverse use must be conducted so that the use may be discovered by any reasonable inspection (not in secret or concealed)

3. Continuous use – use has to be consistent, not constant

4. Prescriptive period – same time period as adverse possession (20 years)

ii. Exclusive use of the property (in *Othen*, not exclusive because both landowners used the road, so it wasn’t an easement by prescription)

1. Exclusivity doesn’t require that only claimant made use of the land, but that his claim doesn’t depend upon a like claim in others. So in most states, can get this even if servient owner uses it too

*b. Public prescriptive use* – can be acquired by the public at large

i. Owner must be put on notice that that adverse right is being claimed by general public, not by individuals

*c. Custom* – beach front property owners own the dry sand part of the beach

i. Common law held that public acquired a customary right to use dry sand part if that use has gone on so long

ii. To establish this customary right the public must prove immemorial usage without interruption that is peaceable, reasonable, certain and consistent with other customs

iii. Prescriptive easement of beaches not likely because courts presume the use of beaches is at owner’s permission

*iv. Implied Dedication* – where the owner intends to dedicate his property to public use. Evidence of intent is inferred from long-standing public use and owner’s failure to halt the use

*v. Public Trust Doctrine* – beach access – state holds in public trust the beach from the water to high tide line (set sand area). This is to enable the public use of tidal waters and lands

d. ***Matthews v. Bay Head Improvement Association*** – Dry sand beaches were owned by a non-profit that restricted access of dry sand beaches to residents of Bay Head and their guests

i. Court ruled private beachfront landowners organized as a "quasi-public" entity must give general public access to and use of privately-owned dry sand areas as reasonably necessary

ii. Court said under *public trust doctrine* members of public must be given "reasonable access " to foreshore and be permitted to use privately owned dry sand areas of beach when such use is "essential or reasonably necessary" for enjoyment of the ocean

**7. Assignability of Easements**

*a. Appurtenant* – passes automatically with the dominant interest

*b. Easement in gross* (general rule) – not transferable unless it is for commercial purposes

c. ***Miller v. Lutheran Conference & Camp Association*** – Pocono grants to Frank and heirs & assigns the exclusive right to fish and boat in the lake. Frank granted Rufus ¼ interest in right to fish, boat and bathe in the lake. Rufus dies and his estate granted licenses to Lutheran to boat, fish and bathe in the lake. Frank sued to stop Lutheran from use of the lake

i. Since Frank never had bathing rights his conveyance of them was void

1. Court said bathing right acquired by prescriptive use, so there was an easement in gross acquired

ii. If there were bathing rights, they were in gross, so neither divisible nor alienable

1. Since this was a commercial easement, it was intended to be transferable

2. But, even though they were transferable, they were not divisible

d. Recreation easements in gross are not assignable – intended to be personal, and we don’t want to burden the servient land beyond the original contemplation of the parties

e. Easement in gross is divisible when the creating instrument so indicates or when the easement is *exclusive* (or it would create a burden on servient estate)

8. **Scope of Easements**

a. To determine scope look at intention of parties creating the easement

*b. Extension/Enlargement* – an easement cannot be used for the benefit of land that is not the dominant estate

c. ***Brown v. Voss*** – easement existed between parcel A (servient) and parcel B (dominant). B subsequently acquired another parcel of land and used the easement for both parcels of land. There was no increase in burden to the servient estate by this use.

i. Rule: When and easement is created by an express grant, the extent of the right acquired is to be determined from the terms of the grant properly construed to give effect of the intention of the parties

ii. Grant gave easement to parcel B, not parcel C. Doesn’t matter that C is now combined into same ownership with dominant estate: have to look at what parties intended to agree on when easement was created

iii. Rule: An easement appurtenant to one parcel of land may not be extended by the owner of the dominant estate to other parcels owned by him, whether adjoining or distinct tracts, to which the easement is not appurtenant

iv. Rule: Just because there is no added burden on the servient estate, doesn’t mean that there’s no misuse of the easement. If an easement is appurtenant to a particular parcel of land, any extension to other parcels is a misuse

d. Notes, Questions and Problems

i. Easement owner can use servient estate as reasonable, even if changed from original use because of normal development, but must be reasonable

ii. A private easement of way usually doesn’t permit the easement owner v\to install on the easement utilities like electrical lines or sewer pipes because such uses are not reasonably foreseeable by the parties - the easement was created to give a way in and off the property.

iii. Location – the location of the easement, once fixed by the parties, cannot be changed by the servient owner without permission of the dominant owner

1. Restatement – permissible for servient owner to change location, at his expense, as long as it doesn’t lessen the utility of the easement, or increase burdens on easement owner’s use and enjoyment, or frustrate purpose for which easement was created.

*iv. Scope of prescriptive easement* – use not confined to the uses made during prescriptive period. But, uses made must be consistent with the general kind of use by which the easement was created and what servient owner might reasonably expect

9. **Termination of Easements**

a. Easements are extinguished in a number of ways

*i. Release* – a waiver; generally it must be written to comply with statute of frauds

*ii. Expiration* – expires by its terms if by grant e.g. stated period of time or when purpose of easement has ceased

*1. Necessity* – easement by necessity expires when the necessity is eliminated

*2. Purpose* – purpose of easement expires (“so long as…”)

*3. Estoppel* – expires when licensee gets full value of expenditures made in reliance on the license

*iii. Merger* – if dominant and servient estate merge (have same owner), easement is extinguished

*iv. Estoppel* – if servient owner relies upon a statement or representation by easement owner

*v. Abandonment* – if easement holder manifest a clear and unequivocal intention to abandon the easement (Preseault)

1. Mere nonuse will not suffice

2. Abandonment is established by either (1) a present intent to relinquish the easement or (2) a purpose inconsistent with its future existence

3. Can be abandonment if not used within a statutory period

4. Act of obtaining alternative means of access to the dominant parcel could constitute an intent to abandon

*vi. Condemnation* – if the government exercises their eminent domain power

*vii. Prescription* – if servient owner wrongfully and physically prevents easement from being used for prescriptive period, the easement is terminated

b. ***Preseault v. United States*** – RR had a right of way easement on Ps property for its rail line. RR ceased operations over that portion, & removed tracks. RR then entered into agreement with U.S. for the lines to be used as a public trail. P sued because government taking their property.

i. Since estate was acquired solely for RR's needs it was an easement not a fee tail

1. Intent was to grant an easement for RR lines and it was not reasonably foreseeable that it would be used as a public trail

ii. There was also a different, not foreseeable, nature of use (scope of conveyance)

1. i.e., private, RR v. public, non-commercial use

2. Also different degree and nature of burden on Ps land

iii. RR intended to *abandon* easement when they removed RR tracks; there was no intent to revive use of easement

1. Mere nonuse will not suffice to prove abandonment

2. Abandonment is established by either:

(1) A present intent to relinquish the easement or

(2) A purpose inconsistent with its future existence

a. Can be abandonment if not used within a statutory period

b. Act of obtaining alternative means of access to the dominant parcel could constitute an intent

**10. Negative Easements**

a. A *negative easement* is the right of the dominant owner to stop the servient owner from doing something on the servient land

i. Common law (England) traditional negative easement – right to stop neighbor from interfering with light, air, support of home (walls), and water

ii. English courts don’t like creation of new negative easements so courts decide no more than 4 traditional.

iii. Today negative easements are usually treated as *equitable servitudes*

b. American courts accepted the English restriction on creating new types of easements

c. Sometimes a new easement is recognized as an equitable servitude

11. **Conservation and Other Novel Easements**

*a. Conservation easement* - developed to preserve historic or scenic areas; prevents servient owner from building on the land except as specified in the grant.

i. Statutes enacted in almost all states authorizing conservation easements

ii. Perpetual, transferable and can be in gross

iii. Owner will give the easement to a non-profit/ public/charitable organization for free, and usually gets tax deductions

**XXIV. Covenants Running with the Land; History**

**XXV. Termination of Covenants**

Covenants, like easements, can be terminated in a number of ways. The following reasons apply

* + - * 1. *Merger*
        2. *Release*
        3. *Acquiescence*
        4. *Abandonment*
        5. *Unclean hands*
        6. *Laches*
        7. *Estoppel*
        8. *Express terms*
        9. *Prescription*
        10. *Condemnation*
        11. *Foreclosure/Bankruptcy*
        12. *Changed conditions*
        13. *After a reasonable time*

***Western Land v. Truskolaski***

**Facts:** Subdivision of development outside of Reno, Nevada contained covenants restricting subdivision to single family dwellings and prohibited commercial development. These lots were subjected to the covenants in 1941 but since substantial changes have occurred affecting the character of the neighborhood since that time. D Homeowners brought suit to enjoin appellant, Western Land Co., from constructing a shopping center on land located within the subdivision.

**Issue:** Had the single-family character of the neighborhood been adversely affected so that the object and purposes of the restrictions had been thwarted, rendering them unenforceable?

**Rule:** “As long as the original purpose of the covenants can still be accomplished and substantial benefit will inure to the restricted area by their enforcement, the covenants stand even though the subject property has a greater value if used for other purposes.”

**Holding:** Substantial evidence indicated the covenants continued to have real and substantial value to the residents of the subdivision and that there was not sufficient evidence that the object and purpose of the restrictions was thwarted.