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Property Owner Rights: possession, use and disposition

First Possession

- ***Relativity of Title***: if 2 parties have bad claim to property, the one with better claim wins.
- Rule of Capture *Wild Animals*:
    - Reduce to possession by kill, capture, or mortally wound.
    - Pierson v. Post: Post chased fox, Pierson killed and took it.
        - Landowner ultimate right to fox, then first possessor. Seizure not always necessary for possession. For Pierson.
    - *Exceptions*: if capture animal and domesticate, then get ownership. If animal escapes, if show *animum revertendi* (animal would return on its own) then escape not divest ownership. Some creatures also exception – whale, bees, fish.
        - Presumptive not avanum revertendi unless they prove it.
        - Stevens and Company: fox farmer – court not apply standard doctrine, wants to encourage fox farming.
- Relativity of title applies to land - 1st possessor better claim to the land.
    - Equitable Estoppel – may avoid nemo dat rule if good faith purchaser – get the land even if prior possessor didn't have it to transfer.

Ad Coelum: if you own the surface, you own it projecting up to the heavens. Right of possession of land extends to all things part of the land (trees, rocks).

- Ratione soli: exclusive privilege of landowner to hunt or to license to hunt game on his land.
- Rights only extend to a certain point that involves your *reasonable use*.
    1. Airspace not automatic trespass unless cause actual damage to land use.

Ad Inferos: You have absolute rights to the depths (center of the Earth).

Gases:

- Owner of land has absolute rights to gas under place unless escapes before reduces to possession by extraction. Water/oil/gas migratory nature, so like wild animals - if escape into other land, then lose title. Not property until reduced to possession by extraction.
    1. Landowner exclusive right of seeking to acquire/appropriate oil/gas beneath.
- If capture natural gas and restrict its movement, you become the owner – not lose ownership if stays in well defined reservoir.
- Some jurisdictions – not lose title to extracted gas unless abandonment (intent). Public interest in protection/distribution of gas – underground reservoir only viable way of storing.
    1. Even if gas goes to someone else's property.
    2. Some statutes: all gas that's not native (pumped there, injected) is property of injector.

Wild Wallets:

- *Replevin*: action to recover personal property wrongly detained by D.
    1. *Conversion*: if can't get good back (destroyed, etc), sue for its value.
    2. Once SOL runs (usually 2-5 years) you lose right.
- Prior possessors beat subsequent regardless of how came to property.
    1. Buy jewelry in alley, take rights vendor had – if buy from jeweler usually implied.
    2. **Nemo Dat:** can't give what don't have – even if buyer bought in good faith.
        - Exception: UCC 2-403: claim of prior possessor against good faith purchaser extinguished – only for sale of goods. Prior possessor can still sue seller.
        - GF: would reasonable person believe they had title?
        - Sometimes ***estoppels*** can make subsequent possessor supersede original.

Right over property depends on mental state of prior possessor – Q of fact for jury.

- ***Lost***: prior possessor didn't intent to part – involuntary (wallet found on bar stool, infer).
    1. Finder wins over locus owner **BUT**: can ***K*** around default rules, and ***trespassers lose***.
- ***Mislaid:*** prior possessor intended to part with possession, but not permanently.
    1. Locus owner prevails over the finder (want prior possessor to be able to find it).
- ***Abandoned***: prior possessor parts with item and intends it to be permanent (trash bin).
    1. Same as lost property – BUT ***finder beats prior possessor***.
- ***Prior possessor beats the locus owner/finder unless abandoned.***
- Some states no distinctions (e.g. NY: if find, give to cops, locus owner is cut out).

- If finder, can't just pocket the $, have to make reasonable efforts to find the prior owner. ***Must take possession to be a finder (physical/mental state***) – if want to avoid liability don't be the finder.
    1. Eeds: need to do more than locate spot to be finder. Marking where wreck is does not make finder over someone parked over it.
    2. Notice/communication of intent can be important to possession – move diligently toward use of resource before can claim in possession (exploring diligently for minerals, exclusive right to work at given spot even before discovery or acquires minerals).
- If 2 locus owners (Lidner Aviation – hangar v. airplane $ was in – airplane the locus) – property owner wins most of the time.
- Employees may have **Ks** that anything they find is property of employer.
- Baseballs: abandoned once leave field – what is possession? Catching ball or holding?
    1. CA made up new rule and split the value in half between catcher and one who got out of mob.

- **Bailment :** temporarily transfers property to other (bailee) - ***voluntary*** (on both sides) entrusting of property from one to another (e.g. transfer clothing to dry cleaner).
    1. If a **K** – then it holds.
    2. Person who takes custody of time assumes responsibility to return it in same condition (with ordinary wear an tear as got it).
        - Obligation not uphold when things totally not your fault (someone holds gun to head).

Gratuitous bailment: bailor only benefit – bailee not get anything from it (watch my laptop).

3. Bailee is only liable for gross negligence.

Quasi-Bailment: both benefit

4. Bailee liable for ordinary negligence.

Bailee Only Benefits: (e.g. borrow someone's computer?)

5. Bailee liable for slight negligence.

Some jurisdictions abandon distinctions for unitary standard of negligence – "ordinary care"

- Is the bailee using the item? Is the use within the scope of the agreement? If outside, owner may have a conversion action.

Relativity of title, 3rd party rights

- *Finder* is has legal duty not to convert to finder's use and not deliver to others. Until SOL runs – finder's title is qualified.
    1. If not could encourage theft.
    2. Finder not a bailee because of no voluntary entrusting – but locus owner does have some standard of care and legal responsibility.

- If converter 1 v. converter 2 – then converter 1 prevails b/c otherwise there would be endless seizures and reprisals (Anderson v. Gouldberg)
    1. Russel v. Hill: opposite result - A wrongfully took from K, B took from A, B defeated A's trover action.
- Roth Hotel Company: leaving envelope with ring in it for hotel's jeweler guest reciprocally beneficial (non-gratuitous) - a service to the customer so under duty to exercise ordinary care (ordinary prudent person in the same situation).
    1. Hotel still liable even though it didn't know ring's value (very high).
- Bailment only if had reason to know they were taking something – value of it not matter though.
- E.g. if coat in coat check -
    1. Liable if coat stolen.
    2. If coat held $ - check not liable for it because its not something you would expect to find in a coat pocket - argue they didn't take custody of the cash.
    3. If diamonds lined coat though, would probably be liable - distinction between the thing and the value of the thing.
- If charge $ to park not a bailee cause didn't take custody – valeting more likely a bailment.
- Parking garage: courts split – can circumvent liability with a ticket clause – if not cohesion though.
    1. E.g. liability of parking garage for car theft where in modern garage with attendant even though ticket had a no liability clause. No bailment if no attendant though.

Accession: mistakenly take something that belongs to someone else and change it.

- Improvement doesn't change ownership - BUT so transformed that its no longer recognized, then it changes ownership, but original ownership can sue for value their destroyed thing.
    1. If you can disentangle, then give the person back their thing (diamond in setting).
- If you're a bad faith improver, you will lose, improver must act in **good faith**.
- If partially destroyed:
    1. Weather: good faith converts trees into something much more valuable. If you transform you keep it, but if you steal it then you're a bad faith improver and will lose.
        - Minority: increased value so much (drastic), just needs to pay conversion (wood value).
    2. Bank of America: shop improved value of car in good faith – detachable parts added by shop not recoverable by rightful owner. Shop can't collect for value of services/labor though.
- Good faith improver of land:
    1. Build part of building on someone else's property in good faith – still trespass.
    2. *Exception*: **statutes**: if improver innocently encroached, can buy the land at a court-fixed price.
    3. *Exception*: if equitable relief would really screw someone – then just damages.
        - BUT – if deliberate encroachment, then equity.
        - Minority: "de minimis" encroachment – nominal damages only.
            - Unintended encroachment with only slight damage to P and grave hardship if removal, then possibly only damages.
        - Majority: Pile: automatic injunction.

Restitution

- Basic elements: 1) unjust enrichment of D 2) at the expense of P 3) under unjust circumstances.
- If in good faith build building on someone else' property – remedy options:
    1. Let owner keep the house and pay encroacher house's fair market value.
    2. Sell property to 3rd party and apportion proceeds between true owner and encroacher.
    3. Restitution to prevent unjust enrichment.

4. If landowner destroys the building on his land - GF improver can recover damages.

Cherokee Principle: legal rights don't enforce themselves, can have best legal right but no good enforcement mechanism.

Time:

- First in time, first in right.
    1. If A and B bought same land from O – if A bought first, A entitled to land, B damages.
- Recording (921):
    1. RARE: If statue says need recording to be valid – B (subsequent purchaser) can beat A if recorded first. Incentive to get it recorded instantly. B only beat A only if in good faith.
    2. Register is based on name not lot cause the size changes. Register can be wrong though (human error) and someone may have better title. *2 responses*, buy title insurance.
    3. OR warranty deed - promise from seller that they own what they're selling. If they're wrong you can sue them - doesn't help against land though.
    4. Quit claim deed - whatever I the seller have give to you, no promises of what I have.

Adverse Possession

- Prevent title owners from "sleeping on rights"
- CANNOT adversely posses land against the US. (Supremacy clause)
    1. State land depends on the state
- "Relation back" - once get title by AP, APer is deemed to have been the owner from the time the AP first entered into the property.
- AP can't run against FIs because FI holder cannot bring action to recover real property, so no SOL run because no legal wrong against FI holder.

AP REQUIREMENTS: - ENCROACH

- Large variations amongst states

1. SOL ran - w/o it, the record landowner wins. 1. Some western states, wrongdoer needs to pay ***property taxes*** on property occupying for full period of SOL - gives a record landowner a method for seeing is someone is occupying their land. Shorter SOL than eastern there because can check.
2. Exclusive (just means not being simultaneously occupied by you and the true owner).
3. Notorious (need to occupy land in a way that someone should see. Rare to have an occupation that's not open and notorious but continuous) 1. Where SOL ran, color of title, paid taxes, and granted use rights to other, public acts of ownership sufficient even though not actual occupation.
4. Claim of Right (lack of permission is enough) 1. Good faith – honestly thought it was their land. i. Carpenter: overgrown cornfield, turns it into a garden - knew it wasn't her land - therefore she didn't act in good faith so title holder wins. 2. Bad faith (know not entitled to possession) - not many jurisdictions hold this. 3. Majority: good faith/bad faith distinction is irrelevant. 4. Sometimes must be under "color title": APer believes has title – wrongful but GF - sometimes shorter SOL. Sometimes allow AP of large piece of land despite using a small portion.
5. Open and notorious: (e.x. neighbor builds doghouse on your land). Courts split on whether

needs to be open and notorious that occupation is wrongful.
    1. Majority: if can see it, then good enough - doesn't need to be obvious that over line.
    2. Minority: only notorious if know its over the property line. If its way over, then hold them to that kind of knowledge.

6. Actual (needs real occupation that triggers SOL, sufficient to trigger legal action)
    1. No clear rule for what is enough possession - depends on the land, what normal person would do on it.

7. Continuous
    1. *Vacation property*: what if wrongly occupy just for portion that someone would occupy - courts split on whether they will allow seasonal occupation for AP.
    2. If pasture, just graving cattle during normal times may be enough.
    3. By a single individual? If in *privity* may be able to add up different people's occupation for the SOL.
        i. Any voluntary handing of possession is privity. If someone with no connections takes your place, then start new clock.
    4. If landowner transfer property while A is possessing, can tack on the time from before sold.

8. Hostile: nothing to do with motivation, nothing to do with mental state of occupant.
    1. Just means non-permissive. Can't adversely posses if nothing to sue about, so SOL doesn't run. Can have factual disputes of whether there was permission.

ESTATES IN LAND

- When convey, assume convey everything unless clear intention only to convey some things.
- And his heirs – temporal words, heirs no legal interest in the property.
    - Valid will determines disposition of the property - statute of intestacies (die and no will). If no one in line according to the statute, the state takes.
- Fee Simple: potentially forever.
- Life estate: measured by lifespan -can only transfer part of timeline you own.
    - Needs to be a human life.
    - May be able to be forfeited if egregious waste.
    - Can grant to someone for the lives of multiple people.
        - A to B for the lives of B, C or D - as long as one alive interest continues. If "and," then they all have to be alive.
        - If not specify measuring life, then its the life of the beneficiary.
        - A to B for B's life - if B dies then A gets reversion in FS.

Future Interests: can sell future interest.

- *Reversion*: future interest that you keep in creating or transferring a lesser present interest than you have - future potential right of possession.
- Lesser in hierarchy, not temporal (fee simple, then life estate lesser, then tenancy lesser) - but life estate to life estate, tenancy to tenancy, you keep a reversion.
- Can't limit transferability of property – "To B so long as property isn't sold" – can o for LEs though – some states defeasibility can't be frivolous.
- Law of Waste: limits rights of present interest holders to benefit future interest holders – can draft around.
    - Holder of present interest can do what a reasonable holder would do.
    - Waste can be:

        - Reducing value of the property - but not every decrease is waste.
        - Harm by not doing (not fixing roof, paying property taxes).
        - Fundamentally changing the character of the property, even if it increases its value (ameliorative waste).
        - If character of area change dramatically, (Pabst) then maybe not waste to change it.
    - Remedies: Injunction - if ameliorative waste, it's the only remedy possible, because only damage in economic sense.
        - Statutes: if flagrant waste, maybe double/triple damages.
        - Less likely to get injunction if unlikely to become present possessor. May be same for damages because need to show damage with reasonable certainty – if unlikely to possess, hard to calculate damages.

Grantor Interests

- POR: possibility of reverter – automatically reverts if triggering condition goes off.
    - Present interest a Fee Simple Determinable
    - If conditions triggers, AP clock starts immediately.
- ROE: Right of Entry/Power of termination – future interest holder choice.
    - Fee Simple Subject to a Condition Subsequent FSSCS.
    - Sue for ejectment to kick them out – some states can just call (but SOF).
    - AP clock starts when future interest holder asserts right.
- If POR/ROE ambiguous of what grantor wants – in favor of CS.
    - Some states only recognize ROEs.
    - If clear what grantor wants – its that. If not, turn to grammar.
        - If seems like condition is an afterthought, condition subsequent (**,but if**)
        - If flow then its determinable.
        - To A for her life as long as she stays off drugs (grantor keeps 2 interests).
- **Transferability:**
    - POR generally transferable.
    - ROE: half states same as POR, other half can only transfer if its to the holder of the present interest (merger), or if the holder dies.
        - IL statute that ROE and Reverter subject to this rule.
- **Invalid Conditions**: can't write into the grant:
    - FS: can't say interest ends if ever sold or transferred - promotes marketability of land.
    - Can't make limitation against PP - nothing illegal.
        - If against PP, invalidate just the illegal clause, not the whole thing.
        - Some jurisdictions - frivolous conditions are invalid (eaten by mutant star goat).

3rd Party Future Interests

- Executory Interest: all future interests other than remainders in a transferee.
- Remainder: **4 requirements** – (Remainders/EIs happen automatically – no ROEs).
    1) Must be **created in someone other than the grantor**.
    2) Must be theoretically **capable of taking possession the instant all prior interests expire**.
        - If its possible to be immediate, then satisfied.
        - NO: To Amy for life, then after B has given her a bang up funeral).

3) Can't divest any interest except that left in the transferor - if can theoretically, not satisfied. Must **wait patiently for prior interest to expire.**
    - **NO:** To A for her life, but the instant that A starts using, to B and her heirs.
    - A for her life so long as she stays clean, then to B and her heirs – maybe.
        - Defensible provision can be natural part of estate.
    - Can divest an interest in the grantor.
4) **Can't come after possessory fee simple**.
    - Has to follow a tenancy or a life estate.

- REMAINDERS are either ***Vested***; ***Contingent***.
    1) **Contingent**: any remainder that isn't vested.
    2) **Vested**: 2 part
        - ***Ascertainable beneficiary***: the time the grant takes affect, look around and see that someone is the beneficiary.
            - **NO:** To Amy for her life, then to Britney's third husband and his heirs.
            - If when Amy dies, B's third husband is alive, then can be vested.
        - There can be ***no condition precedent to possession*** other than the running of the of the prior estate. ***Must be necessary and sufficient condition that prior interest ending makes possessory.***
            - **NO:** To L for her life, then to B and her heirs so long as B does not re-marry K-Fed – not sufficient that L's LE run out.
            - **YES**: To Lindsay for her life so long as Lindsay stays clean, then to Britney and her heirs.
    3) **Reminders Vested Subject to Open**: 1 person meets the description, but more people may. As more join – other become partially vested.
        - To Lindsay for her life, then to Britney's past husbands and their heirs.
            - This is description can expand over time, if she marries more people.

- **EXAMPLES:**
- To Lindsay and her heirs, but if she starts using, then I get it back.
    - L = FSSCS – "but if." Grantor = ROE in FSA.
    - To Lindsay and her heirs, but if she starts using, then to B and her heirs.
        - "," so condition a part of B's interest. B = EI in FSA. L = FSSEI.
        - **, then - means then by the expiration of the previous.**
    - To Lindsay for Lindsay's life, then one day later to Britney and her heirs.
        - B = EI in FSA. The 1 day interest goes to grantor – keeps 1 day reversion in FS.
    - To L for her life, then to B for her life – not a CP for B to outlive L. Still vested because its part of nature of grant so not a contingency.
    - To R for her life, then to S and his heirs so long as S is never sitting on a barbed-wire fence after his interest becomes possessory, and if S is ever sitting on a barbed wire fence, then the property will go to M and her heirs so that it will be M's farm.
        - S = VRM in FSSEI (condition after he takes the property, doesn't have to happen before he takes possession).
        - M = EI (its after a fee simple) in FSA.
    - To S for his life so long as the original lineup of Aerosmith continues to stay intact, then upon expiration of the prior estate to Joe for his life, then upon expiration of the prior estate to Brad and his heirs if Brad's last child ever expresses a sweet emotion.
        - S = LEd (defeasible). J= VRM (Aerosmith breaking up is the natural part of S's grant).B= CRM in FSA (upon expiration of prior estate, so not snatching). CR b/c something has to happen for it to be possessory other than previous dying out.

- To L for L's life, and if B survives (lives longer than) L then to B and her heirs, but if B does not survive L, then to A and her heirs.
  - B = CRM in FSA - B needs to outlive L. A= CRM in FSA (alternate CRMs).
- To L for her life, then to B and her heirs, but if B dies before L, then to A and her heirs.
  - B = VRM in FSSEI. No CP b/c not grammatically connected. It's a CS.
  - A = EI in FSA.
- If A has a LE and transfers it to B, B holds a LE for A's life
  - **<u>If transfer interest, measuring life stays the same.</u>**

<u>Rule Against Perpetuities:</u>

- Concerned with drag on marketability.
- Interest must be **<u>guaranteed</u>** to **<u>vest or fail to within in 21 years after death</u>** of a measuring life at the **<u>time of creation of the interest</u>**.

1. Is the interest a CRM/VRMSTO, EI? If so, apply analysis.
   - *<u>Never worry about present possessory</u>* or POR/ROE following LE/tenancies or kept in the grantor. VRMs not subject to open okay.
   - If future fizzles because no longer possibility to satisfy, then fine.
2. Interest must be certain to turn into a non-threatening interest (VRM, etc), become possessory or fizzle within ***<u>21 years</u>*** after the death of a measuring life. ears after death of someone.
   - **<u>Measuring life</u>** can be
     i. Beneficiaries of grant,
     ii. People who can directly and uniquely affect the identity of beneficiaries in the grant though they may not be beneficiaries,
     iii. People who can affect directly the happening or not of the conditions that affects its ability to become a possessory interest.
   - If A for A's life then to B's children and their heirs.
     i. Only A and B can be used as measuring lives, not the potential children – B's only one that can have the kids and effect.
   - If – "If liquor is ever sold on property" – doesn't depend on specific person actions – no measuring life.
   - Validating life – must ensure that after death no matter when dies (even today) interest will vest within 21 years.
3. If fail the analysis, only the **<u>interest is void.</u>**

- **<u>Examples:</u>**
  - To A for 3 years unless mariners win the world series – fine short drag.
  - To B and her heirs, but if anyone ever makes a heavy-metal remake of "oops, I did it again", then to Lindsay and her heirs.
    - B = FSA – L's interest invalid under RAP so destroy whole clause. L=0.
    - Guaranteed that theres someone alive who would know the fate of the interest? No.
    - Measuring life limited to people alive at the time the grant takes effect.
  - To Britney and her heirs so long as no one ever makes… Again," then to L and her heirs.
    - B = FSD – B's interest not invalid b/c its part of her **<u>present possessory interest.</u>** L's interest is wiped. G = POR in FSA.
  - To SS in FS so long as we do not buy it back in 1987, 1993, 1998, 2003. Statute – must be someone alive in the world that can point to in 25 years after death – know what happened to FI.

        - Could happen, BUT IT MUST.
    - To S for his life, so long as the original lineup of Aerosmith continues to stay intact, then upon expiration of the prior estate to Joe for his life, then to Brad and his heirs if Brad's last child ever expresses a sweet emotion.
        - S = LE(d). J = VRM for J's life. B's interest is wiped!

Joint/Cotenancies

- Tenancy in Common
    - If die and have a will – follow that. If not follow state law of intesticies.
    - Pass the good with the bad – if mortgage it goes.
- Joint Tenancy
    - If 1 JT dies, interest vanishes and other JTs interest expands to fill in.
        - Can sell or give away interest while alive though.
        - 1 JTs baggage also vanishes (leans, etc). JTs can attach jointly though.
        - If 3 JTs and property worth 300k – 1 dies, then 2 JTs get 50k interest each.
        - Reduces admin costs of when someone dies. No inheritance tax under CL, but IRC treats as passing inheritance.
        - If 1 person left – no longer JT, but single ownership that passes by succession.

FOR JTS 6 THINGS

- **DEFAULT** in CL is **TIC**. If not married couple, to create joint tenancy need to fulfill requirements:
    1. **State** property in **must recognize** joint tenancy - some have abolished joint tenancy.
    2. Manifest the necessary **intent** to make a joint tenancy.
        - "To them as JTs and not TICs" court found not clear enough so TIC.
        - Must recognize the interest vanishing to be sufficient - "***right of survivorship***."
            - "as JTs with right of survivorship" prob good enough. Don't need to use this language, but do so to be sure.
- **FOUR UNITIES**
    1. All interests must come in at the **same time** –
        - If not, can have 2 JTs with a tenant in common.
    2. **Unity of title** need to get it in the same single document - grant/piece of paper.
    3. **Interest** - need to have the same durational characteristics as co-owners – same slice of time. If FSA, all must have FSA – same $ share as well.
        - There are jurisdictions that will recognize even if not totally equal.
    4. Unity of **possession**: each must have right to possess the whole.
- If fail one of these requirements, then becomes TIC.
- **EXAMPLE:**
    1. JT A,B,C – A sells to D.
        - No unity of title for D – so hes a TIC.
        - If B sells to E – E is TIC. C now TIC too – pass by law of intestacies.
            - Transfer of title, **even if secret** severs the JT but no co-ownership.
- **MORTGAGES: - 2 Ways – States 50/50**
    - *Leaning Theory*: no transfer of ownership – just give lender right on the property. Still JTs b/c nothing transferred.
    - *Selling*: when you mortgage you sell it to lender and buy back in time (lender owns). Severs the JT and changes it to a TIC. So would pass with mortgage intact.

- IL against CL- mortgage survive even if JT relationship.
- **Leases Land from JT**: sometimes turn into TIC, sometimes not.
  - CL – executing lease turns JT into TIC.
  - CA – if short lease and clear not intend to turn JT to TIC, then JT intact.
- **JIT/TIC both 100% land use right**: parties can K whatever they want – in CL every owner of property has an absolute/unconditional 100% right to use/possess the property.
  - Even if A 5% stake, C 95%, both have same use rights.
  - If 2 JTs – 1 can lease land without permission of other. Could also sell, but not other JTs portion. If rent – other can get a take. If 1 JT ran business on own, other JT no stake.
  - If dispute, options:
    - Divorce co-ownership.
    - *Physical Partition*: make property individually owned. Any co-owner can do at any time for no reason.
      - "Owelty": pay for other's interest.
      - Subject to equitable adjustments – if 1 improved more, offset in sale.
    - *Partition by Sale:* - Sell to 3rd Party: divide up the $ by financial stake – costly to value land.
  - *Termination of co-ownership*: take accounting of everything that happened from beginning to end. If one is responsible for increase in value, they have a claim for the $.
- **Ouster:**
  - If 2 co-owners who both want to possess land – start ouster, then has to start paying rent – pay reasonable rent to co-owners.
    - No AP countdown when possess, as all have right to use the property. Once start an ouster, and A blocks, then AP clock starts.
  - E.g. if call up and say want to use land – may be good enough for ouster. Where co-owners both want to graze sheep, if one calls and says wants to graze cattle.

LEASES

- T = present possessory interest, L = future interest.
  - Law of waste applies - landlord with reversion can sue for waste.
  - T/L have K and Property law relationship – property law usually wins.
- Tenancies differ in how they end:
  - **Term of years**: for a fixed period of time (can be days/months, etc). Some statutes limit their potential duration. It ends automatically when date comes - no need to give notice. Can also end because of defeasibility condition.
  - **Tenancy at Will**: terminates when one party wants to end the relationship.
  - **Periodic**: sign for period with presumption that it will renew itself unless called off, renews as law unless notice given - can be any amount of time.
    - CL: don't need to tell T that not renewing
    - Almost every state statutes that must inform other to call it off.
    - **Form/timing of notice**: CL: parties can write in whatever.
      - SOF - notice makes go from F to P interest, conveyance of property.
      - How far in advance? Presumption is the period of notice. (e.g. if renew at end of 1 mo, give 1 mo notice - 6 month usually the upper bound).
      - Look at 1) statutes, 2) lease 3) CL - doesn't say much about form.

- Q of whether succeeded in telling them you want out of lease - timing can determine when notice is effective.

- Transfer: a conveyance of a present and future interest.
  - When transfer, take it subject to obligations attached to it - mortgage/lien.
  - *Landlord – Tenant – privity of estate b/c of future/present interest*
    - Property law relationship: T - present possessory interest, L at least 1 FI.
    - If FI wants to inspect, has to be in agreement (otherwise trespassing).
    - Present property holder bound by law of waste because of future interest.
    - Obligation from L to T: L guarantees he owns property being transferred (can lease around it).
  - Parties can restrict transferability – can agree not to.
  - If L transfers to L2 and lease allows it:
    - Old L and T still have K with each other. New L and the T are presumably not.
      - Transfer of a L by itself is not a transfer of K obligations - new L not bound by K law to T.
      - Since still have K, need full performance or release (let off hook).
    - New L has *obligations of quiet enjoyment*, and ability to sue under *law of waste.*
      - New L step in (goes with holder of future interest).
    - Some lease provisions **do transfer** and bind subsequent parties (not K obligations, e.g. security deposit).
      - The provisions that **touch and concern the land travel to the new party**.
        - ***T+C***: any provision that normal person would regard as important travels with the lease (e.g. maintenance of physical characteristics. NOT promises to feed goldfish).
  - T transfers are either (**intention of what want not matter just what you transfer**)
    - **Assignment**: still no change of K obligations. P Law: new T now in old T's shoes . New T subject to law of waste – privity of estate.
      - Things that T+C land (obligations and benefits) go to new T. If the original L and assignee want new K, they can do it.
      - If old T transferred **EVERYTHING** then its an assignment.
    - **Sublease**: no effect on K. Still relationship between old T and L. New T now in relationship with old T. Privity of estate never moves (but now theres privity of estate between old and new T).
      - L can sue the original T, but not the new T. The original T can then sue the subleasee.
      - Some jurisdictions have altered this by statute.
      - If T keeps any future interest it's a sublease.
    - Law SPLIT on whether if keep a reversion, sufficient to make it a sublease.
    - Jaber v. Miller: if parties really intended an assignment, and no serious argument they didn't, then use intention.
    - Most leases: can't transfer without consent.
      - CL: if no reasonableness provision, can refuse transfer for any reason.
      - Standard in leases: consent not withheld unreasonably.
      - Split in courts on whether reasonableness condition implied.

- CA: reasonableness is if crappy tenant who is unlikely to fulfill obligations of lease. Making $ on deal not ok, no non-commercial would be either.

L/T obligations under K and P law

- Present/future interest so P law obligations:
- Law of waste/COE can be disclaimed by a **quit claim deed.**
    1. T to L not commit waste
        - If waste intentional or egregious, could result in forfeiture of the lease - could excuse performance of L.
    2. L to T covenant of quiet enjoyment: promise that L actually owns the property (no one will evict T b/c of better claim) – also that L not interfere with T's possessory rights
        - Even if tiniest violation (L starts building on land) will violate and L trespassed.
        - IF violate: can immediately relieve obligations of the lease. If T evicted, then doesn't have to pay. Not end lease, but not clear how much gone.
    3. L/T obligations *Independent*. If T defaults on rent, L obligations not discharged.
        - T still needs to pay rent even if roof is disrepair unless it's a defeasibilty condition – T can sue for damages though.

- Covenant of quiet enjoyment – just a promise of conveying good title, not that land can be used effectively.
    1. There can be circumstances where the nature of the transaction is that you're assuming to get something as part of the land. If rent summer home may be certain obligations (not shell of a house)
- **Constructive Eviction**: if property uninhabitable – like an eviction (property under 6ft of water). IT relieves T of obligation to perform under lease and can sue for breach. Under CL, requires:
    1. L breaches provision in the lease or one thats imposed by law.
    2. Breach must renders the property effectively uninhabitable (or unfit for purpose for which it was leased)
    3. Tenant has to actually leave:
        - If T leaves and sues for constructive eviction and loses, can still sue L for damages. Still a breach of lease, just not at eviction level. T still liable for rent.
        - **Statutes**: T can seek declaratory judgment to see if would win constructive eviction suit before they leave. Shows that uninhabitable is more like really bad that not actually unlivable. (If in DC and no AC, could be constructive eviction).
    4. L failed to fix problem after reasonable notice.

- Jurisdictions often have health codes - provisions specifying construction of buildings (apply to rental too). Provisions not enforceable by Ts, but administratively (call inspector).
- Lease obligations less often dramatic from L to T if housing lesser quality.

Implied warranty of habitability (not implied, usually, or contractual)

1. Term for the general state of the law. Trend to read more into covenant of quiet enjoyment than traditional CL. Focused on minimum quality of unit.
2. Modern L/T law mostly statutes. Express obligations. Sometimes implied, often not.
3. Law varies tremendously by jurisdiction/state.

- Source of landlord/tenant law changes
    1. Courts: from CL. An interpretation of covenant of quiet enjoyment?

2. Legislatures: Commission of Uniform Laws drafted the residential/landlord tenant act - widely adopted. Rental standards for certain units - detailed, basically staples requirements to lease.
3. Nowhere: are a few states where law looks like it did in 1960. Even then there will be variation.

- Coverage: to what do they apply? Coverage depends on jurisdiction and can focus on the following:
  1. Large unit/urban residential housing was biggest concern.
  2. All residential - there are a few jurisdictions that apply to commercial.
  3. Urban v. rural.
  4. Constructive eviction now more generous than was 50 years ago.
- Content: **statutes**, many say "reasonable habitable residence" - courts then imply in law.
  1. Housing Codes: physical characteristics - not legally part of the lease. Low lit costs, but Housing Code is over/under inclusive. Over - contains many things no one concerned with. Under - many T concerns not in code (doesn't deal with all in the building).
  2. Reasonably habitable: difficult to see if comply. Costly to sue - so undercut purpose of raising quality of lower-level housing. Wouldn't be really enforceable?
  3. **Not** an obligation of L to provide ascetically or perfect home. It's a minimum of safe/sanitary – breach a Q of fact for jury.
- Waivability depends on jurisdiction, usually not, if statutory no, if warranty, yes.
- **Consequences of Breach**:
  1. Breach by L same effect as breach of quiet enjoyment – T not obligated to perform (can withhold rent or terminate the lease).
  2. ***Damages***:
     - Original: difference between promised rent (from lease) and the fair rental value.
       - How to determine the fair rental value?
     - Fair Rental Value (lease) difference with actual value – incentive to bring up to compliance with norms. Hypothesize the V would be? Lots of litigation costs, $ prohibitive to many litigants.
     - ***Modern trend***: look at existing unit and existing rent, look at defects that cause it not to be in compliance with implied warranty. Figure out what % of the rent should be reduced given the defects in enjoyment and value. Doesn't require experts - jury.
  - Implied warranty makes mandatory base line of housing – but if require better unit, cost goes up and demand goes up so housing shortage. Some want lousy housing because they have little $.
  - Limited implied theory actions – remedies issue. Difficult to find what is and isn't a violation when its based on reasonableness. Remedy small, but high litigation costs.
  - L/T issues difficult to enforce – most leases, breach by T allows L to terminate. If breach by T, can sue for damages - but spend a lot for small remedy.
- ***Mitigation of Damages***: K/P Law.
  - *P Law: no mitigation* b/c *all covenants of promises are independent* and so breach of one not excuse performance of other.
  - Does L want to put someone else on property or want to terminate original lease?
    - May be better to terminate lease, especially if can make more $ with someone else or if new person wants longer lease.
- ***Abandonment:*** T leaves with intention of not returning.
    - Under P law - no consequence of this. Relieves neither party of obligation.
      - If abandons and stops paying rent, then it is a breach.
    - Doesn't terminate lease, but it is an *offer to terminate it*. T can offer to terminate.
    - When the T abandons, L can:

- *Do Nothing*: not accept offer to terminate, so still effective unless terms run out or defeasibility condition occurs. P law - L can wait out and sure for $ at end.
- *Mitigate Damages*: can mitigate w/o terminating lease through *re-let clause*, if you leave, L can re-rent. P law allows and doesn't violate COQE. If getting same as old T, then no damages. If L getting more, acting as agent of abandoning T, T is entitled to $.
    - Many states have duty to mitigate if want to recover. Damages would be reduced by failure to mitigate.
- *Accept termination offer*: mutually agree no more lease – subject to SOF. P law recognizes 2 types of surrender.
    - *Real*: comply with SOF, laws of conveyance and agree to terminate.
    - *Implied in Law*: look at conduct of parties/relation and conclude parties agreed to terminate lease.
        - Just having someone else on property, not conclusive that intended to surrender.
    - CT Rule: look at circumstances to determine intent of parties. May be enough if someone new moved in. If surrender, no more rent/P law obligations, but doesn't relieve K law – so can get damages in form of rent would have gotten subject to mitigation.
    - To *relieve K duties*, need a ***release*** – have other party relieve you of the K. T wants surrender (remove P liability) and release (K liability).

Ejectment

- What if T defaults and stays? Can't mitigate with a new T if old one is there.
- If default a defeasibility condition in the lease, then L legal right to reenter property b/c has the paramount possession rights, but how to vindicate if other still there?
    - *Ejectment action*: court backlog delay judgment during which have non-paying T.
    - When get judgment on ejectment, defaulting T must pay for time, but $ problem.
- If get ejectment judgment, but T still not leave – need to go to police (massive delays).
    - Now stuck with property and can't mitigate. Options:
        - Stop being a landlord
        - Legislature created special housing courts for this – expedited hearings.
            - Still need police to enforce it. If L changes the locks, T can sue for wrongful eviction action and might get damages. Delay though, housing courts only open to Ls.
            - If throw T's property on the street, you can be liable for it.
- If defeasibility condition go off – L decides if violated, then T can sue to say its wrong. L can act reasonably in self help at CL. If behaved unreasonably, L can be sued for compensation/punitive damages.
    - L can also have judge deem the lease is breached – then can go to police and get locks changed. Legislature typically don't prescribe one method.
    - MN: L self-help no longer an option. Expedited procedure is good enough.
    - Many jurisdictions where self-help allowed, but L can be sued if L is wrong.
- Typically default is not getting rent. What if T pays less b/c violation of implied warranty of habitability? (reduce rent by %). If T correctly identifies violation and damage % is right, then that's the rent. If not implied in the jurisdiction, owe full amount.
    - T can fix issue himself and give L the bill.
    - Paying less is a breach – if no implied warranty in the jurisdiction then the amount owed is in the lease.

- Some courts don't hear T claims whether correct rent. Need to show breach of warranty - some courts don't allow these claims - make long proceedings.

- **EXAMPLE**: L rented property to T – lease provision that must operate within health code. T violates code, T puts up sign (closed for remodeling) and fires everyone.
  - Abandonment? Fired employees/left town - but sign implied would come back.

Housing Discrimination

- Property right to exclude - choose who gets to be on and use your property (CL some limits 445-47).
  - CL presumption inn keepers legal obligation to serve anyone who shows up and meets neutral/non discriminatory criteria (can pay/not nasty dirty). Then have charge you the same.
  - CRA of 1964: no discrimination of race, religion, etc in places of public accommodation.
- **Fair Housing Act**: Federal statute, so state minimum - but they can make protections stronger.
  - ***3604(a)*:** unlawful to refuse to sell or rent, or negotiate for a dwelling to any person because of race, sex, religion, familial status or national original (3602: *dwelling*).
    - *Familial status*: 1 or more individuals who have not attained the age of 18 - being domiciled with another person who has legal custody.
    - ***A*** not mention prohibitions base on handicaps.
  - ***3604(b)***: can't discriminate in terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of ""
    - Employment status/sexual orientation not prohibited under FHA.
  - ***3604(c)***: unlawful to make print or publish or cause to be made, p or p, any notice statement or ad in respect to sale or rental of dwelling that indicates any discrim, limitation or preference for race, handicap, relig, discrim, ect. or intention to make any preference.
    - If sign has gender preference, it violates. DOJ would not enforce though. Doesn't preclude private enforcement.
    - "Waitress Wanted" – express women preference.
    - Bona Fide Applicant Qualification: if require one gender, under CRA, must be qualification for whats performed, not just what customers want.
  - ***C, D, E have handicap provision***, but not A, B. Does have handicap provision (F).
    - Worry that everyone may have to rebuilt to accommodate (if in A, B, it would).
  - ***3603(b) Exemptions***:
    - Any single family house sold or rented by owner - can discriminate. Can only do this if satisfy other requirements: if only done by owner and if don't advertise.
    - Rooms or units of dwellings, if owner contains and occupies one unit - relatively small owner occupied unit housing - can discriminate. May be illegal under another statute.
  - ***3607 Exceptions:***
    - ***Religion organization***, associations, or society can discriminate based on religion if not for commercial purposes. Housing in conjunction with religious operations. Covenants can discriminate on religion/sex - but NOT race.
    - Nor shall anything in the subchapter prohibit a ***private club*** not open to the public to give lodging members only - race not a part.
    - ***Older person exemption for familial relationship***.
  - ***42 USC 1982:*** applies to private citizens and is narrower/broader than FHA.
    - Only applies to discrim based on race (not apply to sex, familial, handicap).
      - Religion/national origin? 1866 understanding - Germans/Arabs/Jews are races.
    - Doesn't have single family home and other exception if based on race.

    - Legal outcomes similar to FHA - can sue under both, but only recover under 1.
- Can discriminate based on marital status/jobs, etc based on statutes in the state.
- States often supplement - add more - could just say "no unreasonable" discrim.
    - Can have town ordinances that are not state-wide, cities not county-wide.

Make a case of discrimination?

- Can get scientific study - some companies do this.
- Get others to apply for thing you didn't get. If you black, they not, its admissible.

Prima Facie Case:

- You're the type of person the statue helps
- This type of thing is covered in the statute
- You didn't get it
- Someone who doesn't have that characteristic did get it.

Once establish, D must respond with some reason beyond discrim for the action. Then P burden to show the reason is not the one, or its discrim itself.

- ***Indirect Discrim***: (e.g. minimum height requirement to exclude women).
    - Unlawful b/c maps onto sex categorization? If disproportional impact, may be discrim.
        - Q of fact whether discrim motives. Impact itself is not enough to violate.
- Disparate is evidence of discrim intent? Not accepted everywhere, or by SC.
    - Can use for gov but not private - theory of liability has to be premised on remedying wider social evil. In housing, circumstances not the result of a single owner so not apply to them. Gov has more control so hold them liable.

Trespass and Nuisance

Trespass: un-consented crossing of a boundary line without a legal privilege.

- Liable even if mistaken belief no matter how reasonable but **not induced by possessor**.
- Action must be brought by **present possessor** – FI holder can't bring trespass/ejectment action.
- Must be **intentional:** intended to move how you did - or caused 3rd party to do so (throw someone across boundary line, thrower is liable, thrown person isn't).
    - Doesn't matter if reasonably thought it was your land.

1. R of T S158: protects your right of possession of land.
    - Liable even if no damage caused.
    - S159 - trespass may be committed ***on, beneath or above the surface*** of the earth.
        - Flight by ***aircraft*** in the airspace above the land of another is trespass but only if:
            - It enters into the immediate reaches of the air space next to the land
            - It interferes substantially with the other's use and enjoyment of his land.
    - Some times when ***legally entitled to "trespass"*** - from R.
        - Witnessing a crime - go on to stop it
        - If had permission then it revoked, allowed reasonable amount of time to get off.
        - Legit claims to things on people's property - privilege to claim things.
    - **Remedy:** automatic injunction if proven, maybe punitive, damages only if damage proved.

Nuisance: non-trespassory invasion of another's interest in private use and enjoyment of their land. Incompatible land uses.

- Can bring claim if: possess land, own easement, have use rights, owners of nonpossessory

estates (FI holders) that are detrimentally affected by interferences with use/enjoyment.

- ***Significant Harm (821f)***: required – kind of harm that would be suffered by normal person in normal use of property (reasonable user, no eggshell skull).
- ***Intentional and Unreasonable or Intentional and otherwise actionable (ultra-hazardous) (822)***: subject must be legal cause of an invasion
    1. *Intentional*: intend to perform the physical acts that set the causal chain of what P is complaining about – know or should know that act is causing a substantial and unreasonable interference (2nd R).
    2. *Unreasonable (826)*:gravity of harm outweighs the utility of the actor's conduct. Gravity of harm factors (827):
        - Extent of the harm involved
        - The character of the harm
        - The social value that the law attaches to the type of use or enjoyment invaded.
            - Important factors: social value of the primary conduct, etc.
        - Suitability of the particular use or enjoyment invaded to the location
        - Burden on the person harmed of avoiding the harm.
        - Use the balancing (826A) if want an injunction. To get an injunction need to further show that damages not an adequate remedy and public interest concerns.
    - (829A) Unreasonable if harm severe that shouldn't have to bear it without compensation then truncate the other issues.
    - **Alternative:** (826b) – unreasonable if harm caused by conduct is serious and financial burden of compensating **for this and similar harm to others** would not make the continuation of the conduct not feasible.

- Need a **non-trespassery invasion** - some kind of boundary crossing.
    - Opening competing store across street not a nuisance.
    - Smell, dust, light, sound, gasses invade property line.
    - Can sometimes get injunction for ***anticipated events***:
        - Dump – actual invasions (smell, flies) . Don't have to wait until its running to bring action because its ***certain*** that the consequences will flow.
    - ***Exceptions***:
        - Funeral homes. If D wants to bring in funeral home, P win w/o invasion. Its because of effect on P's consciousness (depressive – disrupt quiet enjoyment).
            - Exception not apply to cemetery – cemetery almost always wins.
        - Light can be an invasion - really hideous building can be (947)
    - BUT must be "legal cause" to be liable. Appearing in a movie drawing papa is not cause.
- **Examples:**
    - D opens halfway house with former criminal in it. P's property value dies and sues to try to stop housing – under 1) Zoning, 2) Nuisance.
        - Significant harm? Yes. Intentional? Yes. Unreasonable? Assume yes.
        - Invasion? Easy case for halfway house, nothing come onto property.
            - No injunction just because of speculative fears/apprehensions.
            - Anticipated events? If absolutely clear that certain consequences will
            - flow don't need to wait. If studies show house in, crime up, maybe.
    - Halfway house already up in a residential neighborhood – property values down. Since already there and no invasions hard to say future. P wins - court cites reasonable fear (sex offender resident, 1 parolee used alcohol).

- This doesn't extend farther. Other case where parolees near school and P loses.
- Generally parolee houses go through unless actual problem.
- Against AIDs clinics universally not work.

○ 2 neighbors - 1 wants septic system, other builds well – statute can't be within 100 ft of each other. If septic leaked invasion (maybe trespass). Law doesn't recognize legal waves – in this instance.

Nuisance v. Trespass

If you can ***see, feel and touch*** it with the unaided sense its trespass. If not all 3, then nuisance.
Nuisance: ***smell, sound, light, really fine particles.***
- Exception: *water* – typically a nuisance, but dumping bucket of water may be a trespass.
- *natural gases*: trespass in most jurisdictions even though gas in general usually a nuisance.

- SOL for nuisance generally shorter, but sometimes court will allow trespass if SOL run on nuisance.
- Nuisance not automatic injunction – balance factors (win on merits, public interest favor)
- ***Coming to the nuisance***: if P affirmatively takes action towards the conduct (know whats happening and buy or improve land anyway generating nuisance or increasing damages) it doesn't bar a claim. It IS a FACTOR to be considered in determining if nuisance is actionable - whether there should be an injunction.
- If P and have claim:
  1. Try to claim trespass (easiest to satisfy)
  2. Nuisance: gravity of harm outweighs utility OR serious harm and compensating won't shut them down (B).
     - If B need to show significant harm (**F**) – kind suffered by normal person in community or by property in normal condition and used for a normal purpose.
  3. Pluses of arguing gravity:
     - If you want an injunction then need to interest balance. B is just for damages.
     - B cheap + easy - but A allows you to bring in outside issues related to social value (if D negligent, a strip club etc.). Could help get punitive damages.

Examples:

- Fine grain particles settle on property from mine– nuisance?
  1. Proper P? Yes, homeowners.
  2. Significant harm understood by reasonable person using land for reasonable purposes? Bring in realtor to show diminished land value.
  3. Intentional? D planned to run the mine, so yes.
  4. Unreasonable? Gravity of harm outweigh utility of conduct? Mine employs lots people.
- Oil refinery near trailer park – noise/stink bad for business. Trailer sues for nuisance.
  1. Proper P? Yes, present possessor.
  2. Significant harm as reasonable person in normal fashion? Get damage testimony.
  3. Intentional? Refinery knows what they're doing.
  4. Unreasonable? Refinery says no negligence - but action not related to negligence, just whether used property in way that caused injury to other owner.
     - Weigh the loss of business with running the oil refinery - their respective utility. Only look at A if want injunction. If balance, trailer park would lose.

- If just want damages **826B –** look at this compensation **and similar harm to others** to see if appropriate. Look to see if other trailer parks/local places an calculate that in too to see if would shut refinery down.

- Elevated lot developed by D (factory) where rain used to run to nearby car lot. D builds storage drain and offers connection to car lot for $, but they refuse.
  1. Intentional: built storage drain, plausible consequence it would more to neighbor's land.
  2. Unreasonable?
     - A: if no drainage then no factory - better to have factory than dry car lot.
     - B: show serious harm and making pay won't put out of business.
       - Serious harm? 5k damages + ongoing pumping + 12k connect to sewer.
       - 16k put out of business? Probably not.
       - Similarly situated plaintiffs? No.
- Run smelly piggery and over time housing development builds around it, smell damages their value.
  1. Serious? Yes. Nuisance **not consider fault**, just harm. Doesn't matter who got their first.

REMEDIES

- Plant sends stuff into the air and makes lots of noise.
  1. *Remedies*: Damages/injunction to shut down (tough).
  2. Different ways to structure payments to P.
     - If damages, no injunction, then need to sue again for more later.
     - Get all affected together and make agreement that Ps get checks and D use rights so then not a tort. Basically impossible to get all together/in agreement.
     - Here, constructively put people in the room. Landowners get loss of value of their property and expected future loss from the dust. Plant gets legal equivalent of use right.
- Extreme Minority (just once): cattle farm operating and houses open nearby. Encroachment relevant to whether injunction – it granted but made P pay for move, basically bough injunction.

EASEMENTS AND SERVITUDES

- Servitude - agreed upon mechanism for dealing with incompatible land use problems.
  - A right to do something to someone's property that would otherwise be a tort, or right to forbid something that in absence of the servitude would not be forbidden.
- Anything you can do by easement you can do b running covenant or equitable servitude.

License: permission to do something that would normally be a trespass (e.g. movie ticket). No K needed.

- Can be Ks, but don't have to be - can be limited in duration/scope/kind of activity.
- Licenses **CAN BE REVOKED** at any time (give back ticket + $ - need to give time to leave though) no consequences under property law, but if K then probably under that.
  1. Almost always non-transferable.
- *Estoppel*: If expend considerable resources in reliance on license + encourage them to, can be *estopped* from revoking the license. Courts almost always limit the irrevocable license to certain time period needed to recoup the lost investment from expenditures, etc.
  1. Jurisdictions split on whether there can be an irrevocable license.
- Can't be a negative use right.

Easement: not revocable. Could be a K or not.

- If theres an easement, landowner can't interfere with its use.

- To determine if easement, look at document/dealings to see if intent to give irrevocable use right. Must be compliant with **SOF** (in writing, etc, if just say you can use the driveway, it's a license). Doesn't require consideration.
- There will always be a geographical/physical scope of a use right over someone's property.
    1. What an easement encompass? Which part of property can I use? Time can use?
    2. Can carry ***subsidiary rights***. If have the right to pass across property, may have implied right to remove barriers to travel that would otherwise interfere with the easement.
- Easements are attached to ***PEOPLE or LAND***.
    1. Law *assumes* easements are meant to be *appurtenant* if theres is ambiguity of intent.
    2. ***Appurtenant***: use right that travels with and benefits the piece of land for as long as parties intend it to. Benefits/burdens pass to the successors of the property.
        - To ensure this, say - "such easement to run with the land".
        - Has to benefit a certain piece of land – so e.g. can't be across the country.
    3. ***In gross***: benefits a particular person/entity. Doesn't have to connect with any land.
        - If its for a *commercial purpose* - generally can transfer and will bind successors to the burdened property.
            - (E.g. power cables laying on property - not for any sole land benefit).
                - If the company is bought by someone else it transfer.
        - *Personal*: may or may not be transferred - parties often expect them to not be transferable (if give right to geeky guy, not expect transfer to gang member).
- **Example:**
    1. Owner of lot gives easement to build sewer line across his property as long as given easement to hook up later when he develops houses. 8 houses want to hook up.
        - If appurtenant, transferred with the land – but can it be transferred to lots of people? No clear answer – if not ***overtax the easement*** (change it) then ok.
        - Instrument says, "for use of the PARTY" for use by "him". Looks like a personal right, doesn't say transfers with the land.
        - If parties not say appurtenant or gross, usually assume APPURTENANT uness says otherwise or from nature it can't be appurtenant.
- Can create easement in **3rd Party?**
    1. **CL**: Parties to land transaction CANNOT make easement on behalf of 3rd party.
        - Can get around by: transferring land to 3rd party, then to desired party with 3rd party keeping an easement. Converts 3rd party to 1st – OR
        - Transfer land – have the transferee grant an easement in the 3rd party.
        - Can transfer with transferor keeping easement, then transfer that easement to 3rd party? Maybe.
    2. Some jurisdictions (CA) abandoned traditional rule.
- **Example**:
    1. W sells to P trying to make easement in 3rd party on the land. Agreement says "W to P subject to easement…" with purpose/scope (geographic/temporal) and a ***defeasibiliy condition***.
        - Under CL no easement.
        - W could've given church an easement before selling, then transfer subject to that easement.
- ***Appearing Easements – 3 ways to get even if no one gave to you – no K needed.***
    1. ***Implication***: burdened landowner gets NO COMPENSATION. Only need to pay lawyer fees.

- When get – easement for what/where/how long? Court leaves these issues for later. If parties disagree, can bargain or sue – expensive.
- Can argue implied easement in transaction – but extremely difficult/rare.
- Specific use easement if meet ***3 requirements*** – intention irrelevant.
    - *Necessary for the beneficial enjoyment of the land*: not literally necessary, but must be more than a want - strong cost (use of land seriously impaired w/o it).
        - If unitary owner trying to get implied easement over land he just sold, court will be stricter on necessity than if someone bought land from former unitary owner.
    - *Prior use that is apparent*:
        - When the land was broken up into several different parcels and ownership of parcels split among more than one person, the usage that forms the basis for the claimed easement must already have been in existence and apparent.
        - E.g.: when previous owner owned all land he used the land as a source of access for the land he sold off.
    - *All of the affected land must at one time have been owned by one person.*
- **EXAMPLE:**
    - S sells part of property that allows it to be accessible.
        - Necessary? Maybe – very costly alternative route.

2. ***Necessity*:** can only make argument for this when property was landlocked the moment you acquire it. Necessity to reach your land – completely closed in without access.
    - If landlocked yourself, will not work.
    - Doesn't require showing of previous use.
    - *Statutes*: some jurisdictions, if stuck with land and no access - legal right like eminent domain to force sale of easement by neighbor who gets compensation.
        - Go through gov agency and pay landowner.
3. ***Prescription****:* like AP – do things that are nuisance/trespass and when SOL runs, permanent right to do it. Wrong becomes right **without paying.**
    - Use the SOL to recover real property - Adverse Possession statute.
    - Need ***actual, continuous, open and notorious use***.
        - *Continuous*: If crossed your neighbor's lawn every Saturday morning at 9:15 AM for twenty years, its continuous.
        - Only get an easement for what you're actually doing.
    - Uses *do not need to be exclusive* (can get right to pass lawn even if owner uses).
    - ***Hostility***: jurisdictions split on whether needs to be hostile/tortious use of land.
        - Hostility jurisdiction – any permission from landowner negates easement - becomes a license.
    - *Claim of Right*? Depends – may need good faith belief entitled to use land, or use as a reasonable owner would.
    - **EXAMPLE**: 2 adjacent lots – trucks use 2nd lot to back into – lot owner denies permission. Don't use exact space every time, depends on how liberal rule is. Lot owner wants to build warehouse – truck company sues.
        - CA statute: if owner posts sign – "right to pass by permission and subject to condition by owner" then license (because permissive – not wrongful use, so SOL not run).

        - Claim of right – CA not care. Truckers bad faith so no GF requirement.
- ***Affirmative/Negative***:
    - *Affirmative* right to do something that would otherwise be a tort (nuisance/trespass).
    - *Negative*: to stop someone from doing something to their land that wouldn't be a tort. Can do it as a K - but can't transfer K.
        - UNDER CL - ***no negative easements***.
        - ***Exceptions***: things useful to agrarian (blocking sun, interfering with air/water).

Running Covenant: protects against things that can lower prop value and aren't nuisance/trespass. Binds non-parties to the deed.

1. Need actual enforceable **K** between the original parties.
2. Original parties must ***intend*** for promise to bind successors.
    - Technically don't to say "***and assigns***" - "now will bind all successors in interest" - probably good enough
3. Must "*touch + concern*" the land.
    - Ambiguous, usually obvious. If its altering land (physical characteristics or uses of it, then enough). **NOT** promises between parties like feed goldfish.
    - Some things having nothing to do with land can touch and concern – paying rent, promises to buy insurance on land generally run – deposit not.
    - Promise to buy water from neighboring land might not qualify as T+C.
4. *Horizontal Privity*: In British law - need simultaneous interests in the affected property (P/FI interest relationship) – American law not needed this.
    - American law – 3 different rules:
        - No privity requirement (3rd R).
        - Parties must be neighbors or people close enough so that the promise effects their property.
        - *Majority*: can have non-present/future interest relationship If ***promise is part of a land transaction of the parties involving the effected land.*** If A sells land to B, A and B can include promises that will bind successors to their interests – can make phony land transfers.
        - More generous requirements don't require the fake transaction.
5. *Vertical Privity*: ***DON'T WORRY ABOUT.*** Successors have to succeed to precisely the same temporal interest as their predecessors to be bound. Promise made by holder of a FSA would not run to someone who acquired a LE in the property.
    - This is mostly done away with in modern courts.

- **EXAMPLE**: developer makes lots – people buy in knowing only certain types will go up. Only works if everyone bound by mutual agreements – so running covenants. Everyone contributes to amenities of facilities – how to get it to sink in?
    1. Valid/binding K? Assume so.
    2. Parties intend to bind successors in interest? Covenant says "its successors AND assigns" - "shall run with the land" – so yes.
    3. Privity? Yes, involved in a deed of transfer of land.
    4. Vertical privity? Who cares.
    5. Touches and Concerns the land? Promise to pay homeowner ass'n $ each year. CLOSE.
        - T/C: pay so land can use park, etc. enhances value of the property.
        - Not T/C: doesn't physically concern the property - it's a payment.
    6. *Corporation*: existence independent from owners. Property owners set up corp to ensure owners abide by rules. Anyone who buys there succeeds to that right - but it doesn't

own any property and therefore - can't succeed to K rights. Running covenanting but ***THEY CAN'T ENFORCE IT*** (have to be a successor in interest to enforce it).

Equitable Servitude: basically a failed running covenant – ***no horizontal privity needed***. Requirements:

1. Binding **K** between the original parties,
2. **Intended** to bind successors,
3. **Touch and concern** the land, and
4. Provide **notice** (actual or constructive) to successors to the affected property interests.
    a. Easements/Running covenants not needed notice.
    b. ESs successors who are bound by them, must have notice of the restriction.
    c. *Recording statutes*: potential mechanism for notice, depending on the jurisdiction, property whether or not they have notice of them.

- **EXAMPLE:** transfer to D with conditions – (keep as park – negative promise).
    - K, intent to bind successors, touches/concerns, horizontal (transaction of land).
    - **ES** - b/c everyone knew about it.

Housing Developments:

- Developer can write any restrictions in the deed. Vertical privity – transfer of land.
    1. Make the promise reciprocal – Buyer/developer.
    2. For development to function, all buyers have to promise to abide by the covenants – so every land parcel will be burdened by another (everyone obligated to everyone else).
    3. What if fail to make promises to the deeds of some lots? Could be bound to some purchasers then, but not others.
- *Residential Subdivisions:*
    - Sometimes strain concept of touch and concern to uphold running restrictions that benefit homeowner associations.
    - Pushes "notice" – as long as a developer has a “common plan” of restrictions for the subdivision, purchasers will sometimes be held to have “notice” of those restrictions even if they do not show up in the purchaser’s deed.
    - In extreme cases, that common plan can be deduced from the patchwork pattern of deed restrictions that do not include all or almost all of the deeds in the community. Some courts reluctant, but the differential treatment some places.
- **EXAMPLE**: not followed by all states, but, residential lots – only 53/91 had promises that residence only. Whole development residential - allowed there to be an implied servitude even though no document representing it or predecessor making a promise.
    - Look to see if development planned to be restrictions.
    - If buyer has notice of implicitly restricted neighbors – law willing to hold buyers to implied.
    - **Implied reciprocal negative servitude:** reciprocal cause want interlocking promises throughout neighborhood- servitude - legally enforceable interests.
    - Restricted to housing development, not going to imply this is an industrial park.