

Property Outline

I. What is Property?

A. Definition of Property

1. Blackstonian – sole and despotic dominion (autonomous)
2. Bentham – property and law are born together (dependent)
3. Black's dictionary - that which belongs exclusively to one, but rights are guaranteed and protected by the government (combined)

B. Legal rights associated with property

1. Grey – legal rights are a bundle of sticks
2. Epstein – property rights include possession, use and disposition

C. General principles

1. Courts may arrive at common law through doctrinal or consequentialist approach
2. Always look at statutes – they trump common law
3. Outcome often determined by labels

II. Acquisition of Property

A. Capture, Find and Conquest

1. General principles

- a. Simply need to have a better claim than other party for found property, relativity of ownership (Irving principle)
 - i. One trespasser can eject another trespasser from land if first trespasser arrived first and maintained continuous possession of land (*Bradshaw v. Ashley*)
- b. Generally land ownership includes owning the surface and the things attached to it (rocks, trees, grass, dirt)

2. Wild animals

- a. Wild animals are not owned (*Pierson v. Post*)
- b. If a wild animal is on owned property, owner has exclusive right to turn wild animal into property (by killing, holding, otherwise keeping it on property)
 - i. Land owner has exclusive right to hunt on land
 - ii. Trespasser would have to give back found property to land owner
 - iii. If land owner does not have claim to property, then resort to possession
- c. First possession can be satisfied by having control of property or being the first to have reasonable prospect of controlling property – by killing, mortally wounding (inevitable death), capturing
- d. If wild animal escapes, it reverts to being unowned (*Reese v. Hughes*)
 - i. Exception if party could show that escaped animal would return on its own (domesticated or tamed animal)

- ii. Exception if animal was on leash that allowed it to roam off property
 - iii. Possible exception if court wants to protect original property owners – instrumentalist approach (fox farmer in *Duncan*)
 - e. If wild animal escapes, causes damages and is still owned, owner is liable for damages upon proving causation and harm (trespass theory)
 - i. Probably no liability if wild animal is native to area
 - f. Exceptions to the general rules for whales and bees
 - g. Most states follow the general rule or have statutes/regulation governing wild animals
- 3. Wild Minerals
 - a. General principles
 - i. Courts look at analogies between wild animals and water, petroleum, gases
 - ii. Property owners have exclusive right to capture resources beneath surface, but escape presents problems
 - iii. Now generally resolved by statute instead of common law, unless not covered by statute
 - iv. Law not uniform on avoiding trespass action
 - b. Natural gas
 - i. Initially courts treated natural gas like wild animal – gas placed into an underground reservoir was held to have “escaped” and not be owned (*Hammonds v. Central Ky. Gas Co.*)
 - ii. Early ruling criticized for applying wild animal analogy to situation where gas was “caged” in cave and gas was worth billions of dollars
 - iii. Later rulings allowed company to maintain ownership of natural gas stored in underground reservoir (*Lone Star Gas Co. v. Murchison*)
 - iv. Original court finally agreed that analogy is outdated (*Texas American Energy Corp. v. Citizens Fidelity Bank & Trust Co.*)
- 4. Wild wallets
 - a. Can lose custody or possession of property, but not ownership
 - i. Burden on prior possessor to show that he was prior possessor
 - b. Property can be reclaimed subject to a few exceptions
 - i. Abandonment
 - ii. UCC § 2-403 – entrust object to another, then other sells it to third party (only get monetary damages)
 - iii. Have to sue for return of property before expiration of statute of limitations

- c. If Blackstonian owner is not known, found property could go to finder of property or landowner
 - i. Must make reasonable efforts to find prior possessor, otherwise larceny
- d. First possessor has superior right over subsequent possessors
 - i. Trespassers are exception, but people on commercial property are not trespassers
 - ii. Trespasses that are trivial or merely technical do not result in loss of found property (*Favorite v. Miller*)
 - iii. Exception if contract explicitly or implicitly states that found property belongs to someone else
 - iv. Perhaps items found in sanctity of home or other private place go to landowner
- e. Criteria for finder for property
 - i. Must have control over property
 - ii. Must physically possess item (reasonable prospect insufficient)
 - iii. Need to intend to possess
- f. Found property is categorized based on mental state of prior possessor when he parted with property
 - i. Lost – prior possessor unaware of loss of possession
 - ii. Mislaid – knowing parting with possession, but not intended to be permanent
 - iii. Abandoned – knowing parting with possession, and intended to be permanent
 - iv. Treasure trove – only used for antiquities
- g. Law favors finder for lost property
 - i. But consider any contracts with landowner
 - ii. Also consider where property is found (treasure trove)
- h. Law favors landowner for mislaid property
 - i. Assumes that prior possessor will retrace steps
 - ii. But finder has no incentive to report found property to landowner – instead just walk off with property
 - iii. Distinguish from lost property based on circumstances - \$20 bill on floor is lost, \$20 bill sitting on bar is mislaid
 - iv. Money left in an airplane wing must be mislaid or abandoned, not lost – court held mislaid because people used to stash money; if more recent, probably abandoned drug money (*Benjamin v. Lindner Aviation*)
- i. Some states have done away with common law categories
 - i. IA statutes construed such that “lost” means only category of lost property, not any found property
 - ii. NY got rid of categories – lost property includes lost and mislaid; finder receives property after period of time

5. Bailments

- a. Bailment is voluntary entrusting of goods

- i. Party who is supposed to keep goods must agree before bailment exists
- ii. Party must know what property he is taking control of (so no bailment if one object is hidden inside of another)
 - (a). Exception if it is foreseeable that one object will contain others (*Insurance Co. of North America v. Solari Parking* – garage was in tourist area of New Orleans, so garage responsible for car and its contents)
- iii. Person finding an item might be a gratuitous bailee
- iv. Theft is not bailment (not voluntary)
- b. Contract controls if bailee is paid under contract to take custody of property
- c. When there is no contract, property law controls
- d. Property law generally distinguishes based on who gets what from relationship
 - (a). Person borrowing property (bailee) from another (bailor) is primary beneficiary
 - (b). Person renting object (bailee) from another (bailor) – both are beneficiaries
- e. Standard of care is based on this relationship
 - i. If bailee gets primary benefit, bailee needs to take care of property; liability generally based on minimal negligence standard
 - ii. If bailor gets primary benefit, bailor must show gross negligence before there is liability
 - iii. If both get benefit, standard is normal negligence
 - iv. But some courts use general negligence for all cases (*Peet v. Roth Hotel Company* – missing ring)
 - v. If there is no negligence, there is no liability (*Ellish v. Airport Parking Co. of America* – missing car)
- f. Rights against third parties
 - i. Bailor always has right of action if property is damaged
 - ii. Bailee can bring suit on behalf of bailor
 - iii. Bailee has ability to bring independent claim
 - iv. If bailee is bailor's agent, then bailor and bailee cannot both bring suit against third party
 - v. If bailee sues third party, bailor must bring suit against bailee
 - vi. There could be more than one suit against a third party if there is no bailor/bailee relationship (e.g., prior possessor loses item, another finds it, thief takes and destroys it)
- g. If bailor gets back more than what was given to bailee, bailee generally gets nothing

6. Accessions

- a. Value of property is increased as a result of going from prior possessor to subsequent possessor then back
- b. Usually dealt with by contract
- c. In order for law of accessions to apply, second possessor must be improver
- d. Ownership of improved items depends upon circumstances
 - i. If improvements are separable, improver gets to keep the improvements
 - ii. If improvements are inseparable and they transform item (yarn into sweater), improver can keep item if improvements made in good faith (thought that you owned item)
 - iii. If improvements made in bad faith (know that item isn't yours), original owner gets item
 - (a). Exception for items of little value – like paint used on a car or house
 - iv. Improvements to land are treated differently
 - (a). First determine if improvement is separable
 - (b). If not separable, outcome based on relative value of land and improvement (building)
 - (c). Garage is likely not principal item
 - (d). Office building is likely principal item
 - (e). If improvement is not principal item, it becomes a gift
 - (f). Several courts and many legislatures have disagreed with this result
 - (g). Minority of state allow innocent improver to buy out landowner (*Somerville v. Jacobs*)
- e. Courts are divided on what is separable
 - i. Engine of a car may or may not be separable
 - ii. Generally standard is whether separation causes damage to original object or takes too much time and effort
- f. Title stays with principal good (if brick becomes part of skyscraper, improver gets to keep brick)
- g. No formula for determining what is principal good – largely value judgment
 - i. Transforming wood into barrels makes barrels principal item (*Weatherbee v. Greene*)
 - ii. A 5x increase in value likely not sufficient, but a 15x increase might be enough
- h. If improver gets to keep property, he has to pay original owner its value (tort remedy for conversion)
- i. If improver loses, improver effectively makes gift to prior possessor

7. Wild Land

- a. All land in U.S. is owned by someone – private party or government
- b. Only need better possessory claim than another to take possession (*Bradshaw v. Ashley*)
- c. Ejectment – action to recover real property; force someone else off property
- d. Often need to show Blackstonian ownership when selling land (but could take a lower price) or borrowing money while using land as security
- e. Most claims to land derive from grant from a recognized sovereign
 - i. For land deriving from Spanish territory, may need to trace back to 15th century
 - ii. US took ownership from Indians – Indians only had right to occupy land (*Johnson v. M'Intosh*)
- f. Types of deeds
 - i. Quitclaim deed – paper transferring ownership interest in land without giving assurances about what buyer receives; uncertainty transferred to buyer
 - (a). Land often cheaper if buyer bears risk
 - (b). Custom to use this type of deed in some states (MA)
 - ii. Warranty deed – owner guarantees that he has Blackstonian title to property
 - (a). If wrong, buyer entitled to damages
 - (b). Seller could make a partial warranty
 - (c). Promise often made without seller being sure of ownership rights
- g. Requirements for deeds
 - i. Must be written to satisfy statute of frauds
 - ii. Defects such as forged signature, recording in wrong place, person signing without legal capacity are difficult to detect
 - iii. If there is a defect, anything following from deed is not valid
 - iv. Title insurance reduces risk of defective title – covers things in publicly-available records, but not where tortfeasor has taken land (not recorded)
- h. Recordation of deeds
 - i. Recordation and cataloging handled on a county-by-county basis
 - ii. Most states do not require filing deeds with county, but it can be done in all states
 - iii. Most states give bonus for recording deeds and other documents
 - iv. Title searches usually go back 60-80 years
 - (a). No need for 100% certainty, this is sufficient

- (b). Some legislatures have passed statutes that all claims are extinguished if title search going back sufficient number of years is performed
 - (c). Statutes often provide mechanism for maintaining old claims to avoid due process issues
- v. All issues involving recordation are covered by statute; three basic kinds of statutes
- vi. Race statute
 - (a). First purchaser of land must record transaction or subsequent purchaser or creditor can take title – ownership only effective as of time of registration
 - (b). Covers lien creditors – if money not paid back, creditor can sell land
 - (c). Essentially a penalty for failure to record
 - (d). May have valuable consideration requirement
 - (e). Does not matter if subsequent purchaser knows that original seller has no interest in property
- vii. Race-notice statute
 - (a). Same as race statute, but requires that purchase be made in good faith and for valuable consideration
 - (b). If purchaser knows that seller has nothing to sell, good faith is lacking
 - (c). Good faith requirement applies to both buyer and seller
 - (d). May require purchaser to make some investigation about ability of seller to sell (title search)
 - (e). Valuable consideration does not mean fair market value, just a non-trivial purchase price
 - (f). Valuable consideration means that original purchaser always wins over someone who subsequently received land as gift
- viii. Notice statute
 - (a). Last person to be conveyed property without notice of prior sale has senior title
 - (b). Notice usually comes from recordation **[reprint]**
- i. Causes of action
 - i. Ejectment (recovery of property)
 - (a). Dispute over possession
 - (b). Only establishes better title than another party
 - (c). Not enough for mortgages, etc.
 - ii. Quiet title
 - (a). Establishes Blackstonian ownership
 - (b). Attempt to sue entire world and trace claim back
 - (c). Limitation is that outcome of suit applies only to people receiving notice because of due process issues

- iii. Trespass
- j. Adverse possession – method of becoming Blackstonian land owner by wrongful possession of land; does not apply to federal or most state land (varies for cities and counties)
 - i. Each of the following elements must be proven by clear and convincing evidence
 - (a). Way for bad faith occupier to lose
 - ii. Statute of limitations must have expired (generally 5-20 years; less in west, more in east)
 - (a). Clock begins when wrongful party enters land and has open, notorious and continuous use
 - (b). Exception if landowner is in prison, overseas, involuntarily institutionalized, incompetent to sue
 - (c). If an exception apply, owner may get additional time to bring suit
 - iii. Sometimes have to pay property tax on land through statute of limitations period (uniform rule in states with short statute of limitations; generally not required in east)
 - iv. Exclusive
 - (a). Cannot use land simultaneously prior possessor
 - (b). Cannot have multiple groups of wrongful occupants
 - v. Claim of Right
 - (a). Most courts have dropped this element – don't care about good faith or bad faith
 - (b). Historically, needed to believe that land was not yours (bad faith)
 - (c). Sizable minority require that possessor honestly believe that land is his (good faith)
 - (d). According to Helmholz, people who act in bad faith tend to lose
 - vi. Open and Notorious
 - (a). Use of land must be obviously visible
 - (b). Cave entrance on one property but cave extends onto other's property does not meet requirement
 - (c). Building a structure that runs over property when encroachment is not obvious is not sufficient (*Mannillo v. Gorski*)
 - (d). Courts split half and half on whether property owner is responsible for knowing where property line is, but generally encroachment of small distance is not held to be obvious
 - vii. Actual
 - (a). Must be using someone else's land
 - (b). Claimant must act towards land as would average land owner
 - (c). Letting land sit is not sufficient

- (d). Great deal of discretion given to finder of fact
- viii. Continuous
 - (a). Does not mean present on land at all times, reasonably constant is sufficient
 - (b). Absence of year or more would probably destroy continuous use, but absence of a few weeks is generally acceptable (*Mendonca v. City Services* – absence of 3 weeks broke continuity)
 - (c). Based on typical landowner in area
 - (d). Standard is less rigorous for rural land than urban land
 - (e). About half of US courts allow for annual seasonal uses of land
 - (f). If continuity broken, then statute of limitations starts again
 - (g). Tacking is allow when there is privity between/among wrongful occupiers (heir taking over possession immediately after first wrongful occupier's death)
- ix. Hostile
 - (a). Party is wrongful occupant, on land without permission

B. Purchase of Property

- 1. Commercial – UCC
- 2. Land – conveyances
- 3. If person did not have legal right to sell property, do so at risk that prior possessor will take back item, but there is cause of action against thief
- 4. Sometimes can get more rights from purchase than seller has to give
 - a. UCC § 2-403 – if goods are acquired from merchant, this exception applies if purchaser is acting in good faith (but purchaser is under obligation to investigate if circumstances are suspicious)
 - b. UCC § 3

C. Gifts

- 1. Can acquire by gift either when person dies or when person is still alive
- 2. Each state has law of intestacy if person dies without will – approximates what would have happened if there was a will
- 3. For transfers of property, laws ensure transfer is valid and truly intended
 - a. Land – statute of frauds
 - b. Wills – statutory standards
 - c. Contracts – offer, acceptance and consideration
- 4. Generally law looks at intention of grantor, formalities are used as back-up
 - a. If there is conflict between formalities and apparent intention, formalities usually win
 - b. If property is delivered to person, intention is more likely to win out over formalities
- 5. Law inconsistent about when it will enforce gift as legally enforceable

6. Transfer is usually irrevocable when 3 conditions are met
 - a. Reasonably sure that grantor intends to make gift
 - b. Acceptance by recipient
 - c. Delivery of property
 - i. Law on delivery is varied
 - ii. If symbols are allowed to substitute for delivery of actual item, then it becomes closer to simple offer and acceptance
 - iii. If some courts, telling someone where to find property does not constitute delivery

III. Estates

A. Basic principles

1. Property was formerly given for a lifespan
2. Now law presumes that person is giving away everything person has to give away
 - a. In SC, need to use “and his heirs” to be able to grant estate to person beyond his lifetime
3. Words of purchase – words in grant stating who gets the land (to **person** and his heirs)
4. Words of limitation – words in grant stating how long person getting land gets it for (to person **and his heirs**)

B. Fee Simple

1. Convey entire timeline of property to another party
2. Type of fee simple
 - a. Fee simple absolute – nothing in property grant that could bring interest to end; no future interest
 - b. Fee tail – generally abolished in US
 - c. Fee simple defeasible – something can end interest
 - i. FS subject to executory interest
 - (a). Linked to executory interest
 - (b). When third party has future interest
 - ii. FS determinable
 - (a). Linked to possibility of reverter
 - (b). If possibility of reverter not recognized, then will be converted to FSSCS
 - (c). Grammatically written as one unitary thought (to Hasselbeck and his heirs until the Seahawks win a Super Bowl)
 - iii. FS subject to condition subsequent
 - (a). Linked to right of entry
 - (b). Written like two thoughts (to Hasselbeck and his heirs, but if the Superhawks win a Super Bowl, then Hasselbeck’s present interest comes back to me)
 - (c). If ambiguous, this is the presumed type of fee simple determinable (*Mahrenholz*)
 - iv. There are limits on defeasibility conditions

- (a). For fee simples – no restrictions on possessor transferring land (restraint on alienation)
 - (b). In some states, no stupid or frivolous conditions
 - (c). No conditions against public policy (burning down neighbor's house)
- 3. If property not disposed of by will and no one covered by law of intestacy is present, state takes over property
- 4. Are freely transferable, have potentially infinite duration and can be inherited
 - a. Estate can terminate upon some event that is not the death of a human or after a fixed amount of time (e.g, property given for life of pet cat)
 - b. Estate can terminate upon event tied to remainder or executory interest
- C. Life estates
 - 1. Grant of land for the lifetime of a person
 - 2. Less marketable than fee simple, now less common
 - 3. If grantor dies before grantee dies (assumes life estate tied to grantee's life), grantor's heir or designatee gets land upon grantee's death
 - 4. Grantee can sell or transfer land through the entire timeline
 - 5. Generally written as "to person **for life**" or "to person **for person's life**"
 - 6. Can be tied to lifespans of more than one person – either to whoever dies first or last
 - a. If the number of people is unreasonable, courts will treat as a nullity
 - b. If not a person (e.g., a pet), court treat as fee simple
 - 7. Like fee simples, can be absolute or defeasible
- D. Future Interests
 - 1. Party with future rights may prohibit certain activities on land (especially in lease)
 - a. Value of present interest decreases as number of prohibitions increase, but future value rises
 - b. Will can specify use restrictions
 - c. In not specified, person with present can do as he wishes on land
 - 2. Doctrine of waste
 - a. When there are present and future interests in land, present possessor must be reasonable and decent user of land
 - b. Depreciation of land is acceptable
 - c. Can be waived by grantor, or can be further restricted by grantor
 - d. What constitutes waste depends on the land, its use, people, how long the present interest lasts and when future interest kicks in
 - e. Waste tends to be invoked if it affects lost value of land
 - i. Present possessor may be liable for lost value of land
 - ii. Have to establish that waste occurred and value of waste
 - iii. Injunctions are possible if waste is established and future interest-holder establishes that there is no adequate remedy

- at law (also depends upon strength of claim of future interest)
 - iv. Many states allow for double or treble damages if interest holder egregiously commits waste
- 3. Five basic types of future interest
 - a. Reversion
 - i. Kept by grantor when land is granted
 - ii. Created if person with fee simple or life estate gives away life estate or tenancy
 - iii. Upon reversion, original owner gets back original present interest (e.g., reversion in fee simple absolute)
 - iv. Can have reversion combined with POR or ROE (two future interests), still referred to as a reversion (to Ash for 1 year so long as the rent is paid)
 - b. Possibility of reverter
 - i. Kept by grantor when land is granted
 - ii. No need to do anything to take estate when future interest becomes present interest; works automatically
 - iii. Freely transferable (except IL)
 - iv. Not recognized in some states (such as CA), must use right of entry instead
 - c. Right of entry (power of termination)
 - i. Kept by grantor when land is granted
 - ii. Not automatic, owner of future interest simply has right to turn future interest into present interest
 - (a). Usually sending a letter informing interest holder that interest has ended is sufficient
 - iii. Not transferable historically, but varies by jurisdiction
 - (a). Can always transfer by will or intestacy
 - (b). Can always be sold to person holding FSSCS
 - iv. Recognized by all states
 - d. Remainder
 - i. Future interest given to third party
 - ii. Must satisfy four conditions
 - (a). Created by grantor in someone else – future interests take their names and legal properties ***when they are created***
 - (b). It must be ***possible*** for the future interest to become a present interest as soon as the prior present interest expires (so no mandatory time period between prior present interest expiring and future interest becoming present interest)
 - (c). Cannot divest any interest except divesting interest left in transferor – must wait until present estate has run its natural course (OK - to Anthony for life so long as he never wears a suit of armor, then to Blaze)

- and his heirs; not OK - to Anthony for his life, but if Anthony wears a suit of armor, then immediately to Blaze and his heirs)
 - (d). Cannot follow a possessory fee simple (Not OK: To Anthony and his heirs so long as Anthony does not wear a suit of armor, then to Blaze and his heirs)
- iii. Vested remainders must meet two further requirements
 - (a). Must have ascertainable beneficiary - need to have name of at least one person who meets the description in grant
 - (b). Must have no condition precedent other than expiration of prior interest (To Nathaniel for his life, then upon his death to Noah and his heirs)
- iv. If not a vested remainder, then a contingent remainder
 - (a). Can turn into vested remainder once conditions are satisfied
 - (b). If condition can never be fulfilled, it would definitely fail to vest
- e. Executory interest
 - i. Future interest given to third party
 - ii. Any future interest created by grantor in someone else that is not a remainder
- 4. Need to identify type of future interest and type of present interest it vests as (future interest and temporal duration of present interest)
- 5. Future interests can fail to vest (if defeasibility condition on present interest not met) or can transform into another kind of future interest
- 6. Rule against perpetuities
 - a. Does not apply to vested remainders and reversions
 - b. Common law rule only applies to vested remainder subject to open, contingent remainder, executory interest
 - c. If future interest runs afoul of tradition rule against perpetuities, future interest does not exist
 - i. Many modern interpretations give future interest come into being and have a fixed period of time – then blown up
 - d. Cannot invalidate present interest under rule against perpetuities
 - e. Under traditional rule against perpetuities – add 21 years to lifespan of someone who is alive when grant takes effect, then determine if there is any possibility that future interest has not fizzled out, vested or become present interest – if no possibility, grant survives scrutiny of rule of perpetuities
 - f. In general, if a condition is not tied to someone's lifespan, grant will fail the rule against perpetuities

IV. Cotenancies – where more than one person has control of property's timeline simultaneously

A. Joint Tenancies and Tenancies in Common

1. Similarities and differences between the two
 - a. When co-owners are alive, no differences
 - i. Every co-owner has absolute, unconditional right to use and possess co-owned property, regardless of financial stake
 - ii. If co-owners want to use land for conflicting purposes, common law says that both can proceed
 - iii. Parties can alter use and possession rights in land, trump default rule
 - iv. Can have JT and TIC existing simultaneously on same property
 - v. Both JT and TIC can be transferred during co-owner's life
 - b. Law distinguishes between use/possession and finances
 - i. If land is sold, get proceeds proportional to financial stake
 - ii. Financial stake can vary among co-owners
 - c. Rights differ when co-owner dies
 - i. Property in joint tenancy cannot be passed on by will – simply vanishes upon death
 - ii. Third party rights (easements, obligations) granted by a party prior to death continue after death for a TIC (unless explicitly limited) but terminate upon death for JT
 - iii. Many states have passed statutes to protect mortgage lenders and overrule common law
2. Advantages of TIC
 - a. More flexible
 - b. Each owner can decide what to do with property
3. Advantages of JT
 - a. If people you want to have financial stake go to upon death are the co-owners, less paperwork needed for JT
 - b. Remaining joint tenants have right of survivorship to property interest
4. How to establish a JT (four unities, plus two other considerations)
 - a. Live in the right state – not all states allow JTs, but can create functional equivalent through a series of contingent remainders
 - b. Manifest an intention to create a JT (joint tenants with right of survivorship and not as tenants in common)
 - c. All co-owners must be granted interest at same time (can be met by selling land by selling land to third party and then repurchasing it with co-owner(s) at same time – straw transaction)
 - d. Interests must be created in same deed
 - e. One co-owner must have rights over same portions of timeline as other co-owners (e.g., all must have fee simple)
 - f. These conditions must always be present, otherwise JT converts to TIC
5. How to lose a JT
 - a. Severing

- i. Co-owner transfers his interest in property (by sale or gift) – converts to TIC interest
 - (a). In some states, a lender technically owns the property such that a mortgage severs JT
 - (b). If mortgage is a lien, no destruction of JT
 - (c). A lease may sever tenancy, but less likely for short-term lease (*Tenhet v. Boswell*)
 - (d). Bankruptcy and judgment liens may also sever JT
 - (e). Divorce might sever if it alters unity of possession (*Porter v. Porter* – unity lost if one spouse had exclusive and permanent possession of home)
 - ii. Sever to minimum amount necessary to keep JT going
 - iii. Can use straw transaction to convert JT interest to TIC interest
 - iv. If with severance, property is still co-owned
- B. Rights of Cotenants
 - 1. While cotenants are alive, all have 100% use right to property
 - 2. Often there is a document detailing what happens if there is disagreement among co-owners
 - 3. Future interests place constraints on actions taken by present interest holders
 - 4. Generally co-owners do not have obligations to each other in terms of waste – go to a type of partition
 - a. Some states have rule analogous to law of waste
 - b. Strictly speaking, law of waste does not apply because all interests are present interest
 - 5. Co-owners are responsible for tax bills according to financial stake
 - a. If one co-owner does not pay his share, those paying can sue the one not paying for his share
 - b. Can have an action for contribution if action is necessary to keep property in possession (property taxes, mortgage, certain insurance payments)
 - c. Can have necessary repair when property need new roof
 - 6. If one co-owner has taken sole action to increase value of property (an improvement such as an oil well), that person bears all costs but gets all benefits
 - 7. Bringing end to co-ownership
 - a. Physical partition
 - i. Problem is that two halves of a piece of land are not identical – parties may not agree on who gets which piece
 - ii. One solution is that land is divided, both sides are assessed and one owner pays other the difference (but getting accurate valuation is expensive)
 - iii. Breaking up land into smaller parcels can decrease its value
 - b. Sale and financial partition
 - i. Usually done voluntarily

- ii. After sale, proceeds are divided according to financial stake
- iii. Can be problems if one party has improved the land (*Swartzbaugh v. Sampson* – erecting boxing arena on land)
- iv. If this is the case, have an accounting to determine who contributed what to land's total value – again expensive solution
- v. Court can order a sale (e.g., after divorce), even over objection of other co-tenants
- vi. If co-owner is making profit from someone else's use of land, he has to split profits with other co-owners (Statute of Anne)
- c. Ouster
 - i. Not a true end to co-ownership
 - ii. Occurs when one co-owner stops another from using the property
 - iii. If co-owner uses ouster, he has to pay other co-owners reasonable rent for use of property
 - iv. Law does not have good line for ouster – too many marginal cases
 - v. Partition is better and co-owners will get more money

V. Landlord-Tenant Law

A. Introduction

- 1. Varies greatly from jurisdiction to jurisdiction
- 2. Two things happen when lease is signed
 - a. Interest in land is conveyed (lessee acquires present possessory interest) and future interest is formed (reversion if lessor keeps interest or remainder/executory interest if third party has future interest)
 - i. Known as privity of estate – parties are next to each other on timeline for property
 - b. A contract is formed for lease of land
 - i. Known as privity of contract
- 3. Interplay of property and contract law
 - a. If there is a breach of lease, both bodies of law may be relevant
 - i. Under privity of estate, law of waste applies
 - b. Valuable to have two avenues of relief if either party had transferred interest
- 4. Types of tenancies
 - a. Term for years
 - i. Fixed term tenancy
 - ii. Need to identify starting date and ending date
 - iii. Generally, lease ends when term runs out
 - iv. Can include defeasibility condition (e.g., rent not paid)
 - (a). Divides into determinable and subject to condition subsequent

- b. Periodic tenancy
 - i. Automatic renewal at end of lease term
 - ii. Parties need to determine term (period) of lease – generally one month or one year
 - iii. Defeasibility conditions apply
 - iv. Lease terminates upon meeting defeasibility conditions or when one party gives notice to terminate
 - v. Requirements for notice to terminate determined by lease itself (first), statutes in jurisdiction (second), common law (third) – lease can modify statutory or common law defaults
 - (a). Time requirements
 - (b). Adequate notice requirements
 - vi. Basic common law rule is that notice must be given at least one period in advance of renewal date when termination is desired (so for a one month lease, must give notice at least one month prior to termination)
 - (a). Common law requires no more than 6 month notice, regardless of period
 - (b). Statutes can modify notice period, generally to less than common law
 - (c). Lease language trumps both common law and statutes, provided it doesn't violate public policy
 - (d). Effective date of notice is date received by landlord, although some states say notice is effective upon mailing (mailbox rule)
 - vii. Common law is largely silent on adequate notice requirement
 - (a). Statute of frauds may come into play because land is conveyed
 - (b). Otherwise parties have to put any requirements into lease itself, unless against public policy
- c. Tenancy at will
 - i. No fixed period of renewal, continues until someone terminates lease or dies
 - (a). Ending on death is not true for other types of tenancies, unless it is a defeasibility condition
 - ii. Same issues with adequate notice at periodic tenancy
 - iii. Assumed not to be transferable
 - iv. Defeasibility conditions may apply

5. Rights of Tenant

- a. General rule is that present possessory interest does not end until midnight of last day
- b. Tenant can bar both landlord and landlord's employees from entering unless otherwise specified in lease

- c. If a previous tenant has not vacated premises before new tenant is set to move in, case law is split about who has responsibility for removing previous tenant from property
 - i. English rule – landlord
 - ii. American rule – tenant, unless otherwise specified in lease (*Hannan v. Dusch*)
 - d. Landlord has no duty to clear things other than tenants (wild animals) from land
 - e. If someone trespasses on land after tenant takes possession, tenant must file suit against trespasser
 - f. Landlord is assumed to actually own land to be leased (warranty deed)
 - i. Landlord assumed to guarantee no one has a better title than him
 - ii. Can sue landlord otherwise
 - g. If tenant adds something to property permanently, it generally stays after lease ends (law of fixtures) – removable things get to leave with tenant
6. Transfer of lease
- a. Assignment
 - i. Applies when entire interest in land is transferred
 - (a). New tenant has possession at end of lease
 - (b). Not supposed to look at intention of parties, but modern courts appear to do this (*Jaber v. Miller* – sale at auction appeared to transfer entire interest, even though installment payments looked somewhat like rent)
 - ii. Not parasitic on original lease
 - (a). *Jaber v. Miller* – new tenant responsible for rent if transfer was an assignment
 - iii. Moves privity of estate from T to T₁, thereby ending property relationship between landlord and original tenant
 - iv. Contract relationship between landlord and original tenant remains
 - v. Assuming assignment is not a gift, there is a new contract relationship between T and T₁
 - vi. If assignee transfer its interest, privity of estate is lost and there is no remaining contract relationship with landlord unless assignment made landlord a third-party beneficiary (*First American National Bank of Nashville v. Chicken System of America*)
 - vii. Possible contract relationship created with new tenant if assignment makes new tenant assume all terms of lease
 - viii. Original tenant can get landlord to release him from liability in case of default by tenant
 - ix. Obligations to repair property go with assignment

- x. Creates more parties for landlord to sue than sublease (generally original tenant and last assignee in chain)
 - b. Sublease – more common than assignment
 - i. Applies when less than entire interest is transferred
 - (a). Original tenant has possession at end of lease
 - (b). Original tenant keeps a reversion
 - (c). Original tenant keeps a possibility of reverter or right of entry (defeasibility condition, e.g., for non-payment of rent) – but some jurisdictions don't follow this rule
 - ii. Parasitic on original lease
 - (a). *Jaber v. Miller* – new tenant not responsible for rent if transfer was a sublease
 - iii. Property and contract relationships between original landlord and tenant remains
 - iv. No relationship between new tenant and landlord – so landlord can only sue original tenant, unless sublease made landlord a third party beneficiary
 - (a). Some states create contractual relationship between landlord and sublessee
 - v. Adds new property and contract relationship between tenant and sublessee – essentially replicates relationship between landlord and original tenant
 - vi. If tenant makes profit from sublease, he generally gets to keep it (unless lease says otherwise)
 - vii. If tenant does not pay landlord and landlord kicks sublessee off property, sublessee has cause of action against tenant
 - c. Restrictions on transfer
 - i. Assume lease can be transferred
 - ii. Landlords generally free to put any conditions on transfer, as long as not against transfer
 - iii. CA differs from other jurisdictions – landlord cannot unreasonably refuse consent (assuming lease is silent)

7. Breach of lease

- a. First read lease to determine its terms
- b. Traditionally promises in lease are considered to be independent covenants
 - i. If roof leaks, tenant could get damages but not terminate lease (unless defeasibility condition)
 - ii. Exception to rule is violation of covenant to quiet enjoyment of property – this is implicit in all leases

B. Dirtbag Landlords

- 1. Landlord cannot evict tenant without reasons
- 2. Constructive eviction
 - a. If impossible to use property, then there is constructive eviction (office flooded with water after plumbing failure)

- b. Elements of constructive eviction
 - i. Landlord must perform or fail to perform some obligation that landlord is under duty to perform – landlord must have control of circumstances
 - ii. Substantial interference with tenant's use and enjoyment of property
 - iii. Tenant must give landlord notice of interference
 - iv. Tenant must leave premises within reasonable time
 - c. In some jurisdictions, tenant can get court to decide that there is constructive eviction before leaving premises
- 3. Implied warranty of habitability
 - a. Often express, not necessarily implied
 - b. Breach of lease if landlord does not provide a suitable property
 - c. If there is breach, tenant can terminate lease or request damages
 - d. Combination of statutory and common law (in some states, primarily statutory)
 - e. Applies mainly to residential leases, not commercial
 - i. May be further limited to urban dwellings and/or multi-unit buildings
 - ii. Commercial leases may be limited to doctrine of constructive eviction, but some state recognize an implied warranty of intended purpose
 - f. Five major approaches as to what constitutes breach
 - i. Violation of building code
 - ii. Violation of spirit of building code
 - iii. Substantial defect in housing
 - iv. Premises are uninhabitable (essentially same as constructive eviction)
 - v. Whether premises are habitable (*Pugh v. Holmes* – defect must be of kind that prevents use of dwelling for its intended purpose)
 - g. Remedies
 - i. Terminate lease (First Restatement)
 - ii. Improvements in housing or money (Second Restatement)
 - (a). Tenant can repair and deduct costs of repair from rent
 - (b). Landlord can sue if he thinks amount deducted is incorrect
 - iii. Damages measures
 - (a). Fair rental value minus promised rent
 - (b). Fair rental value if it satisfied warranty minus fair rental value as is
 - (c). Proportional damages (Second Restatement, but not adopted by any state)
 - (d). Percent diminution (*Pugh v. Holmes*) – how much usefulness is lost (majority approach)

iv. Tort remedy may be available

C. Deadbeat Tenants

1. If tenant cause damage to landlord, situation is usually covered by defeasibility condition
 - a. Most common breach is non-payment of rent
2. Abandonment occurs when tenant moves away before expiration of lease or makes offer to landlord to terminate lease
 - a. Must have permanent intention not to return
 - b. If landlord accepts offer of abandonment, this is a surrender – transfer of possessory rights back to landlord
 - c. If contract aspect is not surrendered, tenant is liable for rent
 - d. Under statute of frauds, need written agreement to indicate property transfer following surrender
 - e. Even if parties do not explicitly agree to end lease, landlord can terminate by acting inconsistently with lease; action coupled with something else indicating intent to terminate lease – surrender by operation of law
 - i. For tenant, intention is clear if property abandoned
 - ii. For landlord, have to determine whether he was protecting property, mitigating damage or accepting a surrender
3. If tenant abandons, landlord finds new tenant and new tenant is willing to pay more rent, it varies by jurisdiction as to whether excess rent goes to landlord or original tenant (theoretically should be tenant)
4. Mitigation after abandonment
 - a. Historically no duty to mitigate
 - b. Modern trend is change to contract notion of mitigating damages (*Sommer v. Kridel*)
 - c. Once there is duty to mitigate, several issues arise
 - i. How much effort must be made?
 - ii. Some tenants are better than others
 - iii. How much of cost of searching for new tenant can be deducted from mitigated rent?
5. If tenant misses a rent payment, there are several outcomes
 - a. Historically landlord can only sue for missed rent payments
 - b. One exceptional case where landlord allowed to sue for anticipatory breach (*Sagamore Corp. v. Willcutt*)
 - c. If lease includes acceleration clause, tenant is required to pay all remaining rent (not all jurisdictions allow this and only works for term for years)
 - d. If there is accelerated damages clause, landlord may be able to collect double rent if accelerated damages clause operates as a liquidated damages clause
6. Summary remedies
 - a. If there is possibility of reverter or right of entry and it is exercised by landlord, tenant becomes wrongful inhabitant

- b. Landlord can bring action for ejectment – takes a long time, rent is lost (get order from judge, then enforcement by sheriff)
- c. Landlord might be able to drive tenant out (use self-help)
 - i. Traditionally, landlord can lock tenant out provided that it is peaceful
 - ii. Modern view is that landlord cannot act on his own (*Berg v. Wiley*)
- d. Many states have special housing courts for summary eviction proceedings
 - i. Just determine if tenant triggered defeasibility condition, not rights and responsibilities of parties
 - ii. Some states allow tenant to challenge right of possession

7. Holdovers

- a. Occurs when tenant stays on property after expiration of lease
- b. Holdover is not a trespasser (trespasser makes unauthorized entry), instead a tenant at sufferance
- c. Common law gives landlord choice of bringing ejectment action or renewing lease without tenant's approval
 - i. If tenant is over by even one minute, common law says landlord can elect to renew at that time
 - ii. This rule largely modified by courts to be less punitive towards tenants

D. Housing Discrimination

- 1. Landlord can select tenant based on ability to rent pay, but generally not other factors
- 2. Primary factors that a landlord cannot use
 - a. Race
 - b. Sex
 - c. Religion
 - d. National origin
 - e. Perhaps family status (kids), handicap, sexual orientation
- 3. Fair Housing Act
 - a. Unlawful to sell or rent, refuse to negotiate or otherwise make unavailable a dwelling because of race, color, religion, sex, familial status or national origin, or handicap (sex, familial status and handicap added by to later versions of Act)
 - i. Not a violation of FHA if basis of refusal is something not on list
 - b. Unlawful to discriminate against person in terms or conditions of sale or rental
 - c. Unlawful to advertise indicating preference for someone from one of the protected classes
 - i. No one has been successfully sued for expressing sex preference for roommate in ad
 - d. Unlawful to represent that dwelling is not available when it is available because person is in protected class

- e. Unlawful for real estate agents to discourage person in protected class from looking at certain neighborhoods
 - f. Special provisions apply to handicapped – must allow tenant to modify premises, but no requirement to make dwelling available to person whose tenancy would be threat to health or safety of others
 - g. Exemptions to coverage of FHA
 - i. Single family where owner does not own all or part of more than 3 such single-family houses, has not made another sale within past 24 months if owner does not reside in house and does not use broker
 - ii. Owner-occupied rooms or units occupied by no more than 4 families living independently of each other (Mrs. Murphy exception)
 - iii. Does not apply to housing for older persons
 - iv. Does not apply to religious organizations who want to limit rental or sell non-commercial property to persons of that religions, unless membership in religion in restricted on account of race, color or national origin
4. Civil Rights Acts prohibit all race-based discrimination
- a. Does not cover gender or other classifications, but perhaps some ethnic or religious groups if considered another race in 1866 (Gypsies, Jews)
 - b. Relies on 13th Amendment to cover private action
 - c. Restrictive covenant among landowners to exclude non-whites was struck down in *Shelley v. Kramer*, but reasoning has rarely been used since
 - d. There are no exceptions like for Fair Housing Act, so it applies to single family houses, etc.
5. Proving a discrimination claim
- a. Elements
 - i. Specific conduct prohibited
 - ii. Conduct occurs because of status in protected class
 - (a). Does being part of one group serve as proxy for being in a protected class?
 - (b). Motivation is key
 - (c). Disparate impact alone might be enough to show discrimination, but some lower court have split difference between government and private housing (higher burden on government)
 - (d). Disparate treatment is most common theory used in housing crimination cases
 - b. Evidence is decided by trier of fact and can include tester, rental history, statements of landlord, others tenants with similar experiences
 - i. *Harris v. Itzhaki* relied on different experiences of black tester and white tester

6. Structure of discrimination lawsuit
 - a. Prospective P must identify himself as member of one of classes protected by FHA
 - b. No need to allege discrimination for claim to survive motion to dismiss
 - c. D must answer that P did not get apartment for reason for protected by statute
 - d. If D has no plausible reason other than animus, P wins at summary judgment
 - e. Otherwise P must show that there was no reason other than discrimination
 - f. Then goes to trier of fact to determine whether P met burden
7. State courts and laws
 - a. State courts may balance differently than federal courts – in federal court, anti-discrimination law usually wins over freedom of religion, speech, association
 - b. State laws can go beyond FHA and 42 USC § 1982 (Civil Rights Act) in number of protected classes and remedies available
 - i. State law might be relevant simply because of remedies
 - ii. Damages vary in amounts, injunctions, possibility of attorneys' fees
 - iii. Although CA laws prohibit unreasonable discrimination, CA supreme court held that there is no coverage for practices that are not intentionally discriminatory

VI. Protecting Ownership

1. Trespass
 - a. Invasion must be by something that person can see, feel and touch with unaided senses (exceptions for water, generally nuisance)
 - b. Trespass is a super tort, but only present possessor of land can use this cause of action
 - c. Under Restatement of Torts § 158, no requirement for damage to land; just need to intentionally enter land or set in motion events that cause another person or thing to enter land (intentional means voluntary)
 - d. Trespass can be on, underneath or above surface of earth, but for aircraft there is trespass only if it is close to surface and causes harm
 - e. There is liability even if no harm to land
 - f. Mistake of fact is not a defense
 - g. Remedy can be damages or injunction (unlike other claims, injunction is usually automatic)
 - h. Exception to trespass liability if there is consent (but it can be withdrawn), entering to conduct business or entering to stop a crime)
2. Nuisance
 - a. Non-trespassory invasion of another's interest in private use and enjoyment of land
 - b. Required elements

- i. Interest in property
- ii. Invasion
 - (a). Restatement include concept of non-trespassory invasion
 - (b). Local government can prohibit things that are not nuisances, like distance between well and septic system (*Hendricks v. Stallinger*)
 - (c). Halfway houses for prisoners may or may not constitute nuisance, even without invasions – depends on jurisdiction
 - (d). Funeral homes and cemeteries are exception to invasion rule – nuisance even without invasion
- iii. Non-trespassory
- iv. Unreasonable use
- v. Intentional
- vi. Significant harm
- c. Suit can be filed by those who have rights regarding use and enjoyment of land (possessors, owners of easements and profits in land, future interest holders who are detrimentally affected by interference with use and enjoyment of land)
- d. Party is liable only if conduct is a legal cause of invasion of another's interest in private use and enjoyment of land and invasion is either
 - i. Intentional and unreasonable (unlike trespass – gravity of harm outweighs utility of actor's conduct), or
 - ii. Unintentional and otherwise action under rules controlling liability for negligent or reckless conduct
- e. Factors for gravity of harm
 - i. Extent of harm involved
 - ii. Character of harm involved
 - iii. Social value that law attaches to type of use or enjoyment invaded
 - iv. Suitability of particular use or enjoyment to locality
 - v. Burden on person harmed of avoiding harm
- f. Factors for utility of conduct
 - i. Social value of conduct
 - ii. Suitability of conduct to character of locality
 - iii. Impracticability of preventing or avoiding the invasion
- g. Balancing considerations
 - i. Unreasonable if gravity of harm outweighs utility of actor's conduct (Restatement § 826(a))
 - (a). In *Morgan v. High Penn Oil Co.*, court interpreted unreasonable to mean that use of property is one that people ought not to make
 - (b). Most courts do not balance costs and benefits in meaningful way
 - (c). If party creating nuisance was there first, it may affect the outcome (give D extra time to dismantle pig farm operations; made D shut down shuttle farm but forced P to pay damages for building retirement home next to farm)

- ii. Unreasonable if harm caused by conduct is serious and financial burden of compensating for this and similar harm to others would not make continuation of conduct not feasible (Restatement § 826(b))
 - i. Unreasonable if harm resulting from invasion is severe and greater than other should be required to bear without compensation
 - h. Limitations on nuisance
 - i. Liability only to those who nuisance causes *significant harm* of kind that would be suffered by normal person in community or by property in normal conditions and used for normal purpose
 - ii. No minor harm will suffice
 - i. Remedies
 - i. Damages
 - (a). In *Craft v. Willemson*, after D affected water drainage, damages were cost of harm to parking lot and building connection to sewer line
 - ii. Injunction
 - (a). Normal injunction test, except for NY (automatic injunction)
 - (b). Gravity of harm must outweigh utility of actor's conduct, much like Restatement § 826(a) (*Boomer v. Atlantic Cement* – blowing cement dust was only good for damages)
 - (c). Consider full effects of injunction of public/third parties

VII. Private Land Use Controls (Servitudes)

A. General Considerations

1. Mechanism for servitudes
 - a. Parties decide what uses they want
 - b. Reach agreement about extent of use and money for right
 - c. Must be in writing (statute of frauds)
2. Types of servitudes differ in extent to which they can be revoked and to extent they bind future parties

B. Licenses

1. Legal right to use another's land, which would otherwise be a tort
2. Does not constitute a possessory right
3. Arises from consent of person who has present possessory right
4. Can be revoked at any time
 - a. In some jurisdictions, licenses cannot be revoked when party has relied on use right, has expended resources and grantor knew that grantee was making use of rights (*Shearer v. Hodnette* – license for use of driveway could not be revoked because it had been used for 40 years, licensee had improved driveway)
 - b. If not revocable, threatens statute of frauds
5. Can be oral

C. Easements

1. Interest in land that

- a. Entitles owner to limited use or enjoyment of land
 - b. Has temporal duration
 - c. Entitles owner to protection from third parties from interfering in use or enjoyment
 - d. Is not subject to will of possessor of land (primary difference from license)
 - i. Can be subject to defeasibility conditions
 - ii. Just cannot be possessor changing his mind
 - e. Is not a normal incident of possession of any land possessed by owner of interest
 - f. Capable of conveyance
 - i. Binds future parties who are not named in easement
2. Common law allows only positive easements – right to do something, not to prevent something otherwise lawful
3. Requirements for easement
 - a. Identify how far use right goes (e.g., for automobile parking)
 - b. Identify extent of easement (e.g., during normal church hours)
 - c. Identify temporal duration (e.g., number of years, defeasibility conditions)
4. Common law says easement cannot be created in third party, but some jurisdictions allow (*Willard v. First Church of Christ, Scientist, Pacifica* – easement to third party created when one party sold land to another; court looked to intention of parties rather than common law)
5. Types of easements
 - a. Appurtenant
 - i. Goes with particular piece of land (deed should say easement “runs with the land”)
 - ii. Automatically survives transfer of property
 - iii. Property that has easement is servient tenement
 - iv. Property benefiting from easement is dominant tenement
 - v. Courts have strong preference for construing ambiguous easements as appurtenant
 - b. In gross
 - i. Goes with particular person or institution/corporation
 - ii. Commonly used for utility wires or pipes
 - iii. No dominant easement; servient easement same as above
 - iv. May or may not survive transfer
 - (a). Presume that grant to neighbor does not transfer
 - (b). Presume that grant to company does transfer
 - (c). If transfer substantially alters burden imposed by easement, then it may not transfer (*Miller v. Lutheran* – transfer right to take gravel from individual to company was not permitted)
6. If an easement is not valid, could be valid as a license
7. Easements by implication

- a. Needed when lawyer forgets to include easement in a sale splitting a property
 - b. Three requirements
 - i. Unity of ownership – at one point in time, one person owned entire property and then sold part to someone else
 - (a). Careful if property has been mortgaged, half of states regard mortgage as sale of property to bank – would violate unity requirement if easement not in place until after mortgage
 - ii. Use that gives rise to easement has continued for so long that it is apparent that it was intended to be permanent
 - (a). Use must have existed prior to split
 - (b). Use must be apparent – driveway, sewer pipes but not underground tunnels
 - iii. Use necessary or beneficial to enjoyment of land
 - (a). Standard of what is “necessary” varies
 - (b). Usually not absolute necessity – MN courts say use is really helpful
 - (c). Driveway providing only access to road is necessary, but could not otherwise use land without major expense
8. Easements by prescription (by adverse use)
- a. Modeled after doctrine of adverse possession
 - b. Use starts as a trespass or nuisance
 - c. Requirements
 - i. Continuous – use can be intermittent over a period of time, not actually continuous
 - ii. Open and notorious – just like adverse possession
 - iii. Hostile – if use is with permission, then statute of limitations is not running
 - (a). Not all jurisdictions have a clear rule (*Fischer v. Grinsburg* – use of common driveway that may or may not have been with permission)
 - (b). Most states have done away with permission aspect
 - (c). Strong minority still require that use be without permission (otherwise it’s a license)
 - d. Law needs to fill in uses permitted (scope), duration, extent of easement
 - i. Often parties will return to court to determine whether particular use is covered by prescriptive easement
9. Legal rights associated with easements
- a. Immunity from tort action, provided use is within scope, duration and extent of easement
 - b. Sue to stop another party (possessor or third party) from interfering with use right

D. Running Covenants

1. Way to limit what neighbors can do with land, if what they do falls short of being a nuisance
 - a. Remember that common law does not allow negative easement
 - b. Could be done in a contract, but contract only binds signing parties – this may bind other parties or subsequent landowners
2. Requirements
 - a. Make a contract (a gift will not suffice)
 - b. Contract may say that it is intended to bind successors
 - i. Key language is binding “assigns and successors”
 - ii. Also needs to say that other party’s successors can enforce contract
 - c. Parties to contract hold simultaneous interests in property that is subject of agreement (horizontal privity)
 - i. Majority rule is that it is sufficient that parties intended to bind successors, even if there is no simultaneous interest, provided that covenant is made as part of transaction involving land
 - ii. Minority rule is more stringent – need to have buyer-seller or landlord-tenant relationship
 - d. Relationship between parties and successors (vertical privity)
 - i. Most courts no longer require this
 - ii. Historically, had to convey same estate as the possessor held (e.g., if possessor has fee simple, must convey fee simple and not life estate)
 - e. Covenant must touch and concern land
 - i. Promise must deal with the land
 - ii. Promise for medical care, paying rent, etc. does not meet the requirement – does not involve physical characteristics of land
 - iii. Promise to repair roof would meet requirement
 - iv. Promise to pay dues to recreational association may meet requirement, even though covenant does not affect physical characteristics of land (*Candlewood Lake Association v. Scott*)