II. Acquisition of Property

A. Capture, Find, and Conquest

1. Wild Animals

1) **Blackstonian Owner-** If you own something, then you have a better claim than anyone else.
2) **Doctrine to look to when answering questions**
   a) Con
   b) Statute
   c) Regulations
   d) Precedent
   e) Analogous Cases
   f) Academics/Treatise Writers
3) ***"cujus est solum, ejus est usque ad coelum et usque ad inferos."***
   a) If you are recognized as the owner of land that carries with it not just things attached to the surface but down to the depths and up to the heavens.
   b) Does not extend to airspace and air travel – that is either unowned or owned by gov't

Pierson (D) **v. Post** (P) (NY 1805)
P on fox hunt, D knowing the fox was being hunted pursued the hunting party, killed the fox and carried him off. Mere pursuit gave P no legal right to the fox, but the fox became property of D who killed it. If mere pursuit was enough it would prove a fertile source of quarrels and litigations. ***To establish possession of the fox, a party must kill, capture or maim the wild animal so as to deprive the animal of natural liberty and subject it to the party's control.*** Both the majority's rule of capture and the dissent's rule of pursuit are means to the same end – as are the ideas of "possession" and its kin "constructive possession."

4) Wild animals are not owned – ownership would constantly shift with the movement of the animal
   a) Animals are not owned no matter who owns the land – but do have the exclusive right to hunt them. Only owners of that land can perform those acts which concert wild animals to property and become the animal's owner
   b) **The owner of the land has the exclusive right to turn that animal into an object of ownership – *Rationale soli*** (because of the soil)
   c) In order to be an owner of the fox you have to claim an ***exclusive right of any other individual in the universe***
5) **Irving Principal – Relativity of Title**
   a) 142 fastest gun in the west – wants to find 143 or higher
   b) Don't have to be the Blackstonian owner to win – just have to have a better claim than the other guy
   c) Relative Ownership Right – good against all those with lousier claims, but not against everyone else
      i) Court resolves these disputes so parties are not left to their own devices
      ii) Law decides who the biggest losers are to minimize violence and self-help that people will engage in
   d) Law distinguishes between **ownership** and **possession**
      i) Pierson has a right of possession and use just as an owner would. Pierson is an owner in a relative sense, but really just has possession
      ii) Ownership = legal concept, Possession = physical fact
      iii) **Bradshaw v. Ashley** – Need only superior title to due for Ejectment – have authorities forcibly remove a party from your land. Don't need to be the Blackstonian owner to win.

e) **Occupancy Continuum:** To say occupancy/possession is necessary to acquire property rights asks what constitutes occupancy/possession.
    i) What shifts is not ownership, but the right to take certain actions that can reduce a wild animal to ownership ie you don't own the fox, but only you have the right to hunt the fox on your land which might result in mortally wounding the fox, which is then reduced to your possession

6) Physical Acts that constitute possession
    a) Law has filled in to mean capturing, holding and killing
    b) First person committing the act is the first person to possess the animal and that constitutes a better clam than anyone else who comes after

Reese v. Hughes (MS 1926)
P kept two silver gray foxes for breeding purposes, male escaped. Several days later D killed the fox 15 miles away. Issue: Whether a fox kept captive is considered a wild animal and has the property rights attached to it of a wild animal if it escapes captivity. Because the fox has not been so tamed as to recognize his home he was subject to the rules of wild animals. ***If a captured wild animal is so tamed that it loses its wild nature to such an extent that it will recognize the home provided for it by its owner, and has, when absent from it, or the intention or returning thereto, a temporary departure by it from the immediate control of its owner does not terminate his property rights therein***.

7) another case went the opposite way – maintained an ownership interest when the fox escapes
8) **Animum revertendi**
    a) If the animal is captured but so tamed that it will return home and the owner is able to prove this, then the owner retains custody
        i) Contrast with CO minority rule – Importance of fix industry to CO dictates that owner should retain control after expensive fox escapes. The more we encourage of ownership the better.

Possession – the controlling or holding of personal property, with or without a claim of ownership. Need an intent to possess on the part of the possessor AND his or her actual controlling or holding of the property.
Relativity of Title – idea that one person can have a relatively better title or right to possession than another, while simultaneously having a right inferior to yet another person.
First-in-Time – First-in-right, establishing a priority based on the time of acquiring the right in question. Under such a rule, all other things being equal, the chronologically first possessor has the better title.
Constructive Possession – denotes possession that has the same effect in law as actual possession, although it is not actual possession in fact.

2. Wild Minerals

1) **Law draws analogy between fluids and foxes**
2) Hammonds is the dominant CL rule of ownership of gas. PA, KS, NY, and TX are minority rule states which say that you retain ownership of the gas
3) Problem with analogy
    a) Liquids don't move like foxes do, they are no so wild. This is the reason why gas companies do what they do and inject gas where they do.
    b) Gases move around in controlled definite fashion based on properties, physical laws, structure of underground, while animals move at will
4) Oil and Gas Footnote: What happens when you want to attract oil to property?
    a) Example
        i) A and B both have oil under their land, but have to fight to reduce it to possession

(1) A and B would both have to pump fast OR
(2) One may try to buy out the other
(3) There may be a joint relationship between them
(4) There may be a regulatory scheme imposed by the state (this is often the 20th century solution)

ii) There is no right to "the thing", only a right to reduce it to ownership or possession. This, you can dig well in reservoir or put up a fence between yards with foxes, but you cannot pitch a lasso between yards to catch a fox, that would be trespass

iii) Law recognizes acquisitions of property through the steps taken to reduce the property to possession

Hammonds v. Central Kentucky Natural Gas Co. (KY 1934)
D stored gas in an underground reservoir, 54 acres of which were owned by P. P brought trespass claim for occupation of her land without consent. ***By analogy, wild minerals are like wild animals and thus landowner has property rights in gas as long as he has control and is not property of anyone until reduced to actual possession by extraction.*** Putting the gas back into the ground, the gas company no longer has possession and cannot be trespassing.

Lone Star Gas v. Murchison (TX 1962)
P stored gas in underground reservoir, some of which ran under D's property. D took the gas stored in the reservoir. P sued for the value of the gas taken. ***Court held owner does not lose title by storing the gas in an underground reservoir***

3. Wild Wallets

- ***CL holds that a finder of lost property has greater rights to the found property than all the world except the true owner, a prior or rightful possessor, or a person holding through the rightful owner or possessor***
- **Finder** – a person who
    a. First takes control of the lost property
    b. With an intent to maintain possession of the property
- **Conversion** – When a person wrongfully exerts control over an asset inconsistent with the true owner's right to the property
    a. CL action for the tort of using another's property as one's own
    b. The true owner or rightful possessor can recover the property
    c. The action or remedy to recover the asset itself (plus money damages for injury to the asset) is called **replevin**.
    d. The action of monetary compensation conversion of personal property is called **trover.** In effect, a forced sale. A person who is compensated pursuant to a trover action loses his rights to have the asset returned.
- ***Armory v. Delarmirie*** – the finder of the jewel, though he does not by such finding acquire an absolute property or ownership, yet he has such a property as will enable him to keep it against all but the rightful owner, and consequently may maintain trover. The sweep wins the case because he is the prior possessor of the jewel. He could have stolen it from the house whose chimney he last cleaned and, still, as against the goldsmith, he would be the prior possessor, even though the rule of law is that a thief's title is void against the true owner's.
- ***Jeffries v. The Great Western*** – same as *Armory,* but as a defense the D proves the true owner of the jewel (not p). A defendant in a prior possession case should win on the strength of his own claim to the chattel, not because someone else, not before the court, has a better claim than the plaintiff. A party should litigate on the strengths of his own claim, not on the weakness of another's.

1) **Replevin** – action to recover personal property wrongfully held by another
2) **Conversion –** to get damages for goods that are damaged or stolen
3) Law of Found property is without reference to wild animals or minerals
4) Best way to determine – look to statutes, then go to CL
5) CL
    a. Finders Keepers is not the law – never has been never will be
    b. Rule – If it was once yours and someone else winds up in possession then you get to reclaim it, subject to a couple of exceptions
        i. **Abandonment** – released it into wild, never meant to reclaim it → cannot reclaim it
        ii. **UCC §2-404** – under certain rare circumstances
            1. example – give jeweler a watch who then sells the watch and you want to recover the watch – if jeweler is a recognized merchant may only be able to recover monetary damages
        iii. **Statute of Limitations**
            1. notification – if find an item you know is not yours – have a legal obligation to locate the prior possessor and failure to do so makes it a larceny
    c. **Classifications of Lost Property** – dependent on mental state – what label is attached is a jury question of fact
        - **Lost:** unintentional – loser never intended to depart from the item. Loser dropped or misplaced the property unintentionally. When prior possessor parted with possession, person was unaware at moment of losing possession
            1. Legal consequence:
                a. Prior possessor always gets it back subject to SOL
                b. Finder is the presumptive winner subject to exceptions
                - Trespasses (Favorite v. Miller) – trespasser who find property is going to lose, ***but if the trespass is technical and trivial, then maybe the find would win***
                - Finder works for someone else – contract – Even if worker's contract does not state it explicitly, employer can argue that it's implicit
        - **Mislaid:** intended to part, but not permanently. Loser does not intend parting to be permanent
        - **Abandoned:** intended to part permanently – change of heart doesn't matter
            1. Legal Consequence:
                a. Treated like lost property
        - **Treasure trove:** Gold, silver, and in some jurisdictions, currency, intentionally concealed or underground, with indications it has been so long concealed that the true owner has long since died.
            1. Goes to the finder.
    d. Determining mental state of person who is not present and whose actions we know nothing about so court looks at reasonable actions of the prior possessor in the situation
        i. Wallet on the ground vs. on the counter → look at the location of the item and make your best guess on a preponderance of the evidence
        ii. Whatever characterization of the property (lost, mislaid, or abandoned) the trier of fact reaches will be upheld on appeal so long as its rational.

Ganter v. Kapiloff (MD 1986)
P purchased valuable stamps, forgot them in a desk drawer that was later sold to D (ganter) came into possession. D claimed to own stamps. P sued as rightful owner. ***Court held once a true owner or prior possessor appears, the property is his.***

Favorite v. Miller (CT 1978)
King George statue was cut up and buried during the Revolutionary war. D knowingly trespassed on P's land to dig up a piece and sold it. Because property was found embedded in the earth and that D was a trespasser he did not have any claim to the property he would have otherwise had as a finder. ***The fact that the finder is trespassing is sufficient to deprive him of his normal preference over the owner of the place where the property was found – wont allow profit from wrongdoing.*** Property found embedded in the earth is property of the owner of the land – presumption in such cases is that possession of the article found is in the owner of the land. But where the trespass is trivial or merely technical the finder wins.

Benjamin v. Lindner Aviation
P found $18,000 found in the wing of plane being serviced. Bank owned the plane and had repossessed it from the prior owner. P filed claim against the bank and the company that serviced the plane. Court ruled the property mislaid, so Bank had the strongest claim to ownership. ***Court would not consider abandoned property because no one would abandon that much money, and would not consider treasure trove because the original owner could conceivably be living.*** Premises where money was found was plane and not Lindner Aviation so Lindner Aviation has no claim.

6) **Trivial Trespass Exception**
    a. But where trespass is trivial or merely technical then Finder wins.
    b. Example: Walking down path and see something on the side of the road. Unintentional trespass. The purpose of the law is to give property to owner to punish trespasser, but here there is no clear Owner and no need to punish the trespasser
7) **Possession**
    a. ***Seeing a wallet is not possessing it*** – not a finder until the item is reduced to possession
    b. Need to complete the job – simply identifying the thing and a reasonable prospect of possessing is not going to work
        i. Example: salvaged ships
8) **Accompanying mental state to claim possessory rights**
    a. Need physical act of control and the mental state to go within
    b. Keron – wasn't until money was seen that anyone had the intention of keeping the sock and its contents
    c. Have to have both to be a finder – if not a finder then cannot claim possessory rights

Keron v. Cashman (NJ 1869)
5 boys walking along train tracks played with dirty old sock – passed around and $800 fell out. Court ruled all parties should split the money evenly. ***Wasn't until the point that money was visible that the kids had the requisite mental state for possession.***

9) **Finder's obligations** – if you become a finder there are consequences:
    a. In every state, there is an obligation to make reasonable efforts to locate the prior possessor. Failure to do so is crime of larceny
    b. What constitutes reasonable effort depends on individual situations
    c. Finders level of care is that of gross negligence
    d. Rights of a finder are the same as a bailee – you can protect your rights against anyone who's down the chain, but if the prior possessor shows up, the finder has to turn over the money/damages gained
10) **Subsequent Finders of Lost Property**
    a. Relativity and the Irving Principle applied
    b. Loser, F1: Public Street, F2: Park, F3: Private Place (H's Home), H (Home Owner – Final Locus Owner)
        i. As between F1 and F2: F1 has superior right as prior possessor
        ii. As between F2 and H: F2 has superior right as prior possessor

iii. As between F2 and H: Depending on jurisdiction, H may win because locus point is private and H is the owner
    1. If F2 lost the item, F2 might win
    2. If F2 Mislaid the iten, then H would probably win
iv. As between F1 and H: F1 has superior right as prior possessor

c. Dispute between F1 and F2 where L is known to the parties
    i. F1 usually wins as the prior possessor
    ii. NC Minority rule: Court cannot award lost object to L unless L is a party to the suit. Since L is not a party to the suit, the law does not want to intervene, through the case out of court and leaving F2 as the possessor
d. Law does not demand proof of Blackstonian ownership: If we don't intervene then parties will be reduced to self-help
e. What if possession is obtained wrongfully or tortiously? Court usually does not take this into account. Court will say that criminal law should take care of this. For the civil law to deal with this would unnecessarily interfere with property rights
f. Lawson believes that courts giving mislaid property to locus owner under the theory that the loser might return is problematic. If finders know that they are supposed to give property to the locus owner, there is no incentive to give it back to the true owner, thus finders might just pocket it.

a. Bailments

- **Bailment** – transfer and delivery by an owner or prior possessor (the **bailor**) of possession of personal property to another (the **bailee**)
    - Whose purpose in holding possession is often for safekeeping or for some other purpose more limited than dealing with the object or chattel as would its owner, AND
    - Where the return of the object or chattel in the same, or substantially the same, undamaged condition is contemplated.
- A bailment is the **result of a contract or agreement**, express or implied, or the conduct of the parties – or some combination of agreement and conduct. Some jurisdictions require an express agreement of some type to create a bailment, but also may imply agreements and bailments from conduct. Identifying a bailment requires that you look not only at the parties agreement, but also at their conduct – if only as evidence of their implementation of an implied agreement.
- **Delivery** – bailment requires a delivery of possession. And **Acceptance.**
    - **Actual** – the object is physically handed over to the bailee
    - **Constructive** – when one gives the keys to a safe deposit box – transfer of control of the object without actually delivering it
    - **Symbolic** – the receipt by the bailee of a thing symbolizing the object of the bailment. May be something associated with the object but usually means a transfer by use of a written instrument.
- **Constructive bailment** – when possession of personal property is acquired and retained under circumstances in which the recipient should keep it safely and return it to the owner. Without an actual delivery and acceptance – constructive bailment.
- **Misdelivery** – For misdelivery of the bailed object, the bailee is strictly liable in tort, absent a special agreement or a statute, even if the bailee is not at fault for the misdelivery.
- **Standard of Care**
    - Benefits Bailor – bailee is liable only for gross negligence
    - Mutual Benefit – negligence and has a duty of reasonable care under the circumstance.
    - Benefits the Bailee – highest standard of care

1) **Bailment = in its simplest form a voluntary entrusting of goods**
    a. Voluntary arrangement – theft is not a bailment
    b. Where you have a legal right to something and you hand it to someone else – as long as both parties agree = bailment
    c. Not always a species of contract because you can have a bailment without consideration
2) **Bailee = person taking to item, Bailor = person entrusting the item**
3) **CL approach to liability**
    a. Where bailee gets the primary benefit
        1. the bailee better take good care of the stuff
        ii. Need to exercise strict control
        iii. Minimal negligence (no strict liability – but could arrange through contract)
    b. Where the bailor benefits
        i. Gross negligence
    c. Where both parties benefit
        i. Normal negligence
4) **Modern Trends**
    a. Ordinary negligence standard used
        i. Misdelivery of goods is always Strict Liability
    b. **Bailee can sue on behalf of bailor**
        i. Bailee can sue for his independent interest in the bailed item
        ii. Bailee has prior-possessor relative title to a thief (not relevant if third party purchases from bailee, except for UCC merchant exception
        iii. Any damages taken on behalf of bailor by bailee must be turned over to bailor
        iv. Cannot get double damages from a tortfeasor – only collect once
    v. **Bailor's rights:** Bailor has a right to the goods. If they are damaged, not as a result of the bailee's negligence, then tough luck for the bailor.
        1. Bailor can recover from the bailee any damages that the Bailee recovers from a third party actor
    vi. **Bailee's Rights:** Bailee has rights as a rightful possessor against those who have damaged or stolen the item. Bailee has an independently protectable legal interest similar to a prior possessor. Bailee can take tort action
        1. If Bailee gets goods or money in these situations, bailor is entitled to them
        2. Bailee is independent legal agent, asserting own rights and as an intermediary for the bailor
        3. **Agency –** whatever action of the bailee is binding on the bailor
c. **Can Always contract around standards of care**

Peet v. Roth Hotel
P brought ring to D hotel for a jeweler – D lost the ring. ***The failure to return the bailment was a prima facie case of negligence and the burden of proving that it was the result of anything other than negligence is on the D to make.*** There was benefit to both parties under the arrangement so D had duty to exercise reasonable care to keep the ring. Where there is a loss it is assumed that it was lost from negligence. ***An erroneous estimate of the value of a ring does not release the bailee from liability or result in a conclusion that no bailment is created if the bailee was not prevented from ascertaining the value upon reasonable inspection.***

Ellish v. Airport Parking Co of America
P parked auto in D's lot at airport – car was gone when she returned. In the absence of any proof of neglect by D, Do should not be held responsible → ***not a bailment relationship. P retained as much control as possible because retained keys.*** Transaction was a license to occupy space.

Reinfeld NC v. Griswold & Bateman Warehouse
"A bailee who accepts responsibility for goods should have the burden of producing evidence as to the fate of those goods. To hold otherwise would place an impossible burden on a bailor. . . This burden of producing evidence is shifted to the bailee but the burden of proof that the bailee is at fault or that conversion or negligence exists remains on the bailor."

Samples v. Geary 189
Coat checked with a hidden mink stole. Agreed to take $14 coat but not the $50,000 fur inside. ***Not a bailment because must be voluntary*** – and coat check did not voluntarily agree to take the $50,000 fur because did not know it was there***.***

b. Accessions

1) **Accession -** When the value of the original owners property is increased. As a result of changing hands from possessors it comes back to prior possessor worth more. Occur when someone improves a good and the prior possessor then comes along and wants it back.
    a) **Who owns the improved item?**
        i) General rule is to **separate** if possible.
        ii) If cannot separate, then ownership goes to whoever **the principle item owner** is. Determined by:
            (1) Common Sense
            (2) Understanding of Value
            (3) Fairness to the Parties
        iii) Sometimes property rights are determined by good or bad faith – did the improver clearly know the property was not his?
        iv) If the only improvement is **effort** then usually the prior possessor gets the item.
    b) **Once owner is determined, is there any compensation allocated to the losing party?**
        i) **Prior possessor with get the value of the goods.** Measure of the value of the goods at the time of conversion or the finished product
            (1) **Standard Measure** of damages is to award market value of the good at the time of conversion
        ii) **Improver** –
            (1) **standard rule** – can't make someone pay for improvements they never contracted for – same theory as unjust enrichment – no damages when the enrichment was voluntary and the other party had no knowledge of the improvements.
            (2) **Land** – almost always the principle item. Either landowner gets the land but pays for improvement, or allows accession of the land and improve has to pay fair market value for the land to prior possessor – but most courts say too bad to the improver.
2) **Land – Innocent Improver Doctrine**
    a) Honest mistakes about who owns the land are common because of difficulty or surveying – extremely plausible to innocently improve land that you don't own
    b) Normal law of Accessions
        i) Land is always going to be the principle item because it is special – no matter ow big the building that you put on it – and cannot separate a building from the property
        ii) Best argument is that the value of the building is out of proportion to the value of the land, the good faith improve could maybe get it – bad faith improved will always lose
3) Example
    a) Lost ring and original possessor shows up and the jewel is in a new setting

b) If can put back in original setting without damaging anything then you can keep the improvement if you can separate it our from the original item
c) If can't then the law has long said that improvement transforms the items into a totally different item
    i) improver has a chance of keeping the item
    ii) Has to have been done in good faith
    iii) law will not act favorably towards bad faith improvers

4) Transformation from one item to another – there is no strict rule – seat of pants approach

Bancorp Leasing v. Stadeli Pump & Construction (OR 1987)
D defaulted on obligations to P. Before P would repossess D's truck, D removed and sold the engine, which D had purchased and installed. ***Court held because engine was readily severable from truck and no other circumstances that imply engine was an accession, the engine did not accede to the truck***. Other circumstances include (1) a possible presumption that a debtor's improvements are intended to benefit the secured party and (2) detrimental reliance.

Bank of American v. J & S Auto Repairs (AZ 1985)
After a title service indicated a van was gree of all liens, D improved the van. Later, D discovered that P had a lien, and P brought a replevin action to recover the van. ***Court held that D was entitled to parts that could be removed without injury.***

5) Who gets the item when separability is impossible depends on the increase in value 5x over probably will not, but 28x will
    a) If accession causes the transfer of property to the improver then the original owner gets money
    b) If the improver loses then he has made a gift because he improved it at his own risk

Weatherby v. Green (MI)
Guy wanders onto another's land, chops wood and turns it into barrels. Everyone agrees not his land, but that it was an honest mistake. Increased the economic value of the wood several dozen times.

6) Improvements to Land
    a) Easy to make innocent mistakes about boundaries
    b) Don't want those who make mistakes to have to make gift of building to property owner
    c) Depends what the principal item it – if garage then land is probably worth more, if skyscraper building is worth more and have to pay original owner
    d) Some legislatures have enacted statutes to protect innocent improvers

3. Wild Land

1) All land in the US is owned by someone – under the Irving principle all you need is a better possessor claim than others

Bradshaw v. Ashley (US 1901)
D intruded upon P's land and ousted P. P was the actual, continuous and undisturbed owner, and brought action of ejectment to recover possession. Proof of previous possession is sufficient proof of title to recover against D for trespass and ouster.

2) **Cherokee Principle – remedy is as important as the right – remedies do not enforce themselves** – judgment means nothing unless ou can enforce it with the power of the executive

3) No such thing as "perfect title" – just a continuum from running from very good to very bad
    a. Land for which title is questionable is worth much less than land for which title is relatively good.
4) **Deeds – represent the transfer of interest in land** – Statute of Frauds requires that there be a writing
    a. **Warranty Deed**
        i. I the seller promise that I have absolute Blackstonian title to property - if anything goes wrong the seller will be liable for damages
        ii. Warranty Deed implicates the Cherokee Principle because what are the chances of a fraudulent seller sticking around – no way to enforce if you can't catch the seller.
    b. **Quit Claim Deed**
        i. Whatever I've got you've got
        ii. No specific assurances on what the first guy got – allocates the uncertainty to the buyer
        iii. Facilitate transfers of land
            1. example: Y wants to sell land but X had easement many years ago that is possibly abandoned. X can't use a warranty deed because may not have anything to convey. Use a quitclaim to the easement – that facilitates Y selling the land.
5) **Title insurance** – compensates party if title is no good
    a. Reduces but does not reallocate risk
6) **Quiet Title** – want everyone else to shut up about your title
    a. Suing the entire would and issuing a declaration that you have the best claim
    b. Anyone who doesn't receive notice is not bound by the quiet title action

Gregerson v. Jensen (UT 1983)
P had contract with D to buy D's property – but D had a previous unrecorded deed giving the property to D's wife. Statutes do not require recording as a prereq for the validity of a deed. ***One who has transferred his legal estate to one person cannot thereafter detract from the effectiveness of such transfer by undertaking to transfer it to another.*** It is immaterial that the later grantee pays value under the supposition that he is acquiring property.

Messersmith v. Smith (ND 1953)
Mrs. P quitclaimed her property to Mr. P, her husband. Later she conveyed a mineral deed to D. D's conveyance was registered before P's. P brought action for quiet title. ***The original mineral deed was void because it was never recorded***. Court held that the conveyance to her husband rendered the later deed to D inoperative.

Guerin v. Sunburst Oil & Gas Co (MT 1923)
Thornton leased property to D. Later Thornton conveyed land to P by warranty deed. P sued for an injunction to stop D from exploring for oil and gas on the land. ***One who purchases land from the owner, after the recorder of an option given by the owner to another person to purchase the same land, has constructive notice of the option.***

7) **Recording Statutes**
    a. **Title Searches**
        i. Mechanics are long and difficult – costly process
        ii. Records sometimes get lost or destroyed
        iii. You are not by law required to file your deed in the registry of deeds, but the recording statutes attach consequences of not filing that deal with the validity of your title should claims be made against it because of subsequent transactions
        iv. Incentives to file your deed, but no affirmative penalties for not depending on jurisdiction

b. **First in Time, First in Right**
    i. Recording statutes can alter this rule and make what is recorded first controlling – incentive to record deeds
c. Generally documents are recorded
d. Generally law does not require it but there are benefits to doing so
e. Can alter the first in time rule if the purchaser fails to record in a timely fashion
f. Meant to protect bona fide purchasers
    i. Must exchange something of value for the interest
    ii. Gratuitous donees are not protected
g. Recording may constitute constructive notice

8) **First Transfer Rule**
a. Legally can only sell what you have and can only sell it once
b. Sometimes things are sold more than once as deliberate fraud, sometimes b/c stupidity

Leach v. Gunnarson (OR 1980)
D sold land to P and made covenant against encumbrances. D had also granted an irrevocable encumbrance to third party to draw water from spring. Statutes require a grantor who covenants against encumbrances in a warranty deed to be liable to the grantee if the real property is encumbered by any interest not expressly excluded from the scope of the covenant against encumbrances. Exceptions apply with respect to encumbrances that affect the physical condition of the real property that are open, notorious and visible (ie RR tracks). ***Court held that the encumbrance breached the D's covenant b/c use of a spring is neither so palpable nor so physically permanent as to come within the exception***.

9) **Encumbrances**
a. CL Rule – a purchaser is entitled to rely upon the covenants in a deed and if open, visible and notorious easements are to be excepted from the operation of the covenants, it should be the duty of the grantor to except them
    i. Seller is usually in a better position than the buyer to know what the legal status of the actors (ie short or long term lease)
b. Modern Rule – where the encumbrance is clearly visible then it may be excepted
c. Remedy is usually damages

10) **Marketable Title Acts**
a. Tradition way and insurance systems give buyers assurance of good title by
    i. Supplying evidence of title all the way back to the original sovereign
    ii. Compensating the buyer if a defect should be successfully asserted
b. Statute of Limitations – may the title good by cutting off potentially conflicting interests that have not been asserted in a long time
c. Marketable Title Acts – most comprehensive statutory attempt to solve marketability problems by making title good
    i. 1/3 of states
    ii. Define a root title as the most recent conveyance of the property in question older than a specified number of years (most commonly 20-40) – and cutting off nay interest pre-existing the root that is not recorded subsequent to the root
    iii. Why? 200 year title searches are prohibitively expensive
    iv. Gives new meaning to "root title" so searches can go back to "root title"

B. Adverse Possession

1) **Running of Statute of Limitations is a necessary condition** for wrongdoer to become landowner, but it is not a sufficient condition
    a. 5-20 years depending on the state
    b. A lot of states – especially in the West – say that need to pay property taxes on the land through the period of the SOL to become an adverse possessor – because puts the landowner on notice
    c. If SOL has not run out then the prior possessor can bring a recovery action and force the current occupant of the land
        i. Action for ejectment
        ii. Action to quiet title
        iii. Trespass
    d. The adverse possessor can do the same once he has met the SOL and ENCROACH requirements, ejectement, quiet title, or wait to be sued
2) The Adverse Possessor can only acquire that title which the person with a cause of action had if the original owner had a life estate – can only get his life estate.
3) In addition to the SOL, generally need to fulfill the requirements in ENCROACH
    a. **E**xclusive
    b. **N**otorious
    c. **C**laim of
    d. **R**ight
    e. **O**pen
    f. **A**ctual
    g. **C**ontinuous
    h. **H**ostile
        i. Ultimate question is whether the claimant has acted towards the land in question as would an average owner taking properly into account the geophysical nature of the land.
        ii. **Burden of proof** is on the would be adverse possessor no matter what the cause of action is

4) **Actual**
    a. Means actual use of the land
    b. Law requires a would-be adverse possessor to use the land in an affirmative and productive fashion
        i. Ie putting up condos
        ii. Not watching the mosquitoes breed
    c. Gillespie example: used the land to tap trees and park cars. For forest land in VT this what a reasonable person would do with it. Meets the requirements for Actual.
    d. What constitutes actual possession is a function of the type of property involved, where the property is located, ad what uses of the property would be expected in the community.

Jarvis v. Gillespie
D got quitclaim dead from town (owner of land), P claimed ownership of parcel through adverse possession. P owned 200 acres that surrounded the lot. P fulfilled all of the requirements of adverse possession.

5) **Continuous**
    a. The person must use the property as would a true owner under the circumstances. Intermittent uses usually do not constitute continuous possession but may be continuous in some circumstances such as season property.
    b. Means reasonably constant
    c. Does not require all the time – because dependant on the nature of the land and the uses so whatever is sensible

d. If at any time the occupation continuity was broken then that would restart the clock
e. Gillespie – more than a month less than a year was enough based on the rural nature of the land
f. Length of time to break the chain depends on jurisdiction – up to year as little as 3 weeks
g. Seasonal property – when land is only suited to seasonal occupation – then continuous is just during the seasons to occupy – American jurisdictions are split on this

6) **Notorious and Open**

a. Use of the property is so visible and apparent it gives notice to the legal owner that someone may be asserting an adverse claim to the land. The adverse possessor's use must be of such character under the circumstances as would indicate to a reasonable person that someone else might be claiming the property.
b. Need indications that someone is occupying the land
c. If it is not open and obvious so that the owner would notice that someone is using their land – then statute of limitations would not begin
d. How can land be **used actually and continuous and not be open and notorious?**
    i. Land where use is not obviously visible
        1. Marengo Cave – below ground extended below neighbors property line
    ii. **Manillo v. Gorski** (NJ 1969) – D's son made additions and changes to D's home which resulted in an encroachment of 15" onto P's land. Mistaken belief of title is sufficient to constitute hostility, but remanded to determine whether the act was open and notorious.
        1. States are split –
            a. Law charges owners with constructive knowledge
            b. Reality is that people don't know where their property lines truly fall

7) **Exclusive**

a. Generally means that the adverse possessor holds the land to the exclusion of the true owner. Possession cannot be exclusive, moreover, if two or more adverse possessors use the property adverse to each other's ownership.
b. Doesn't mean that you have to be only one wrongfully occupying the land – can be a team, can be more than one person
c. Exclusive means exclusive of any other group's uses
d. Cannot be using simultaneously with another possessor
e. Mostly not an issue because its difficult for two groups to use the same property at the same time that would meet all the other elements of adverse possession
f. Tacking
    i. Adding one person's occupation onto another's for the purpose of meeting the statute of limitations
    ii. Sometimes it is allowed
    iii. Privity – allows you to tack if and only if you are in privity with the other wrongful occupant
        1. privity means essentially a voluntary handing over of possession
        2. If its voluntary you can add the numbers together, if its not then you cannot

8) **Hostile**

a. Has nothing to do with the intent of the wrongful occupant
b. Just means that they are the wrongful occupant and are not there by permission

9) **Claim of Right**

a. Three views
    i. Good faith – wrongfully occupy land but think you have a right
    ii. Bad faith – wouldn't want to reward wrongdoers – BUT want to penalize owners who don't do anything with their land or take to time to know if anyone else is – way of transferring land ownership to people who are going to do something with it
    iii. Who Cares about intent
b. All three views are represented in American jurisdictions

i. Plurality is for who cares – that is the modern trend
ii. Vanishingly small amount of jurisdictions are for bad faith
iii. Good faith is still aplenty –
1. **Carpenter v. Ruperto** (IA 1982) P developed onto D's property knowing it belonged to D. P brought quiet title action against D. P did not satisfy adverse possession because she had no claim or right to title since she acted with bad faith.

c. **Helmholtz Effect**
i. If go to Who Cares? Jurisdictions people who act in bad faith usually more often than those who act in good faith. Outcome is more like good faith jurisdiction

10) **Government Land and Adverse Possession**
a. Baseline rule is that you can never adversely possess government land
b. Unconditional rule with federal land - 1/3 of the US is off limits to adverse possession
c. States and counties and towns depend on their own laws

11) **Statute of Limitations**
a. Open and notorious requirement provides a rule about the commencement of the SOL
b. If occupying land secretly at night would not be continuous and not open and notorious and the SOL would never start
c. SOLs do take into account prison, military service, minor etc get extension after the disability is removed – purely a function of statutes

12) **Burden of Proof**
a. Whoever is claiming the adverse possession either as an affirmative claim or a defense has the burden of proof on all of these elements and has to show them by more than a preponderance of evidence – usually require clear and convincing

13) **Disabilities and Tolling the Running of the SOL**
a. Many states provide that the SOL for an adverse possession claim will not run against a true owner who is under a **disability** when the adverse possession commences.
b. Infants and the mentally ill generally are deemed disabled. Other common groups include prisoners, those in military service and those who are absent from the state.

14) **Privity and Tacking**
a. An adverse possessor may eject other trespassers and adverse possessors even before the SOL runs, as long as the adverse possessor entered the property first
b. Adverse possessor may sell or gift his interest to another person. The purchaser or donee succeeds to the adverse possessor's attributes, including the time the first possessor occupied the property.
c. **Tacking** is the adding of time the first possessor used the property to the time the second possessor used the property
d. **Privity** – the relationship necessary to allow tacking – occurs by contract of sale, gift or inheritance.

15) **Color of Title:**
a. Refers to situation where the possessor claims land he has entered under the erms of a written instrument that purports to convey a title to the possessor but is defective or invalid for one reason or another. Three possible effects
i. Helpful to establish hostility
ii. SOL may be shortened
iii. May allow adverse possession of a small parcel to yield control of a larger tract (constructive adverse possession).

C. Gifts and Promises

- **Gift** is a noncontractual, gratuitous transfer of property, made without legal consideration.
  - **Inter Vivos Gift** – to be effect need to show
    - Donative intent - Clear and convincing intent in the donor to transfer the object to the donnee
    - Donor must actually deliver the object

        - Donee must accept
    - Gifts in will do not take effect when a will is signed, but take effect when the person dies unless the person revokes. The recipient of the gift in the will has no property right in the subject matter of the bequest until the testator dies.
- **Delivery –** donor can revoke the promise anytime before delivery.
    - **Symbolic delivery** – occurs when the think delivered stands in the place of the property.
    - **Constructive delivery** – property is not transferred but something giving access and control to it is.
- **Gift Causa Mortis** – need s subjective expectation of death. Donor must have a present intention to deliver absolute ownership of the property in the future, at death; an attempt by the donor to reserve control over the property until death invalidates this type of gift. The title to the donee is not absolute until the donor is dead. Gift causa mortis are revocable until death, and if death doesn't happen is automatic in some jurisdictions. Gift is not revived by a relapse.

1) **Two Principles of Property Transfer**
    a. Want to honor intention of the grantor – want people to be able to transfer their property to whom they wish under the terms they wish
    b. We want the law to make sure that it gets the grantor's intentions correct
        i. Channel intentions through formal mechanisms like consideration
        ii. Prove you "meant" it
2) **Future Promises for Gifts**
    a. We want to honor the intentions of the grantor, but do we want to honor at the time of the gift promise or when he takes the promise back?
    b. Enforcing a gift promise frustrates the formality requirement to ensure we got the grantor's intentions correct
3) Normally in law there is **formalities for transfers** – like the Statute of Frauds requiring writing for the transfer of land
    a. Meant as a check and validation that the giver wants to give
4) **Gift -** If law recognizes a transfer of property as a gift it is an irrevocable promise divesting you of your ownership rights
5) **Will recognize gifts when**
    a. Sure that the grantor intends to make a gift AND
    b. Acceptance by recipient AND
    c. Delivery
6) **Delivery**
    a. Can you allow symbols to substitute for delivery – the more symbols are allows to substitute for actual delivery then comes closer to contracts without consideration
    b. Constructive delivery – when the donor delivers to the donee an object that permits the donee to gain possession of the subject matter of the gift
        i. Courts are divided on whether constructive or symbolic delivery is an acceptable substitute
7) **Causa Mortis (gift made in contemplation of death):** courts are split as to whether pre-existing possession is enough to constitute delivery.
    a. Is revocable by the donor at any time prior to death
    b. Prevailing view is that it is revoked automatically if donor does not die of the anticipated peril
8) **Intent**
    a. Must be intent to give an interest in the property at the present time, cannot be a promise to make a gift in the future – absent consideration that would be unenforceable
    b. The gifted interest need not be a present possessory interest

Porter v. Wertz (NY 1981)
P loaned painting to D because D wanted to purchase it. D sold the painting to a third party, and P sought to recover possession. P can recover painting.

Gruen v. Gruen (NY 1986)
P's father, now deceased, promised to give P a painting. D, P's stepmother, who had the physical possession of the painting refused to give P the painting. Court held P was the rightful owner because there was donative intent, delivery and acceptance. ***Court held delivery need not be physical and acceptance was presumed because of the value of the gift.***

Foster v. Reiss (NJ 1955)
D's wife gave him a gift causa mortis. Wife had given D a note that indicated her intent for D to have a bank account and told D where to find certain items in their house. P trustees objected and said that a valid gift causa mortis had not taken place because of not delivery. ***Court held while the note demonstrated the donative intent there was no delivery.***

III. The System of Estates in Land

A. Introduction to Estates

1) A **present possessory estate** is a right to use and possess the property in the present moment.
   a) There is always one and only one present interest in the property
   b) The present interest can be simultaneously owned by more than one person or entity
   c) Every interest has a temporal duration which it confers a right to use and possess and dispossess the property
2) A **Future Estate (or interest)** is an interest in property where the right to possession of the property is postponed into the future
   a) A possible, and in some cases certain, right to future use and possession of property
   b) There can be more than one future interest, held either by the same person or by different people.
   c) The fact that possession is postponed should neither suggest that the future interest is valueless or even less valuable than a present possessory estate, nor that the holder of future interest has no other present rights in the property
   d) Future interests take their names and their legal properties when they are created
   e) When the present interest in property is anything other than a fee simple absolute, there is always at least one future interest
3) Grants of Land definitions
   a) **Words of Purchase** – who gets the land
   b) **Words of Limitations** – for who long
   c) "To A and his heirs" – "To A" are the words of purchase, "and his heirs" are the words of limitation
4) **Present Interests**
   a) Fee Simple – Interest in property that is potentially infinite and freely transferable
      i) Absolute – cannot come to an end
      ii) Defeasible – Can come to an end (e.g. because of a condition) – a future interest exists in the property
         (1) Fee Simple Determinable (FSD)
         (2) Fee Simple Subject to Condition Subsequent (FSSCS)
         (3) Fee Simple Subject to an Exectuory Interest (FSSEI)
   b) Life Estate – finite temporal duration fixed by some person's lifetime
      i) Absolute
      ii) defeasible
   c) Tenancy
5) Fee – Potentially can be possessed to infinity and property interests are freely transferable
   a) **Fee Simple Absolute**
      i) There is always something that can bring property ownership to the end (i.e. not paying taxes)
      ii) There is nothing to the grant that could bring that interest to an end – control all possible timelines
      iii) Complete ownership until the end of time. The owner can enjoy the property, freely transfer or devise it.
      iv) "To A and his heirs" or even just "To A" will assign a fee simple absolute

B. Life Estates, Reversions, and Waste

1) **Life Estate**
    a. **Characteristics**
        i. Measuring life is the life that measures the duration of the life estate – a human being who is alive when the grant takes effect
        ii. Measured life must be a person; otherwise the grant would be a FSD
        iii. Life Estate Per Autre Vie: measuring life is another person's
        iv. Can use as many names as you want – usually up to ten people
        v. If you have a relatively small number can make it dependent on the lives of the people
    b. After the death of the measuring life – have no rights to give away
        i. Prior to death can transfer the land – but the timeline ends with the death
2) **Waste**
    a. **Waste** occurs when the possessory life tenant permanently impairs the property's condition or value to the future interest holder's detriment.
    b. Any time you divide ownership of an asset over time you create a possible conflict of interests between the present possessor and the future interest holders
    c. Grantor can exert some control over present interests by allocating rights between the present and future by specifying whatever limitations on uses – if not then the law fills in the gaps with the law of waste.
    d. ***Law requires that the present interest holder should be reasonable***
        i. Doesn't mean that the present interest holder cannot use the land or depreciate it, means that he has to be reasonable to the fact that someone else is going to take over
    e. If grantee commits waste, then he forfeits his present possessory interest in the land
    f. Voluntary Waste: do something horrible
    g. Permissive Waste: Fail to do something (i.e. pay property taxes)
    h. **Remedy**
        i. Injunction - Proving entitlement to injunction is difficult – especially if the future interest holder cannot prove that the future interest WILL happen rather than might just happen
        ii. Forfeiture for waste – generally not used – but future interests can be accelerated
        iii. Many places have statutes that if you commit egregious waste award the future interest hold double or triple damages
3) **Future Interests**
    a. **Definitively failing to vest** = When future interests vanish
    b. **Stating the title** = process of identifying and naming temporal interests
    c. Can sell or will future interests
    d. Any time there is not a fee simple there is at least one future interest that needs to be identified and named
    e. **Types of Future Interest Grantor Keeps**
        i. **Reversions** – (These are the future interests that a grantor keeps when he gives away less of the timeline than he started with – can be to multiple people – whatever you keep for yourself) – Only future interest that is sure to become a present interest
        ii. **Possibility of Reverter** – if it becomes a present interest, it does so automatically when the even happens (from an FSD)
        iii. **Right of Entry** – Grantor does not immediately get possessory interest, instead has the power to convert it into a present interest; failure to converty results in the current possessory owner reaming the lawful possessor (from a FSSCS)
    f. **Remainders** and **Executory interests** are when the future interest is in a transferee

g. **Reversion** – the future interest that you keep when you give away a lower interest in the estate than what you start with
    i. Example: Grantor has a fee simple absolute. To A for A's life. What the grantor keeps after A's life is a reversion in fee simple absolute.
    ii. If start with a fee simple and give away a life estate or a tenancy then you keep a reversion
    iii. If start with a life estate and give away a tenancy – you keep a reversion
    iv. Totally Illogical – If start with a life estate and grant away a life estate measured by a different life, or start iwht a tenancy and grant away a different tenancy → grantor keeps a reversion
    v. **Example**: A has fee simple absolute. A grants a life estate to B – To B for B's life. B grants a life estate to C.
        1. If B dies before C, then C loses the property and A gets it back. A has a reversion in fee simple absolute.
        2. If C dies before B, then the property returns to B and B retains possession until his death → A. B has kept part of the timeline, but that is not absolutely certain. B has a reversion in life estate
h. **Transferability**
    i. Transferable subject to jurisdictional rules
    ii. Possible for a grantor to grant life estate, keep a reversion in Fee Simple Absolute, and **then transfer that Reversion to a third party**
        1. Still called a Reversion when transferred because future interests take their names at the time they are created
    iii. Possible for a third party to get a Future Interest that can only be created in a grantor – but must be accomplished through TWO SEPARATE transactions
        1. Can never create a Reversion, POR, ROE in a third party through a single grant
        2. Can only create Remainders and Executory Interests in a 3rd party
        3. Sometimes beneficial to do it the long way for legal properties or to circumvent Rules Against Perpetuities

C. Fee Simples

1) **Fee Simple Absolute**
    a. Potentially infinite interest in the land and freely transferable
    b. If there is nothing in the nature of the property grant than would bring the present interest to an end then it is a fee simple absolute
    c. Can transfer through succession, will or inter vivos
    d. If grant away anything that isn't a fee simple absolute, then maintain a reversion in fee simple absolute
2) **Fee Simple Defeasible** – if the grant identifies some even or evens in the world that can bring the interest to an end – do not control all possible outcomes.
    a. **Restraints**
        i. Few restraints on conditions that grantors can impose for defeasibility
        ii. Cannot make a fee simple defeasible if it is transferred
            1. violates the restraints on alienation and they are void
        iii. Generally it is possible to make tenancies and life estates defeasible if transferred
        iv. Cannot impose conditions against public policy
            1. to A as long as A burns down my neighbor's house
        v. Some states – cannot impose frivolous conditions
            1. to A as long as a mutant star goat does not eat the moon
    b. Can also have a life estate defeasible

c. **<u>Fee Simple Determinable</u>** – If condition is violated (time bomb exploes) the land goes to the Grantor through a **Possibility of Reverter** whether or not the Grantor was aware that the time bomb went off.
    i. The significant difference between a fee simple absolute and a fee simple determinable is that whole both potentially have an infinite or perpetual duration, the fee simple determinable might terminate automatically if a condition subsequent occurs.
    ii. Example: To A and his heirs so long as no booze is sold on the land."
    iii. No commas – single through
d. **<u>Fee Simple Subject to Condition Subsequent</u>** – if the condition is violated (time bomb explodes) the land does not automatically go back to the grantor but grantor establishes a **Right of Entry** which is the legal right to get the land back. Until the grantor exercise his power of termination (ROE), the holder of the fee simple subject to a condition subsequent continues to own the property.
    i. Example: "To A and his heirs, but if booze is sold on the land, that's it"
e. **<u>Fee Simple Subject to Executory Interest</u>** –
    i. A defeasible fee with the future interest rights in a third party.
    ii. Example: To B as long as B does not do X, then to C and his heirs."
    iii. The future interest to the third party is an **executory interest**
f. **Grantor's Future Interest** –
    i. Reversion – When a grantor grants away anything lower on the list than what he has
    ii. Fee simple determinable → **Possibility of reverter** or Reversion
    iii. Subject to Condition Subsequent → **Right of Entry**(power of termination)
        1. All other future interests except for ROE just become a present interest.
        2. If the thing that make the fee simple defeasible comes to pass, that creates a right of entry to turn it into a present interest, but does not automatically turn it into a present interest – the holder of the future interest acquires the right to terminate the present interest.
        3. Rights of Entry remain future interests even after the defeasibility conditions with which they are associated occur.
        4. Can turn it into a present interest by suing for possession or by doing some other acts that manifest an intention to take possession.
    iv. Subject to Executory Interest → Executory Interest
    v. **Examples:**
        1. To A and his heirs until the Seahawks win the Super bowl
            a. Present interest - Fee simple determinable
            b. Grantor's future interest is Possibility of Reverter
        2. To A and his heirs, but if the Seahawks win a Super Bowl, then A's interests end.
            a. Present interest – fee simple subject to condition subsequent
            b. Grantor has kept Right of Entry
g. Difference between determinable and subject to conditions subsequent is formal – comes from the grammar
    i. Fee Simple determinable if there is a time bomb planted in the same thought as the grant
        1. Does the language contain a comma?
        2. IS it one though?
        3. FSD: "unless, until, while"
        4. FSSCS: "on condition that, but provided that"
h. **Practical difference between FSD and FSSCS**
    i. automatically becomes present interest or not until grant exercises the right of entry – means that the SOL would start running on an Adverse Possession claim when the defeasibility condition occured

ii. POR is freely transferable – ROE can always will but can't always sell or give away
iii. **POR don't exist everywhere, ROE is recognized everywhere**

i. **In States that do not recognized FSD don't just invalidate, but those states treat it as a FSSCS**

j. When the **defeasible condition becomes impossible** to happen
   i. Then the fee simple defeasible becomes a fee simple absolute
   ii. Interests can change their names and legal characteristics as events happen – do not change from transactions
   iii. **Example**: Simon has FSA. Grants to Paula as long as Randy does not say "Yo, What's Up Dog"
      1. Paula has a fee simple determinable
      2. Simon has a Possibility of Reverter in Fee Simple Absolute
      3. If Randy dies without saying Yo What Up Dog – then Simon's future interest definitively fails to vest

D. Future Interests in Transferees: Remainders, Executory Interests, and the Rule Against Perpetuities

1) Future Interests can change their names by the passing of time and occurrence of events, but they do not change names by being passed back and forth.
2) **Names**
   a. Its future interest label (reversion, POR, ROE, Remainder, executory interest)
   b. It's present interest label it would become if it every becomes a present interest
3) **Executory Interest** – any future interest in a third party that is not a remainder
   a. Shifting or Springing doesn't matter – operate the same way
   b. A future interest in a third party that divests or cuts short a prior estate.
   c. Most common executory interests follow defeasible fees
4) **Remainder:**
   a. **Requirements**
      i. Created by the grantor in someone else – created in third party, not grantor or grantee
      ii. Must be possible, but does not have to be certain or absolute, for the future interest to become a present interest as soon as the prior present interest expires
      iii. Cannot divest any interest
         1. Does it wait for the present interest to run its course or does it spring from the future?
         2. Divest means has to sit back and wait
         3. Need to terminate on the happening of a limitation not on the happening of a condition
         4. A limitation is inherent in the estate created
         5. Condition is attached to an estate
         6. So usually only from a life estate
      iv. Cannot follow a possessory fee simple
   b. **Vested**
      i. **Ascertainable beneficiary**
         1. do not have to be specifically named, ie to A's children
         2. but need at least one person who meets the abstract definition
         3. A person is ascertained if he or she can be specifically determined currently
         4. The most common *unascertained* people are unborn persons
      ii. **No condition precedent** other than expiration of prior interest – and event that must occur before an interest becomes vested.

1. A condition precedent must be contrasted with a condition subsequent that terminates a possessory or vested interest. The fee simple determinable, fee simple subject to condition subsequent, and fee simple subject to an executory limitation all incorporate a condition subsequent. The holder can be divested if the condition subsequent occurs.
2. A condition divesting a fee simple on executory limitation and giving possession to an executory interest is both a condition subsequent and a condition precedent.
3. Since a remainder by definition follows the natural termination of a life estate or term of years, a condition before a remainderman can take can only be a condition precedent.

c. **Vested Remainder Subject to Open**
   i. Is a remainder limited in favor or a class
   ii. It is open if new persons can join the class
   iii. Example: to A's children, if A is still alive and can have more children then it is open, if A is dead and can no longer have children then it is closed.
   iv. **The Rule of convenience** – stats that a class closes whenever any member of the class can demand possession or distribution.

d. **Contingent Remainder**
   i. Any remainder that is not vested
   ii. May or may not become possessory
   iii. Limited in favor of:
      1. an unborn person
      2. an unascertained person
      3. a person who is either born or ascertained but whose interest is subject to the occurrence or nonoccurrence of a condition precedent
      4. contingent remainders are less and less important – used to be destructible – but most modern courts do not recognize them as that.
         a. If the present interest has expired by the contingency hasn't been satisfied then the contingent remainder definitively fails to vest → destructibility of contingent remainders

5) **Rule Against Perpetuities**
   a. Only a dozen state have the traditional rule, most states have abolished and some have modified versions
   b. CL rule – ***no interest is good unless it must vest if at all not later than 21 years after some life in being at the creation of the interest***
      i. Unless the even must be accomplished by a life in being, during a life in beings life or within a definite period of time less than 21 years, in all likelihood any interest dependent on the occurrence or nonoccurrence of any weve will violate the rule, no matter how improbable the chances we will not know one way or the other within the perpetuities period.
      ii. **Validating Life –** When a condition is an event or act, look for a life in being who must accomplish the act, or in whose life (or no longer than 21 years after that person's life ends) the even will occur or forever be unable to occur.
         1. If there is a validating life, the contingent remainder or executory interest will be good
         2. If there is no validating life, the future interest most likely will be invalid.
      iii. Rule balances the marketability and free alienability of land against the legitimate reasons a grantor may have for controlling who owns property long after the grantor has died.
      iv. Exists because of concern for marketability of land – being able to assemble the time line in one person and transferring that is a driving force behind the law

1. Future interest reduce the marketability of land because more difficult to put together a fee simple absolute → higher transaction costs

c. **Validating life can be three categories of people**
   i. Beneficiaries
   ii. People who can affect who beneficiaries are
   iii. People who can directly and uniquely affect conditions in the grant
d. RAP will not void reversions, possibilities of reverter and rights of reentry because all future interests in grantors are vested
e. **When the RAP will void interests**
   i. **RAP can void**
      1. **Contingent Remainders**
      2. **Executory Interests**
      3. **Vested Remainders subject to open**
   ii. Unless contingent remainders and executory interests can be proved to either vest or forever fail to vest within 21 years of a life in being, they will be found invalid against the RAP
      1. Remainder is vested when all recipients are ascertained and all contingencies have been satisfied – but does not have to become possessory.
      2. Executory Interest becomes vested and possessory at the same moment
   iii. All person's receiving a class gift must pass the RAP or no member's interest can be good. The Rule demands each and every person in the class be certain to vest (or certain to fail to vest) within the perpetuities period. If even one *potential* member of the class can be identified or envisioned who will not vest (or fail to vest) within the required period, the grant to the entire class fails and is void.

Interpreting Grants with Conditions Precedent and Conditions Subsequent

Example 1: O coveys Blackacre to A for life, then, if B survives A, to B and her heirs. B has a remainder since it follows the natural termination of A's life estate. For B to take possession, however, B must outlive A. The survivorship requirement is a condition precedent. B has a contingent remainder. In the actual conveyance the drafter should provide who takes if the condition precedent is not satisfied. Since no provision was made, O (or O's heirs) as the holder of the reversion takes Blackacre on A's death if A survives B.

Example 2: O conveys to A for life, and when A dies, to B and her heirs. A has a life estate. B has a remainder since it follows the natural termination of A's life estate. B in fact has a vested remainder in fee simple absolute. The clause "and when A dies" is not a condition precedent. A life estate naturally terminates on the death of the life tenant. The natural termination of a life estate, or the end of a term of years, is not a condition precedent (or a condition subsequent).

Example 3: O conveys Blackacre to A for life, then to B and his heirs, but if B does not survive A, then to C and his heirs. A has a life estate. B has a vested remainder since the interest follows the natural termination of the preceding life estate and there is no condition precedent. There is a condition subsequent, however. B's interest, therefore, is a vested reaminder, subject to divestment, in fee simple absolute. Difference is in the order, with example 1. C does not have a remainder because a condition must divest or cut short B's vested remainder before C can possess Blackacre. C, therefore, has an executory interest in Blackacre.

Example 4: O conveys Blackacre to A for life, remainder to B's children. B is alive and has two children, C and D. A has a life estate. B's two children, C and D, have vested remainders subject to open. B's children's interest follows the natural termination of the preceding life estate and there is no condition

precedent. Hence the children's interest is vested. Their interests are subject to partial divestment, however, if B has another child, who when born would share in the grant.

Example 5: O conveys to A for life, remainder to B's children who attain age 18. B is alive and has one child, C, who is ten years old. B's children, including C and any later-born children, have a remainder. It is a contingent remainder because to take Blackacre the child or children must reach age 18, a condition precedent. Until C or some other child of B reaches age 18, the interest remains a contingent remainder in fee simple absolute. Since O did not make a provision as to what happens to Blackacre if none of B's children attains age 18, O retains a reversion.

Alternative Contingent Remainders

Example 1: O conveys Blackacre to A for life, then to B if B attains the age of 21, but if B does not attain age 21, to O. A has a life estate. B, an ascertained person, has a contingent remainder because she must live to age 21. If B does not attain age 21, O at A's death once more owns the property, so O has a reversion.

Example 2: O conveys Blackacre to A for life, then to B if B attains age 21. B is 15. A has a life estate. B has a contingent remainder, O has a reversion. If B turns 21 during A's life, B's contingent remainder becomes a vested remainder and O's reversion disappears. If A dies before B attains age 21, O once more owns Blackacre, subject to a executory interest in B if and when B attains 21.

Example 3: O conveys Blackacre to A and then to B if B reaches 21, but if B does not attain age 21, then to C. A has a life estate, B and C have alternative contingent remainders. O has a reversion. If B attains age 21, B gets Blackacre on A's death and C gets nothing. Alternatively, if B dies before turning 21, B loses her interest and C gets Blackacre on A's death. If A dies before B turns 21 but while B is still alive, O gets back Blackacre until either B celebrates her 21 bday, in which case B gets Blackacre, or B dies before reaching 21, in which case C gets Blackacre.

Vested Remainders

O transfers Whiteacre "To A for life, then to B for life, then if C survives A and B, to C and her heirs."

A has a life estate; B has a bested remainder in life estate. C's remainder is now subject to a condition precedent – C's surviving both A and B. Thus C has a contingent remainder in fee simple absolute. O has a reversion in case C fails to survive A and B.

O transfers Whiteacre "To A for life, then to B for life, then when A and B die, to C and her heirs."

A has a life estate; B has a vested remainder in life estate. C has a vested remainder in fee simple absolute. The clause "then when A and B die" states the law as to when a remainder takes possession: Life estates end at the death of the life tenant and remainder take immediately thereafter. It is not a condition to C's taking. C will possess Whiteacre after A and B die.

IV. Co-Tenancies

A. Joint Tenancies and Tenancies in Common

1) **Concurrent Interest**
    a. Whenever two or more persons have a concurrent and equal right to the possession and use the same parcel of land
    b. Over a huge range of circumstances no difference between JT or TIC
        i. When all co-owners are alive they operate the exact same way
2) **Tenants in Common**
    a. Baseline Assumption is for a Tenancy in Common
    b. Each tenant is equally entitled to the right to possess all of the property subject to tenancy
    c. Each co-tenant has an interest that is alienable during his life, devisable by his will and descendible to his heirs should he die intestate owning such interests
    d. ***Persons can be Tenants in Common without regard to whether they acquired their interest at the same time and under the same instrument***
    e. Need not have an equal interest in the property
        i. Different percentage interests in the estate does not affect the individual's rights to the possession of the whole
            1. example: 1/3 owner has the right to possess the entire parcel, as does the 2/3 owner
        ii. Other elements of control come from the percentage of ownership
            1. example: If a co-tenant obtains a loan and mortgages the property, he is able to mortgage only his percentage ownership interest
            2. Example: If one co-tenant rents the whole property to a third party, he must share the proceeds with his co-tenants in accordance with their respective percentages of ownership
            3. Sharing the benefits that flow from the land, other than the right of possession of each co-tenant generally follows the percentage of ownership in the land
3) **Joint Tenants with Right of Survivorship** – have concurrent interest in property whose interest also satisfies the four unities test
    a. **To Create a Joint Tenancy**
        i. **Live in the Right State** (Some states have abolished Joint Tenancies)
        ii. **Manifest an intention to create a Joint Tenancy**
            1. Saying that you want a Joint Tenancy is not enough
            2. Have to want the Right of Survivorship – if you say that you want to create a right of survivorship that might be enough to manifest intention
        iii. **Four Unities**
            1. **Time** – acquired their concurrent interests at the same time
            2. **Title** – acquired their concurrent interest under the same instrument
            3. **Interest** – Each joint tenant has an identical percentage share of the concurrent estate
            4. **Possession** – each JT has an identical share respecting duration, quality and right to some possession
                a. See Porter v. Porter – focused on right to live in the house – not conventionally what the law means by unity of possession.
    b. The surviving Joint Tenant owns the entire property in fee simple because none of the other Joint Tenants who predeceased the survivor had an interest that was devisable or descendible.

i. The survivor owns the entire interest in fee simple not because he inherited the interests of the deceased joint tenants but because as each joint tenant dies, his interest in the property is extinguished
ii. **Example:** A,B,C have a Joint Tenancy
1. A dies → B and C now have ½ stake in land rather than 1/3 interest
2. when B dies C owns 100% of the property

c. **Severance/Alienation** – Each joint tenant has an alienable interest
i. If the right to alienate is exercised, the alienation severs the joint tenancy and converts it into a tenancy in common between the transferee and the other co-tenants
ii. The effect of a **severance** is to terminate the right of survivorship with respect to the part that is severed
1. anything that transfers the title from the original owner to a new tenant – since the new tenant owns it under a different piece of paper at a different time → severance
iii. **Effect of Mortgaging**
1. Some states view mortgages as a sale and then a buyback → severance
2. Other states view mortgages as liens, and the title stays with the borrower and the lender acquires a financial claim on the asset → not a severance
a. But when the JT dies, don't his interests (and thus the mortgage) die with him? Yes
b. Mortgage lenders will require all the owners to sign or some state have passed statutes to overrule the common law rule so that when the financial stakes of the remaining tenants expand with the death of A, then B+C are stuck with the mortgage
iv. **Effect of Leasing**
1. Courts have disagreed on the effects of leasing the property an outsider
2. Courts agree that a short-term lease will end on the death of the leasing joint tenant
a. The lessee has possessory rights through the lessor joint tenant; when the lessor joint tenant no longer has an interest, the lessee also hoses his right of possession
3. Some older cases held that a lease with a longer term might work a severance, at least for the term of the lease.
4. More recent cases have concluded that even a long-term lease by one joint tenant will not sever the joint tenancy.
v. **Example**: A, B, and C in a Joint Tenancy
1. A sells his 1/3 interest to D
2. B+C still have a joint tenancy
3. D is in a TIC with B and C
4. When B dies, C will get a 2/3 stake in interest

d. **Extinguishing Possessory Rights matter because**
i. When A dies, any of A's obligations extinguish as B and C's rights expand
ii. In a TIC A's interest and obligations pass to A's successor OR if A had a life estate then B + C would have to honor the obligations

e. A majority of state by statute presume that, unless the conveyance or will otherwise provides, a conveyance to two or more persons creates a Tenancy in Common
i. When property passes by intestacy to two or more heirs, the property passes to the heirs as Tenants in Common

4) **Difference between JT and TIC**
a. TIC is more flexible – can decide what happens to your stake in the property – possessory and financially
b. JT does not have that – cannot pass on to successor and your financial stake goes to your co-owners

i. If you are confident that you want the other owners to get your land when you die, then there is a small advantage in an easier administration when that happens

5) **Obligations to Co-owners** (see Swartzbaugh)
   a. **Incompatible Uses**
      i. Partners generally do owe certain obligations in the kinds of dealings he can make with each other and the assets of the partnership
      ii. Courts are split – have no obligations / have obligations
   b. **Financial obligations** –
      i. Property taxes, repairs, maintenance for the current value, and things to increase value – when there is an obligation to bills then in proportion to shares
      ii. If one person does not pay → have a claim against the co-owner
      iii. Action for Contribution – only allowed in limited circumstances and limited to keeping the property in possession (i.e. mortgages or taxes)
      iv. Improvements – a co-tenant who improves property cannot compel contribution from his co-tenants. The rationale is that no one has a duty to improve property, and no one who chooses to improve the land should force his co-tenants to contribute.
6) **Remedy to Co-Tenancy Conflicts**
   a. **Partition** - Split land and make co-tenants individual owners
      i. Problem with partitioning is that the two halves will not be the same, and under many circumstances where breaking up the land hurts the value
      ii. Most partitions sell the land and then divide the proceeds
         1. Dividing cash can become a difficult issue because one party may make a claim about increasing the property value and need to take that into account
      iii. **Accounting** – when partnership dissolves and parties figure out who deserves what
         1. Generally relevant when the land produces some kind of income
         2. When partition property → accounting
      iv. Action for Contribution – action for particular cost without doing a full accounting
      v. Improvers get to keep the value of improvements
7) **Rents**
   a. The majority rule is that a co-tenant using the whole property, absent ouster, does not owe rent to the other co-tenants. In a small minority of states, a co-tenant using the property owes a fair rental to the remaining co-tenants
   b. If a co-tenant is getting money from a third party, then has to pay a share to the co-owners – difficult to calculate that share
      i. Only has to split profits
      ii. If rent is under market value – does not mater because Co-Owners are only liable for the ACTUAL income not for a reasonable amount of what it should be
   c. Against general rule – there are a couple of states that will allow a co-owner who is not in possession to collect a reasonable rent from others – general rule is that you don't have to account for possession to others
8) **Ouster**
   a. When a co-owner prevents another co-owner from using the property and affirmatively acts to stop the co-owner then they are using an ouster. Ouster may occur if the occupying tenant changes the locks or if the occupying tenant makes use of the property in a way that no other use can be made of any part of the property and refuses to make room for another's use. Generally, before the ousted co-tenant can bring an action for ouster, the co-tenant must make a demand for access to the property and be denied access.
   b. Co-owner who is on property and keeping other co-owners off must pay reasonable rent to others
   c. Ousted party can bring an action
   d. Clock has started ticking for Adverse Possession

Hoover v. Smith (VA 1994)
Deed conveyed one acre of land to the Shoemakers "as Joint Ts, and not as T's in common." The language of the deed fails the test that requires a deed manifest the intention to create a survivorship estate and thus is insufficient to create a survivorship estate. ***The language of the deed is too ambiguous – could have intended to create a joint tenancy without a right of survivorship – because failed to manifest their intention explicitly they failed to create a Joint Tenancy with the Right of Survivorship***.

Swartzbaugh v. Sampson (CA 1936)
Married couple with a JT, and lots of land for a walnut grove. Husband leased land to D to build a boxing pavilion, and wife wants to invalidate the lease. ***Co-owner in a Joint Tenancy can lease, which gives the same right to possession as the co-owner had, and the other co-owner cannot cancel the lease.*** Being a co-owner does not mean having to get the other party's consent to transfer.

Tenhet v. Boswell CA 1976
P and Johnson owned property as JT with right of survivorship. Johnson lease property to D and subsequently died. Court held the lease does not sever the joint tenancy, but expires upon the death of the lessor joint tenant. During his lifetime a joint tenant may grant certain rights in the joint property without severing the tenancy. ***But when such a joint tenant dies his interest dies with him, and any encumbrances placed by him on the sproperty become unenforceable against the surviving joint tenant***. ***Many cases reach the Opposite result!!!*** Breaks the four unities and the leasing party now has a reversion.

Porter v. Porter AL 1985
D and decedent had owned property as JT w/ right of survivorship. They were divorced and D retained possession of the property. Decedent later remarried P, and after his death P attempted to sell the property. The granting of exclusive possession of the house to D did not destroy the unity of possession. ***The mere temporary division of property held by Joint Tenants, without an intention to partition, will not destroy the unity of possession and amount to a severance of the Joint Tenancy. A divorce does not necessarily sever a joint tenancy.*** A divorce decree which is silent with respect to property held jointly with a right of survivorship does not automatically destroy the existing survivorship provisions…

V. Landlord Tenant

A. Introduction

1. Nature of the Leasehold Estate

1) **When a lease is signed 2 things happen**
   a) **Property** – Interest in the land has been conveyed
      i) Rights of use to land to the tenant
      ii) Landlord retains a future interest – law of present and future interests applies to landlord tenant relations
      iii) Law of waste is applicable
   b) **Contractual** relationship is formed between Landlord & Tenant – governed by the rules of contract
      i) If property law says one thing and contract law says another, Contract law usually wins
2) Landlord tenant law is dominated by statutes – prevail over both property & contract common-law
   a) Sources of law to determine when the tenancy ends (hierarchy generally):
      i) The lease itself
      ii) Statutes that might alter/define common law
      iii) Common Law rules
3) **Classifications of Tenancies**
   a) Three (four) Types of tenancies
      i) **Term for years**
         (1) A ***lease for any fixed or computable period of time*** – fixed beginning and end date
         (2) Some states have imposed restrictions on the duration of tenancies for a term of years in order to prevent the creation of extremely long tenancies
         (3) ***No notice is required to terminate*** a tenancy for a term for years other than the notice provided by the lease
            (a) The lease may provide that the term for years will terminate prior to the date fixed in the agreement because of the happening of some condition of limitation
            (b) Unless otherwise provided in the lease – a tenancy for a term of years is alienable, devisable and descendable.
         (4) Two ways to terminate a lease for a term of years: wait until the time is up,or break one of the defeasibility conditions
         (5) **Statute of Frauds Issue**
            (a) **No oral leases for a term of more than one year.** However these statutes often provide that if the T enters into an oral lease of more than one year and pays rent, a periodic tenancy arises that is not subject to the statute
      ii) **Periodic Tenancy**
         (1) Tenancy that ***will endure until one of the parties has given the required notice*** to terminate the tenancy at the end of a period
         (2) Periodic tenancies ***have definite durations*** such as one month… but at the end of the term the ***lease is automatically renewed*** for period unless the landlord or the tenant gives proper notice of intent to terminate the tenancy to the other
         (3) Inheritable
         (4) Two ways to terminate periodic tenancy
            (a) Notice
            (b) Defeasibility conditions

(5) These tenancies have been characterized as leaseholds having indefinite durations that require a minimum advance notice of intent to terminate
(a) Common law
(i) A year to year periodic tenancy required 6 months notice to terminate
(ii) Leases of short durations required a notice to terminate that equaled the period of the lease (month to month lease means month notice)
(iii) Notice to terminate must be received by the party to whom it is delivered no later than the last day of the period. If the notice was not received by that date the termination was ineffective as to that period. However, the notice was sufficient to terminate the tenancy at the end of the subsequent period
(b) Modern Trends
(i) State laws in many jurisdictions have shortened the length of notice required to terminate periodic tenancy
(ii) Other states have permitted a month to month tenancy to be terminated at any time during the period provided sufficient notice is given in advance of the termination date

iii) **Tenancy at Will**
(1) ***Of potentially infinite duration*** which at cl could be terminated at any time by either party without prior notice to the other
(2) Death or LL or tenant terminates the tenancy – not inheritable
(3) Many states concerned by the disadvantages to both LL and tenants if tenancies are terminated without notice, have modified the notice requirement by requiring some
(4) A lease that can be terminated at the will of only the landlord or only the tenant, but not both, is a tenancy at will

iv) **Tenancy at Sufferance**
(1) Not a tenancy at all
(2) Arises when a tenant who enters the LL's property rightfully remains in possession of the property after the termination of the tenancy
(3) Tenant is a holdover is not really a tenant – at the moment of holding over the tenant is a trespasser in possession of the property without consent of the LL
(4) The landlord may elect to treat the holdover as a trespasser and intiate an action to evict the tenant, or the landlord may elect to treat the holdover as a periodic tenant
(a) If such election is made, the period begins to run from the date the tenant first became a holdover tenant

4) **Possession vs. the Right of Possession**

a) **Hannan v. Dusch** (VA 1930)
b) Court held that defendant, absent an express provision found in the lease, impliedly covenanted that plaintiff shall merely have the legal right to possession at the beginning of the term; that is, that the ***possession shall not be withheld by defendant himself or by one having a paramount title, but that there was no implied covenant to put the lessee in possession as against an intruder***.
c) **English Rule (majority)** implies that it is the landlord's responsibility to kick holdover tenants off property when beginning a new lease
d) **American Rule** (in a small majority of jurisdictions) recognizes no such responsibility, only required to put T into legal possession, not actual possession. Rationale being that the Landlord has not covenanted against the wrongful acts of another and shouldn't held responsible for such a tort unless so contracted. If the landlord wants to extend a warranty or additional rights to the tenant, the parties should bargain over such matters.
e) *The general rule is that a lease becomes complete and takes effect upon its execution, unless otherwise specifically provided, and entry by the lessee isn't necessary to give it effect.*
f) No courts recognize Landlord's responsibility when it is not a holdover but a **third party**. The common law has never said that landlords have to the responsibility to take care of

trespassers who have no prior relationship to the landlord (though it is possible to include such provisions in a lease).

g) What all the jurisdictions agree on is that what L guarantees, even if the lease is completely silent, is that he has actual land to convey to the tenant in the lease. ***Leases presume that the landlord actually has land to convey***. The presumption can be overridden by lese agreements; but where there is silence, the law will assume a legal possessory right of the tenant.

h) **Result depends one what the tenant is buying**
   i) If tenant is buying a slice of the timeline then the landlord should win because then the tenant just purchases possessory rights over the land for that time, that possession is a paramount title over the trespasser and the tenant can litigate to remove the trespasser from the land
   ii) If the tenant is buying not just a slice of the timeline but also expectation of possession, then the tenant would expect to actually take possession of the property

i) The **measure of damages** for the landlord's breach of the covenant to deliver possession of the leased premises (the English rule) is the difference between the fair rental value of the leased premises and the promised rent. Lost profits would be compensable as special damages but in many cases the tenant is unable to prove the amount of lost profits.

j) **Covenant of Quiet Enjoyment**
   i) Landlord guarantees that the tenant will not be sued by a party with a better claim than the landlord
   ii) Warranty against Ejectment
   iii) Presumption of Common Law, but can contract around

2. Transfer of Leasehold Estates

1) Unlike fee simples, tenancies (and life estates) can be contingent upon not being transferred. Leases can restrict the transfer of a tenant's interest to another
2) **Privity of Contract and Privity of Estate**
   a) **Privity of Estate**
      i) Property Law relationship – technically definition is being next to each other on the timeline, the legal consequence of which is liability
      ii) Both the landlord and the tenant have a mutual, immediate, and simultaneous interest in the leased premises – tenant having a right to possession ofr a term, and the landlord having the reversion after the term.
      iii) Lease carries with it all the background rules of Estates and Future Interests
      iv) There is a present interest/future interest dichotomy created
      v) Law of Waste applies
      vi) Defeasibility Laws apply
         (1) Possibility of Reverter vs. Right of Entry
         (2) Reversion in Landlord at end of lease
         (3) Co-Existence of POR/ROE and Reversion allowed
         (4) Terms of the Lease essentially provide the defeasibility condition
   b) **Privity of Contract**
      i) Contract law relationship the lease creates.
      ii) Thus, it implicates reciprocal rights and responsibilities → the lease contemplates an on-going relationship between Grantor (Lessor) and Grantee (Tenant/Lessee)
         (1) Not true of the regular property law relationship because normally a conveyance is an end
         (2) But a lease is both a conveyance and a contract, thus the lessee gets land as well as a reciprocal rights relationship with the Lessor
   c) When a breach occurs – does not matter much if its from PE of PK when between the original lessor and lessee, but when the lessee transfer the land to a third party through assignment or sublease that PE and PK become conceptually distinct routes to liability

3) **Transfers in Tenancy**
   a) **<u>Assignment</u>**
      i) A transfer of the whole of the unexpired term of the lease. It need not be a transfer of all of the premises.
      ii) When attach assignment to the transfer – the ***property law relationship moves down the chain of transfer***, it leaves the original tenant and latches on to the new, transferred tenant. Eliminates privity of estate between Landlord and Assignee, ad the assignee assumes all property law liabilities in relationship with the landlord
         (1) Any important terms of the lease will travel with privity of estate
         (2) If its something one party would sue about, the liability will transfer by the assignment (Rent is the obvious example)
      iii) The assignment ***does not take the contractual relationship*** between the original tenant and the landlord and move it to the new tenant. The original tenant and the new tenant have a new contract between themselves, but typically the new tenant and the landlord have not made any contractual relations. So, L and the original T are still bound to each other by privity of Contract.
         (1) Original Tenant is still contractually liable to the Landlord for the terms of the Lease
         (2) Assignment does not create privity of contract between the Landlord and the assignee, thus the assignee is not contractually liable to the landlord for the terms of the original lease
      iv) Landlord can only recover once if there is a breach of the lease, but under an assignment he has two different people to choose from; the old tenant under the contract relationship, or the new tenant under the property relationship
         (1) Original Tenant can get out of contractual obligations to L through costly means
            (a) Original tenant can be released by the landlord; OR
            (b) The contract can be renegotiated, called a novation
         (2) Theories to created a contractual relationship between new tenant and landlord
            (a) Get new tenant and landlord to sign a contract together – that is the only way that a landlord will ever be liable to the assignee
               (i) **Does not mean** that the Privity of Contract between the Landlord and the original tenant is eliminated. The contract will remain in effect until a release or until the term of the original lease expires
            (b) **3rd party beneficiary can be created**. Third party oblige cannot be created but beneficiaries can. Person can enforce the rights under the Contract to which it is not formally a party
            (c) **Assumption**. As party of the deal between the original tenant and the new tenant, the new tenant can explicitly say that the new tenant will assume contractual obligations.
   b) **<u>Sublease</u>**
      i) A sublease is a partial transfer of less than the full remaining term of the lease. This the sublessor retains some interest in the terms. A sublessee is not bound by the covenant to pay rent in the original lease – the original tenant remains bound by it – or by any other covenant in the original lease.
      ii) Under a sublease, nothing really changes. **Privity of Contract and Privity of Estate remain intact between the original Tenant and the Landlord**. A sublease does not connect the landlord and the new tenant in any way (unless a new contract is created between the new Tenant and the Landlord).
      iii) **Tenant and sublessee are both in a privity of contract and privity of estate relationship** – a new landlord/tenant relationship arises between them. This is another level added on top of the relationship between Tenant and Landlord.
      iv) **For sublessee to be liable to Land Lord**
         (1) Would have to establish contract between T and T2 where L is a third party beneficiary
         (2) Assumption – could say that T2 assumes T's liability as part of the deal

(3) Otherwise, nothing connects L to T2

v) ***No liability relationship exists between Landlord and Sublessee***

vi) ***When the Lease "blows up" the sublease "blows up"*** – if there are things that can bring the original lease to an end the sublease comes to an end

vii) If Tenant sublets the apartment for more rent than the Tenant is under duty to Landlord to pay, then Tenant is entitled to the extra money. Nothing has changed the contractual duties or property rights with the landlord.

viii) If Sublessors pay the Tenants promised rent, but the Tenant fails to pay the Landlord, then Landlord can sue the sublessor for possession.

(1) In Common Law the mere failure to pay rent in and of itself does not void the lease

(2) In the real world, leases are almost all defeasible leases, with a condition that failure to pay rent voids the lease

(3) Landlord's reversion would kick in, and the Tenant and therefore the sublessor would no longer have a present possessory right.

c) **Real Covenants –** those whose obligations or burden attaches to the estate or interest of its promisor.

i) Intention of the original promisor and promisee that they bind successors to the interests of each

ii) Privity of estate (always present with a chain of assignments between the original landlord and any later assignee in possession), and

iii) The requirement that the subject of the covenant touch and concern the leasehold premises or land.

First American National Bank of Nashville v. Chicken System of American, Inc

Three legal factors arise to create a liability running from the assignee of a leashold to the lessor

- privity of estate
- covenants in the lease running with the land and
- actual assumption of the covenants of the lease by the assignee

Liability of the assignee to the lessor, being based solely on privity of estate, does not continue after he transfer that interest to another.

An assignee who has not assumed the lease "stands in the shoes" of te original lessee only for covenants that run with the land, and then only during privity of estate.

The mere acceptance of an assignment is not an assumption. Every assignment requires acceptance… yet an assignee who does not assume the performance of the covenants of the lease holds the lease merely under a privity of estate.

Assignment Examples

- Lease covenants are either **real or personal**
  - A **real covenant** is enforceable against the lessee as well as subsequent transferees with whom the lessor is in **privity of estate** (eg covenant to pay rent, do repairs, etc)
  - A **personal covenant** can be enforced only against the original parties to the contract an **subsequent persons who promise to be bound by the terms of the contract** (eg taking care of cat).

1) **L→T→ [assigns] T2. T2 breached, ie fails to pay rent:** The assignment transfers **property rights and obligations** (POE) to T2. So T2 is liable to L. L may also have a contractual claim against T, if T did not transfer privity of Contract to T2. If T2 did not acquire contractual obligations, then T is liable to Landlord based on privity of contract. T can sue T2 is T2 fails to pay the rent.
2) **L→T→[assigns] T2→ assigns T3. T3 breached.** L can sue T3 because of the privity of estate. L cannot sue T2, once T3 is assigned the interest. There's no longer any privity of estate between Landlord and T2, though a contractual relationship may exist if it was created upon assignment. L cannot collect from both T2 and T3 for the same lease period.
3) **L→T→T2→T3. L Breached.** T3 can sue L because L and T3 are bound under privity of estate. L sin't bound to T2 because privity of estate relationship was broken when property was reassigned. Original tenant could conceivably sue L because they have a contractual relationship still under privity

of Contract – that would have a damages problem because without a possessory interest, it is hard to have damages.

Sublease Examples

1) **L→T→[sublets]S. S breaches:** L can sue T for unpaid rents – privity of contract and estate stay where they were. **L can't sue S.** Privity of estate doesn't move, there's nothing linking the two parties. If S promises to T to pay rent to L, then T can sue S for breach of Contract. **L can sue the sublessee only if landlord was made a third party beneficiary to the contract.** If S promises to T to pay rent to L, and S fail to P rent then T can sue S as a simple breach of contract case and property law liability.
    a. Two other ways where a L and a sublessor can have contractual duties: 1) statutes that explicitly say that L and S can sue each other (e.g. Kansas statute) and 2) doctrine of equitable servitudes

4) Who sues who?
    a) Sublease
        i) L can only sue T
        ii) T may sue T1, not L's problem
    b) Assignment
        i) L can sue T only under POC (even if the original tenant is no longer on the property) or T1 under POE for no rent
5) **Determining Assignments v. Subleases**
    a) Two approaches
        i) **Traditional Common Law** (still dominant approach)
            (1) If Tenant transfers the entire remaining term of the lease: Assignment
            (2) If Tenant "keeps" anything: Sublease
                (a) "Keep" = Any part of the timeline: POR, ROE, Reversion for a day
                (b) Thus, defeasibility conditions in the transfer means that the Tenant has "kept" a Future Interest – a POR or ROE
                (c) Strict Approach: Keeping any future interest makes it a Sublease
                    (i) Effectively there would be no assignments if any future interest yielded a sublease
                (d) Lenient Approach: Keeping a future interest does not necessarily make it a Sublease – depends on how court views "keeping"
        ii) **Intent of the Parties** - Jaber
            (1) Use language of transfer document as evidence of intent – sometimes that is ambiguous
            (2) Can also end-up turning on how much the Tenant conveys away and how much, if anything the Tenant has kept as a future interest
    b) Most formal opinions cite the common law test
    c) Helmholtz
        i) Courts never apply CL test in frustration of the parties manifest intent
        ii) Tweak the CL requirement of how much you must "keep" for the sublease vs. assignment
6) **Limitations on Transfers**
    a) **Traditional Majority Rule**
        i) Where a lease contains an approval clause the lessor may arbitrarily refuse to approve the proposed assignee no matter how suitable the assignee appears to be and no matter how unreasonable the lessor's objection
    b) **Modern Minority Rule**
        i) Where a lease provides for assignment only with the prior consent of the lessor, such consent may be withheld only where the lessor has a commercially reasonable objection to the assignment, even in the absence of a provision in the lease stating that consent to assignment will not be unreasonably withheld.

Jaber v. Miller
We think of an assignment as an outright transfer of all or part of an existing lease, the assignee stepping into the shoes of the assignor. A sublease, on the otherhand, involves the creation of a new tenancy between the sublessor and the sublessee, so that the sublessor is both a tenant and a landlord. Court held that there was no doubt that the parties intended an assignment and not a sublease, as evidenced by the document's title. ***All its language was that of an assignment rather than a sublease***. The consideration was stated to be in payment for the lease and not in satisfaction of a tenant's debt to his landlord. The deferred payments were evidenced by promissory notes, which were not ordinarily given by one making a lease.

B. Dirtbag Landlords

1. Constructive Eviction

1) **Introduction – Interference with T's Use and Enjoyment**
   a) CL wasn't prepared to read many things into a lease, but did read it:
      i) **Law of waste**
      ii) **Implied covenant of quiet enjoyment**
         (1) Implicit promise that L actually has a property interest to convey (although parties can bargain around that, i.e., L says I cannot guarantee that you have the best right to possession and won't be ejected) – **the implied covenant of quiet enjoyment.** This does not include breaches by mere wrongdoers unrelated to LL giving landlord/tenant equivalent of a warranty. Assuring that no one will come forward to kick the T of land
         (2) ***Breach only occurs when the holder of a paramount title interferes with the tenant's possession, or when the landlord wrongfully interferes*** with the tenant's use, enjoyment or possession of premises
            (a) Generally if the landlord wrongfully evicts the tenant, the tenant can sue for damages or possession
            (b) Tenant can cease paying rent and terminate lease if the landlord itnerferes
      iii) LL is assumed to promise that they will not evict a tenant without reason
   b) In a lease, L makes a series of promises to T, and T makes a series of promises to L. These promises are really secondary, to the basic transaction of a present possessory interest in the land and the creation of a reversion
   c) **If Landlord breaches**
      i) According to CL – L's breach of a promise does not relieve T's duties, nor does it give rise to termination of the lease. Called the **independence of lease covenants**. The performance of one party does not affect the performance of the other. Parties can, however write out of that independence. The lease can specify that, for example, not paying rent terminates the lease, but the lease itself does not do this
      ii) **The things that CL did read into the lease, if broken, do terminate the lease**
2) **Constructive Eviction**
   a) Essential theory is that the Landlord has done, or knowingly allowed to be done, something that has come close enough to actual eviction to call it an eviction
   b) **Need to Prove 4 things**
      i) ***Landlord must wrongfully perform or fail to perform*** some obligation that the landlord is under some expressed or implied duty to perform
      ii) As a result of the landlord's commission or omission there must be a ***substantial interference with the tenant's use and enjoyment of the premises***.
      iii) Tenant must give the landlord ***notice of the interference and a reasonable opportunity to remedy*** the interference
      iv) If after such notice the landlord fails to remedy the interference, the tenant must ***vacate the premises within a reasonable time*** – Otherwise it is not an eviction. T not only has to assert

that no reasonable person would stay on property under these circumstances, he must actually leave.
    (a) Once T has vacated the premises, his obligation to pay rent terminates
    (b) Risky for the T because if two years later the court determines that there wasn't a substantial enough interference, then T is in breach and owes back rent.
    (c) Mass has moderated vacate provision by having a procedure for getting an advance determination – is it a good idea for me to leave proceeding - **declaratory judgment** → takes the risk for the T out of the equation

c) Constructive eviction has the same result as actual eviction. L is liable for damages, T gets out of the lease.

d) **3rd parties causing problems**
    i) Generally, L is not responsible for what other tenants are doing
    ii) But if a T is acting as an agent of L, L could be liable
    iii) In general, before the landlord can be found to have breached his obligation because of the behavior of third persons, more than the mere landlord-tenant relationship between the landlord and the third person must be shown – Permission or authorization, express or implied, from the landlord is necessary in order to attribute a third party's behavior to the landlord.

e) **Restatement view**
    i) Liberalizes CL doctrine in a few significant ways
        (1) Interference need be more than insignificant rather than a substantial burden
        (2) Rejects the position that T must vacate
        (3) Makes L responsible for acts of third person if they conduct can be legally controlled by L

f) **Scope of Landlord's liability**
    i) **Lease agreement does not define the scope of illegality for the landlord**
        (1) Housing Codes (generally not tenant enforced – government enforced)
    ii) **Constructive Eviction is typified by a landlord breaching duty by**
        (1) Heat or other utilities
        (2) Making repairs the landlord covenanted to make
        (3) Remedy unsafe, unhealthy, or unsanitary conditions on the premises such as rodents or insect infestations OR
        (4) Remove nuisances on the premises, such as a house of prostitution
            (a) **Common Law duty to Repair**
                (i) Absent a contrary provision in the lease, the landlord was not obligated to repair the leased premises
                (ii) The obligation to repair was imposed upon the tenant
                1. Scope of duty unclear – obligation to repair did not mean an obligation to make improvements
                2. Tenant's duty was for all ordinary and necessary or minor repairs
                3. Tenant was not obligated to restore or repair premises destroyed by acts of god or other casualties not resulting from the tenant's negligence
                4. At CL – if premises were totally destroyed by fire or similar calamity, the tenant was not excused from the obligation to pay rent

2. Implied Warranties

1) Before the 1960's, the only assurances for allowing the termination of lease were
    a) Whatever was in the lease
    b) Covenant of Quiet Enjoyment
    c) Doctrine of constructive eviction
    d) Otherwise, action for damages or junction, but no termination of lease
2) Four ways the label **Implied Warranty of Habitability is misleading**
    a) It suggests that there is a uniform doctrine (like the CL), but not true – wide range of responses for the same concerns

b) Not a warranty. Obligations don't follow the traditional rules of warranty – closer resemblance to tort law
c) Not implied – sometimes implied, sometimes expressed
d) Habitability – sometimes it does, sometimes it has nothing to do with habitability

3) Enormous variation between jurisdictions – focus here is on plurality rules, not majority rules

Pugh v. Holmes
The ***covenants and warranties in the lease are mutually dependent; the tenant's obligation to pay rent and the landlord's obligation imposed by the implied warranty of habitability to provide and maintain habitable premises are, therefore, dependant*** and a material breach of one of these obligations will relieve the obligation of the other so long as the breach continues.
The implied warranty is designed to insure that a landlord will provide facilities and services vital to the life, health, and safety of the tenant and to the use of the premises for residential purposes.
In order to constitute a breach of the warranty ***the defect must be of a nature and kind which will prevent the use of a dwelling for its intended purposes.*** At a minimum, this means that the premises must be safe and sanitary – of course there is no obligation on the part of a landlord to supply a perfect and aesthetically pleasing dwelling.
A tenant must prove he or she ***gave notice to the landlord of the defect or condition, that the landlord had a reasonable opportunity to make the necessary repairs and that he failed to do so***.

4) **Scope**
   a) **Types of Residences**
      i) Commercial units are generally not covered under the implied warranty of Habitability, instead traditional common law rules apply (get what they see)
      ii) Residential units
         (1) Whether to include single and multi-family unites, whether to include small or large multi-unit, urban v. nonurban
      iii) Usually applied to large urban multifamily residence only, but hard to define
      iv) Some jurisdictions say all residential and others don't….
   b) **Violations**
      i) Housing Code
         (1) Codes are traditionally enforced by the government and penalties are fines to the government
         (2) Idea was to make the Code enforceable by a private action as part of the lease
            (a) Could be underinclusive depending on the problem to address
            (b) Codes are filled with minutia that a T does not care about them, to call them breaches of the lease are not calibrated to problems that tenants worry about
         (3) Although the implication is that a single breach of any provision of the housing code would be sufficient to result in a breach of implied warranty, no court has taken that strict a position
         (4) Substantial compliance with the housing code – would assume that substantial compliance means the dwelling is habitable
      ii) ***Housing Code is a relevant standard but not the only standard. Standard of if the defect would render the premises uninhabitable in the eyes of a reasonable person.***
      iii) Could define in positive terms – test of whether it is a good place to live
5) **Remedies**
   a) **Termination** of the lease and vacate premises
      i) Problem for tenants who have no where else to go
   b) **Damages**
      i) <u>Fair Rental Value Approach #`1</u>
         (1) Damages = difference between the promised rent and the fair rental value of the premises during the period in which the warranty was breached
         (2) But most of the time "fair rental value" equals "promised rent,' this damages are zero
      ii) <u>Fair Rental Value Approach #2</u>

(1) Damages = the difference between the fair rental value of the premises if the premises had been in their warranted condition and the fair rental value of the premises in their "as is" condition
(a) The fair rental value in the hypothetical world if the apartment was in the condition it was supposed to be in
(b) The as is condition is just the promised rent, but could construct a hypothetical value too for a fair housing market
(2) Experts needed to construct these hypothetical values would cost more than what the judgment would be worth
(a) Would need damages of high value to make the litigation worth while – which means that this method is not amenable to low-income protection policy

iii) Percentage Diminution Approach
(1) Damages = the promised rent multiplied by the percentage of the use of the premises lost as a result of the breach
(2) We just construct this….
(3) Pugh court took this approach
(a) Need for expert testimony is greatly reduced – considered a matter to determine for a layman
(b) Layman approach is a joke because it is looking the other way to construct a damage remedy to allow these cases to go forward
(c) Still have to pay the lawyers…

iv) Restatement Approach
(1) If the tenant is entitled to an abatement of the rent, the rent is abated to the amount of that proportion of the rent which the fair rental value after the event giving the right to abate bears to the fair rental value before the event
(2) Abatement is allowed until the default is eliminated or the lease terminated, whichever occurs first

v) Tort Approach
(1) Tenant can recover for emotional distress and discomfort and punitive damages in addition to any loss of rental value as measured by one of the foregoing methods.

vi) The problem with damages is their feasibility only in high rent situations, this will not help the low-rent slum housing the doctrine was originally envisioned for

vii) **Best remedy is to assert breach of implied warranty of habitability as a defense to an ejectment action**
(1) Tenant can stop paying rent (or pay less) and refuse to leave the property, making the landlord file an ejectment action
(2) If Tenant loses subsequent ejectment action and there is no breach found by the court
(a) Worst case scenario – pay back rent
(b) Best Case scenario – Tenant is judgment proof or insolvent
(3) Result: Tenant can maintain possession of the property without paying full rent when the Landlord is a dirtbag.

c) **Repair**
i) If the tenant is entitled to apply his rent to eliminate the landlord's default, the tenant, after proper notice to the LL, may deduct from his rent reasonable costs incurred in eliminating the default
ii) A tenant may not repair at the LL's expense if the condition was caused by the deliberate or negligent act or omission of the tenant, a member of his family, or other person on the premises with his consent

6) **Warranty of Fitness of a Particular Purpose**
a) To some extent, the movement concerning the implied warranty of habitability built upon two CL exceptions to the "no warranty" rule:
i) If T's use of the premises was restricted to a particular purpose, L warrants the premises are for that purpose – express warranty

ii) Exception is *Ingalls v. Hobbs*: In a lease of a completely furnished apartment, there is an implied agreement that the house is fit for habitation

b) CL rational rests on the grounds that in a normal lease, a T could have secured an express warranty that the premises were fit for a particular purpose or could have inspected the premises prior to executing the lease to determine whether they were suitable for T's needs. This notion is embodied in **caveat emptor**

7) **Implied Warranty of Suitability**

Davidow v. Inwood North Professional Group
We hold there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose. ***This warranty means that at the inception of the lease there are no latent defects in the facilities that are vital to the use of the premises for their intended commercial purpose and that these essential facilities will remain in a suitable condition***. If, however, the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control.

C. Deadbeat Tenants

1) Generally
   a) Tenant's obligations come from
      i) Lease
      ii) Law of Waste
   b) No statutory or CL duties on the tenant – these all generally put restrictions on the LL
   c) Only breach really concerned about is non-payment of rent.
2) Non-payment of Rent **–** two situations
   a) T on the property – L wants the $ and possession
   b) T not on the property
      i) L wants the money
      ii) If Tenant just wants to scam and leave – would be too expensive for LL to find the tenant to get paid
3) Traditional common law does not give L the right to retake the premises, but everyone is smart enough to put in the lease language giving L the power to retake the premises for non-payment

1. Abandonment vs. Surrender

1) **Abandonment**
   a) Tenant leave the property with an intent never to return
   b) This is only an Offer to terminate the lease, the landlord can accept or reject
   c) If Landlord does not accept the offer, then the Tenant is still bound by the terms of the lease, whether he is on the property or not
   d) ***Abandoning the property does NOT terminate the lease***
2) **Surrender**
   a) **If L accepts the offer** to terminate, then it becomes a **surrender.** The lease is over. If there is no more lease, then the T is no longer obligated to pay rent.
   b) Acceptance of the surrender can either be
      i) **express** (to satisfy the Statutes of Frauds) or
      ii) **operation of law** – when the parties to the lease do some act so inconsistent with the subsisting relation of L and T as to imply that they have both agreed to consider the surrender effectual
         (1) Need to Prove
            (a) Specific Intent of the Tenant to Abandon
            (b) Specific Intent of the LL to Accept the Abandonment

(2) Proving either raises problems, because Tenant can return and say was not planning to leave forever, and LL can accept the keys and change the locks and just claim that he intended to give it back to Tenant when he returned.

c) **T is responsible for back rent** – Termination does not wipe out past debts

d) **Termination of the lease does not wipe out future debts** – When the lease is terminated, the privity of estate no longer exists, but T by failing to fulfill the remaining obligation is breaching a contract.
   i) **Standard Contract law applies** – Measure of what T owes T's total rent minus L's reasonable mitigation of taking into account L's expenses in finding T2. **Legal consequences of a surrender are that it removes property law from the deal and imposes a duty to mitigate on the L.**
   ii) What if T mails the keys and leave (no formal writing with the SOF). If L refuses the offer, or remains silent, but L re-rents out the property for the purposes or protecting it from vandalism or heating, that would not necessarily constitute a surrender
   iii) How do you know if L put a person on the property for reason of rent or for other reasons? Jury question. Is it relevant that the other person on the premises is paying rent?

e) **Abandoment w/o acceptance** of the surrender is still an abandonment; L wants to keep privity of estate and contract; putting a person on the property shouldn't be construed as an acceptance of the surrender, nor should his acceptance of somebody else's rent. **Whatever L gets in way of mitigation offsets what T owes.** If T is still the present possessor, how can L lease the property to someone else? You can say L is effectively acting as an agent for T to mitigate his damages

Sommer v. Kridel
Whether a landlord seeing damages from a defaulting tenant is under a duty to mitigate damages by making reasonable efforts to re-let an apartment wrongfully vacated b the tenant. A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant. If the landlord has other vacant apartments besides the one which the tenant has abandoned, the landlord's duty to mitigate consists of making reasonable efforts to re-let the apartment. As part of his cause of action, the landlord shall be required to carry the burden of proving that he used reasonable diligence in attempting to re-let the premises.

3) **Release**
   a) If tenant under Contract law wants to terminate that relationship

4) **Traditional View of Wrongful Abandonment**
   a) Landlord may at once enter and terminate the contract and recover the rent due up to the time of abandonment, he may suffer the premises to remain vacant and sue on the contract for the entire rent, or he may give notice to the tenant of his refusal to accept a surrender when such notice can be given, and sublet the premises for the unexpired term for the benefit of the lessee to reduce his damages.

2. Summary Remedies

1) **Duty To Mitigate**
   a) **L can do nothing** – no rejection or acceptance. He doesn't need to mitigate damages or rent the apartment
   b) **Traditional CL** – YES – under property law concepts; a lease conveys to a T an interest in the property which forecloses any control by L; thus, it would be anomalous to require L to concern himself with T's abandonment of his own property. **A substantial number of states refuse to impose a duty to mitigate on L.**
      i) Most states do not impose the duty to mitigate on the LL
      ii) If the rule were established it leads to unlimited potential for litigation initiated by the tenant concerning the landlord's due diligence

iii) Fundamental unfairness in allowing the breaching tenant to require the nonbreaching landlord to mitigate the damages caused by the tenant – unfair to deprive the landlord of the benefit of the bargain and forcing him to do the work to mitigate the breach.
iv) Would unfairly require the lessor to find new tenants continually

c) **Modern View** – some jurisdictions require L to reasonably mitigate regardless of acceptance of surrender
i) The LL is entitled to damages even though it has not attempted to mitigate, but that the amount of damages are to be reduced by the fair rental value of the premises.

2) **Acceleration clauses**
a) Provides that if the tenant wrongfully abandons the premises all rents due in the future become immediately due and payable
b) At CL could only sue for rents accrued, not for rents payable in the future

3) **What if the LL rents for more?**
a) Under agency, tenant should get this amount because T still has a property interest, the LL is just acting as the tenant's agent to relet the premises and mitigate damages
b) Under the SOF approach, the landlord should get the amount because the T's present property interest has been conveyed to the L
c) Courts are split

4) **Self-Help Remedies**
a) Law frowns upon self-help eviction procedures
i) In no American jurisdiction is a landlord authorized to use excessive force to regain possession of leased premises, no matter what the landlord's rights under the lease
ii) In a majority of states today, a landlord can still resort to self-help for retaking possession of the premises if
(1) The landlord has the right to repossess the leased premises (otherwise if the tenant has the right of possession this is a quiet title enjoyment issue); AND
(2) The landlord's exercise of the remedy is peacable
b) Statutes have been enacted providing the landlord with an expeditious judicial procedure for obtaining possession of the premises in cases where the tenant has breached the terms of the lease – Summary procedures or forcible entry and detainer acts
c) Traditional view – LL can take the risk and have to pay damages if they are wrong
d) Modern View –
i) Do not want to incite violence
ii) Have procedures to get faster resolution to these disputes

Berg v. Wiley
A restaurant operated by plaintiff on the premises had been cited for health code violations. Plaintiff failed to comply with defendants' request to remedy the matters and put up a sign saying the restaurant was closed. Defendant had locked the plaintiff tenant out, claiming breach of the lease. The jury found that the tenant ***did not abandon or surrender the premises and the trial court found defendant's reentry forcible and wrongful as a matter of law.*** The court affirmed the judgment below holding that the jury's verdict was supported by sufficient evidence and that the trial court's determination of unlawful entry was correct as a matter of law. ***It appeared that plaintiff intended to retain possession, closing temporarily to remodel. Defendant should have resorted to the available judicial remedies to resolve the claim of breach of the lease.***

5) **Holdover Tenants**
a) After the termination of the lease, if the tenant fails to surrender possession of the premises to the landlord → holdover tenant
b) CL – if tenant wrongfully holds over beyond termination of the tenancy, the landlord has the option to treat the tenant as a holdover tenant for another term or to treat the tenant as a trespasser and sue for possession

6) **Doctrine of Fixtures: Innocent Improver Problem with Landlord-Tenant Law**
a) **Three elements**
i) **Annexation**

ii) **Adaptation** of the thing to the use or purpose of the premises to which it is annexed
iii) **Intent** to make the thin a permanent feature of the property – critical element in the US

b) In many cases, whether the fixture can be removed without damaging the premises is the crucial issue.
c) Example: T installs a portable AC. L says thank you, AC is part of the apartment
   i) Yes AC if fixed, but easily removable
   ii) CL T loess – Things fixed to land are fixtures, and anything fixed to land belonds to the land and is transferred with the property
   iii) Might be covered by statutes
d) Example: T installs new rug
   i) Probably belongs to T, but if it is nailed to the floor probably goes to L
e) Usually what changes in the unit will go to the tenant or the landlord will be determined by the lease, or can lead to questions of intention
   i) Commercial lease – presumed that the tenant is going to carry away items that are movable fixtures
   ii) Residential property – if the item is affixed to the property, then it stays with thte property
   iii) Generally, what can be moved is taken, what cannot stays
f) **Other Forms of the Innocent Improve**
   i) **Doctrine of Accessions –** Allocation of ownership when one or more parties have improved it
   ii) **Doctrine of Transformation –** Item is so changed that it cannot be separated

Abandonment all over again

1) **Lease continue; Landlord Does nothing -** The landlord can treat the lease as continuing, do nothing, and sue the tenant on the covenant to pay rent as the rent falls due
   a) Could entail several lawsuits to collect past due rent because cannot collect future rent
   b) LL do run the risk of tenant's skipping jurisdiction or becoming insolvent and judgment proof
   c) Some courts view the lease as a contract and impose a duty on the landlord to mitigate damages, usually by finding a new tenant.
2) **Landlord Relets on Tenant's Behalf -** The landlord can treat the lease as continuing and relet the premises for the tenant's account, reserving the right to sue the tenant for any unpaid balance of the rent
   a) The tenant remains liable for the difference in rents received and rents owed, and is entitled to any excess rents collected (which is unlikely because the LL would then accept the abandonment to keep the excess).
   b) In states with a duty to mitigate, the ll may only recover those future unpaid rents and other damages that she could not have avoided by reletting.
3) **Landlord Treats Abandonment as Surrender -** The landlord can accept the surrender of the lease, and reletting on the landlord's own account
4) The landlord can treat the abandonment of the lease as an anticipatory repudiation, suing the tenant for either (a) damages – the difference between the reasonable rental value of the unexpired term and the present value of future rent – or (b) unpaid future rent – the difference between the contract rent and the amount received from a new tenant, both damages and future unpaid rent being recoverable in one judicial procedure.

D. Housing Discrimination

1. Federal Antidiscrimination Laws

1) **Common Law**

a) Provides no protection against discrimination in the housing market, did not want to deal with someone, did not have to
b) Exception was common carriers. No CL law said landlords were required to rent to anybody other than whom they choose.

Shelley v. Kramer (1948)
Housing development had covenants neo to sell to blacks. Went to the SC on a 14th A claim. Claim was that 14th A was only for state actions and this was a private contract. SC said that it was a **state action because the state validated the contract.** If the case was used for precedent, it would have been huge. But it never really took hold. **Generally, the fed con isn't there when it comes to private conduct.** But there are a variety of federal and local statutes to deal with this.

2) **Civil Rights Act of 1866** (42 USC §1982)
   a) Essentially said no housing discrim based on race.
   b) **Jones v. Mayer** (1968) The CRA does deal with private transactions – only applies to discrimination based on race – based on 13th A § 2
3) **Fair Housing Act of 1968**
   a) §**3604** – Discrimination in rental sale or practices of housing made applicable §3603(a)
      i) Statute is a ban on discriminating conduct on the basis of race, color, religion, sex, familial status, or national origin in rentals/housing market. **Anything not on the list is not protected** (1974 added gender, 1988 added familial status and handicap)
      ii) Rest of it lays out in a more detail manner – anything dealing with property in (b)
      iii) (C) deals with advertising a preference
         (1) The publisher can also be liable "make to have published"
         (2) 1986 DOJ made an informal statement that it would not prosecute sexual preference in ads involving shared living facilities. Technically the ads violate §3604, but this is not enforced
      iv) (f) deals with sales or rentals or denying someone because they are handicap
         (1) Replicates a and b but separated because includes refusal to permit reasonable accommodation and modifications
         (2) Nothing in this subsection requires that a dwelling be made available that would be a threat to others or if it would result in substantial physical damage.
   b) §**3603(b) Exemptions to §3604 – except (c)**
      i) Everything other than ads is exempted – you can refuse to deal, discrimination provision of services, lie about availability, and steer people away. Just cannot advertise in a discriminatory manner
      ii) Any single family house sold or rented by an owner provided that… This exception would probably not have been included if the act were enacted today
         (1) Conditions for single family house
            (a) Cannot own more than 3, and if you are a developed (b) does not apply
            (b) Only get one exempt sale every 2 years
            (c) Cannot use a broker, have to do it yourself.
      iii) Rooms or units in dwellings containing living quarters to be occupied by no more than 4 families living independently of each other, if owner occupied. Mrs. Murphy exception.
         (1) But there is an exception to the exception (c) – cannot ***advertise*** "whites only"
         (2) Mrs. Murphy Exception has been repealed
   c) §**3607 exceptions**
      i) Religious organizations and private clubs (for non-commercial purposes) may rent to persons that belong to that particular organization or affinity – "unless such religion is restrict on account of race, color or national origin."
      ii) Housing for older persons.
4) **Fair Housing Act vs. Civil Rights Act**
   a) Civil Rights act is narrower – **only deals with race**

b) Fair Housing Act is narrower because it has exceptions. Civil Rights Act has none, so in the sphere of racial discrimination, it is absolute. Mrs. Murphy can discriminate based on sex, but not on Race ever.
   i) Jews are considered a race by their 1968 meaning.

5) **Structuring Cases for Discrimination**
   a) One problem with civil rights violations is that measuring the injury caused by discrimination is extraordinarily difficult
   b) **Patterns creating liability**
      i) **Problem of Proxy –** Where you have a specific set of prohibited characteristics, and the person is being discriminated against based on something that correlates significantly with the prohibited characteristics – question of intent for the jury. If you are genuinely looking for these characteristics and it just happens to have a discriminatory effect then that is fine.
      ii) **Disparate impact** is largely applied in large scale hiring schemes. Need to generate large enough samples to make a good case – works best for large scale litigation. Rarely used in housing situations.

Harris v. Itzhaki
To bring a claim the P must establish a prima facie case that:
1. P's rights are protected under the FHA, AND as a result of the D's discriminatory conduct, plaintiff has suffered a distinct and palpable injury
2. Establishing a prima facie case affords the plaintiff a presumption of discrimination
3. After that burden shifts to D to articulate a legitimate, nondiscriminatory reason for the action, D is only required to set forth a legally sufficient explanation.
4. The burden shifts back to the P to raise a genuine factual question as to whether the proffered reason is pretextual.

   c) **Fair Housing Act Violations by Local Governments**
      i) Municipalities and other local governments, just as private actors, can violate the federal FHA
      ii) Most governmental violations involve practices such as zoning or other restrictions on development that have a disproportionately adverse impact on racial minorities
      iii) The Supreme Court has never decided whether discriminatory intent is essential to an FHA violation
      iv) ***The government or private plaintiff challenging a municipal action under the FHA generally makes out a prima facie case by showing that the action perpetuates racial segregation or makes it more difficult for racial minorities than for white people to obtain housing in a particular community***
         (1) Can defend by showing an interest substantial enough to outweigh this discriminatory effect which could not have been achieved by some alternate means
      v) Prima Facie showing of disparate impact under the FHA
         (1) The strength of the showing of discriminatory effect
         (2) Whether there was some evidence of discriminatory intent, although not enough to warrant finding an EP clause violation
         (3) The nature of the D's interest in taking the action being challenged
         (4) Whether the D is being asked affirmatively provide housing or merely to refrain from interfering with private owners or developers who wish to provide such housing
         (5) D's response
            (a) bona fide and legit justifications for its action with no less discriminatory alternatives available

United States v. Starrett City Associates
(1) regardless of whether complex was clothed with state authority, racial ceiling quotas were unlawful under Fair Housing Act; (2) white flight phenomena could not be used as basis for denying minority applicants same rights white applicants enjoyed with respect to obtaining apartments; and (3) admittedly deferential treatment of Negro and Hispanic applicants from white applicants violated Fair Housing Act, regardless of landlord's motivation.

2. State and Local Antidiscrimination Laws

1) Things that aren't covered by the Fair Housing Act (most notably like sexual preference)
   a) They do not remain subject to CL baseline rules of freedom to associate if there are state and local statutes governing
   b) State anti-discrimination statutes are often broad than federal states

1) **State v. French**
   a. Court did not construe marital status to include unmarried cohabitating couples – its inconsistent with public policy, legislative intent, and previous decisions of this court
   b. (1) landlord's refusal to rent house to tenant because tenant intended to cohabitate with her fiancé prior to her marriage did not violate Human Rights Act's prohibition of marital status discrimination, and (2) landlord's right to exercise his religion under Freedom of Conscience Provision of Minnesota Constitution outweighed any interest of tenant to cohabitate with her fiancé in rental property prior to her marriage.
2) **Braschi v. Stahl Associates Co**
   a. : (1) the term "family" as used in the noneviction provision of the rent-control laws includes unmarried lifetime partners of tenants, not just persons related by blood or law, and (2) the partner established a likelihood of success on the merits of his claim and, thus, he was entitled to a preliminary injunction.
   b. Term "family" as used in noneviction provision of rent-control laws, which protects surviving spouse of tenant or other member of deceased tenant's "family" who had been living with tenant, includes adult lifetime partners whose relationship is long-term and characterized by emotional and financial commitment and interdependence; term is not limited to those people related by blood or law.
   c. Gay life partner of tenant in rent-controlled apartment should have been given opportunity to prove that he was member of tenant's family, for purposes of determining whether partner was protected from eviction upon tenant's death.
   d. Noneviction provision of rent-control laws, which protects surviving spouses of tenants or other members of deceased tenant's family who had been living with tenant, does not concern succession to real property, but rather, is means of protecting occupants of apartments from sudden loss of their home.

VI. Protecting Ownership

A. Nuisance and Trespass

1) Law of nuisance and trespass is historically part of the law of torts.
   a) Use rights → nuisance
   b) Possession rights → trespass

1. Defining Trespass

1) **Defined**
   a) §**158 Restatement**
      i) Liable even though you cause no harm to the land, so long as you
         (1) *Intentionally* enter land of another or cause a third person to do so; OR
         (2) *Intentionally* remain on the land; OR
         (3) *Intentionally* fail to remove from the land a thing which he is under a duty to remove
   b) Only requirement for liability is that you intentionally go on the property, do not even have to know that it is someone else's property
   c) Mistakes do not matter in trespass, you can make a reasonable mistake, but you will be liable for trespass
   d) Consent cannot have been given – if you consent to the person being there it is not trespass, but if you give consent and withdraw, they have a reasonable amount of time to vacate
   e) Flight by aircraft is excepted from trespass unless it interferes substantially with the other's use and enjoyment of the land – ad coelum rule
   f) Requires for something that someone else controls to cross you property – must be physically tangible See, Feel, Touch Test with the unaided senses
2) **Remedies**
   a) Don't have to prove any damages for trespass (supertort)
   b) Injunction or Damages (prefer damages to keep things out of the criminal justice system – damages are easier to administer as a remedy)
   c) Injunction if the damages will not suffice as a remedy

2. Defining Nuisance

1) **Public Nuisance v. Private Nuisance**
   a) Public nuisance is controlled by the government. Subjects of zoning laws, prohibitions of prostitution, public drinking
   b) Private nuisance involves private disputes between private property owners, government is not a party to the case.
2) **Nuisance Per Se –** or at law – is an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings
3) **Nuisance per accidens** – or in fact – are those which become nuisances by reason of their location, or manner in which they are constructed, maintained or operated

4) **Restatement approach**

Defendant's acts or the condition on Defendant's property will be a private nuisance if either:

i) The gravity of the harm to plaintiff's use and enjoyment outweighs the social utility of defendant's conduct or the condition on defendant's property;
ii) The harm to the plaintiff is sufficiently grave and greater than the plaintiff should be required to bear without compensation;
iii) The harm to plaintiff is sufficiently grave and the financial burden of defendant's compensating for the harm and for similar harm to others would not make the continuation of the defendant's activities infeasible;
iv) The harm to plaintiff is sufficiently grave and defendant could avoid the interference in whole or in part without "undue hardship"; OR
v) The harm to plaintiff is sufficiently grave, plaintiff's use is well-suited to the character of the locality, and the defendant's conduct or property condition is unsuited to the locality.

b) §821D: **Private Nuisance**
   i) Non-trespassory invasion
   ii) Of another's interest in the private use and enjoyment of land
c) §821E: **Standing to Bring Nuisance Actions**
   i) Only those with Use and Enjoyment privileges can bring actions
      (1) Possessors of the Land
      (2) Owners of Easements and Profits in the Land
      (3) Owners of non-possessory estates in the land that are detrimentally affected by interferences with its use and enjoyment
d) §**821F**
   i) There is liability for nuisance only those to whom it causes a **significant harm,** of a kind that would be suffered by a **normal person** in the community or by **property in normal condition and used for normal purpose**
   ii) Unusually sensitive plaintiffs
   iii) Nuisance is measures by the objective standard of a normal person or property in normal condition used for a normal purpose
e) §**822 General Rule**
   i) **One is subject to liability** for a private nuisance if, but only if, **his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land**, and the invasion is either:
      (1) Intentional or unreasonable, OR
      (2) Unintentional and otherwise actionable under the rules controlling liability for **negligent or reckless conduct, or for abnormally dangerous conditions or activities**.
   ii) Difference with Trespass – reasonableness does not matter in trespass
   iii) Only thing that has to be intentional is the act, but do not have to intend to create a nuisance
f) §**826 Unreasonableness and Intentional Invasion** – unreasonable if:
   i) The **gravity of the harm** OUTWEIGHS the **utility of the actor's conduct**, or
   ii) The harm caused by the conduct is ***serious*** and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.
      (1) Assume that if the harm is not *serious* then the only way to get liability for a nuisance is to so (i).
      (2) Only know that serious is stronger than significant
g) §**827 Gravity of the Harm**
   i) Extent of the harm involved
   ii) Character of the harm involved
   iii) Social value that the law attaches to the type of use of enjoyment invaded
   iv) The suitability of the particular use or enjoyment invaded to the character of the locality
   v) The burden of the person harmed of avoiding the harm
h) §**828 Utility of the Conduct**
   i) Social value that the law attaches to the primary purpose of the conduct
   ii) The suitability of the conduct to the character of the locality

iii) The impracticability of preventing or avoiding the incased

i) §**829A Gravity vs. Utility – Severe Harm**
   i) An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm resulting from the invasion is severe and greater than the other should be required to bear without compensation

j) §**830 Gravity vs. Utility – Invasion Avoidable**
   i) An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if the harm is significant and it would be practicable for the actor to avoid the harm in whole or in part without undue hardship

k) §**831 Conduct Unsuited to Locality**
   (1) Unreasonable invasion and significant harm if:
      (a) Particular use or enjoyment interfered with is well suited to the character of the locality; And
      (b) The actor's conduct is unsuited to the character of that locality

l) §**840D Coming to the Nuisance**
   i) The fact that the plaintiff has acquired or improved his land after a nuisance interfering with it has come into existence is not in itself sufficient to bar his action, but it is a factor to be considered in determining whether the nuisance is actionable.

B. Applying Nuisance

1. Harm and Utility

1) Unreasonableness has nothing to do with negligence
   a) Restatement §826(B) – unreasonable if the gravity of the harm outweighs the utility of the actor's conduct
   b) Nuisance is an intentional tort – just have to intend the action, not the harm

Morgan v. High Penn Oil
Person who intentionally creates or maintains a private nuisance is liable for the resulting injury to others regardless of degree of care or skill exercised by him to avoid such injury.

2. Avoiding Harm/Utility Analysis

2) Plaintiff's failure to reasonably remedy
   a) If the effort risk, sacrifice or expense which the injured must incur to minimize loss or injury is not reasonable then that the injured party's failure to incur will not bar award of damages
3) **Restatement has an Alternative Definition of unreasonable besides the gravity v. utility balance**
   a) §**826b – Avoids the Balancing Test**
      i) Codifies the situation in *Boomer*
      ii) Have to prove that making the nuisance pay will not shut it down, and paying you off will not put them out of business, AND have to identify the universe of potential plaintiffs
      iii) If money damages would put the company out of business, then there is no nuisance liability – that would make it akin to an injunction by putting you out of business with a money damages award.
   b) Why not use §826(b) to avoid the harm utility analysis of (a)
      i) Serious harm as opposed to just a significant requirement
      ii) Sometimes it is so obvious that the utility of the conduct is so low do not want the jury to think about anything other than the law of utility
   c) ***Available only when the plaintiff is asking for money***

d) **<u>In Practice</u>**
   i) Company has to have a private interest in the use and enjoyment of the land
   ii) Non-trespassory invasion
   iii) The harm is significant to a normal person
   iv) The harm is intentional
   v) The harm is serious
   vi) Compensation through Money Damages will not put the Defendant out-of-business or financially cause them to discontinue the conduct in question
   vii) **Liability for Nuisance**
e) **Policy Considerations for this:**
   i) Objective test for liability
   ii) Courts always use the inteional and unreasonable verbiage though

Crest Chevrolet Oldsmobile Cadillac v. Willemson
This principle is that if the plaintiff by reasonable expenditure on his party could have remedied the condition or protected his property, or the enjoyable use thereof, from further damage or interference, and he fails to do so, he cannot hold the defendant liable for the subsequent occurring damage. If the effort, risk, sacrifice, or expense which the injured person must incur to avoid or minimize the loss or injury is such that a reasonable person under the circumstances might decline to incur it, the injured party's failure to act will not bar full recovery of full damages.

Boomer v. Atlantic Cement Co.
The ground for the denial of injunction, notwithstanding the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and the injunction. ***The court determined permanent damages were allowed where the loss recoverable is small in comparison with the cost of removal of the nuisance.*** The court further indicated permanent damages were appropriate when there was a continuing and recurrent nuisance, as in this case.

C. Remedying Nuisance

1) **Remedy**
   a) **Damages**
      i) P is entitled to damages for the harm that was caused.
      ii) Must prove a nuisance, liability and damages
   b) If a plaintiff has good reason to think the nuisance will be an ongoing activity then
      i) **Permanent Damages:** Establish the nuisance and that there's reason to believe that the nuisance will continue. Then, bring expert witness to determine what the total past and future loss will be in lieu of the Plaintiff bringing lawsuit after lawsuit, and reduce the full measure of damages to one number.
      ii) **Injunction** – P needs to show that it's a nuisance, plus prove that it's a better world if the injunction is issued. Judges can take into account the impact an injunction would have on the town/economy
         (1) An injunction doesn't preclude P from seeking past damages, but P cannot seek future damages
         (2) Must prove: nuisance, liability, damages are insufficient, AND it is in the public interest to have an injunction
         (3) This means, how seriously harmed was the plaintiff and how much harm does it take to stop the defendant from what they are doing.
   c) Other remedies for nuisance other than damages for the past nuisance
      i) **Nothing** – if the nuisance has stopped and cannot establish that the nuisance will continue in the future. Damages could be too speculative
      ii) **Injunction**

(1) P can keep or sell the injunction out to D
(2) P will most likely always want to get an injunction, because puts D under P's control and can mean money

iii) **No injunction, but damages – buy out the plaintiff**
(1) If shutting down the plant would be too much a burden, can award damages like in *Boomer*.

iv) **Injunction, but because the injunction imposes costs on the D, P pays damages to the D – buy out the defendant**
(1) Situations where it is not obvious who should rennet
(2) Cattle farm v. housing community example
(a) Most courts do not follow this – farm could protect itself though easement or running covenants.
(b) Some courts use coming to the nuisance as a bar against a P asserting a claim.

Spur Industries v. Del E. Webb Development
Cattle farm is a nuisance to a group of houses that were part of a new development that started after farm. Court says that it matters that the farm was there first. Still a nuisance, and P gets an injunction, but since the P basically brought the nuisance on themselves by moving to the nuisance, court makes P pay for D to stop/move his operation.

Estancias Dallas Corp v. Schultz
Plaintiffs are not required to recover damages for temporary nuisance in order to secure permanent injunctions. Plaintiff neighbors obtained a permanent injunction from the trial court enjoining defendant corporation from operating its air conditioning equipment and tower on the property next to plaintiffs' residence. The court affirmed the judgment of the trial court. It found that the trial court did not abuse its discretion in balancing the equities in favor of plaintiffs because ***there was little or no testimony in the record reflecting benefit to the public generally in permitting defendant's nuisance to continue***. The court observed that there was no evidence in the record that there was a shortage of apartments and that the public would suffer by having no place to live. ***It found that there was not evidence to indicate that the necessity of others required plaintiffs to seek relief by way of an action at law for damages rather than by a suit in equity to abate the nuisance.***

D. Invasions

1) **Don't Forget to ask if there is an invasion!**
a) Some states do not require an invasion as an essential element of a private nuisance. All that is required is a condition on the defendant's land that unreasonably interferes with the plaintiff's use and enjoyment of its land. Stored explosives or above ground fuel storage tanks, therefore, could be the grounds for a private nuisance action. Other conditions that have constituted a private nuisance have been houses of prostitution, crack houses, funeral homes, and a tuberculosis hospital.
b) Even states that recognize noninvasive conditions as the basis for a private nuisance claim may not have found this interference to be "substantial" if the parties merely feared for their lives and property. It is only when that fear is reflected in the decline in the property's fair market value that many courts will conclude the interference would be considered substantial to the normal person the community.

2) As a general rule, something has to cross the boundary line of your property, whether it smells, sounds or is visible for it to be a nuisance
a) **Exceptions:**
i) Situations where it is almost 100% certain that a boundary-crossing will occur if the defendant does or completes the conduct in question – **Anticipatory Invasion**
(1) Ie The defendant is building a dump next to your house → court will enjoin on nuisance theory because it is 100% certain that even if it is the best built dump in the world, there will be smells and flied crossing the boundaries

ii) Undertakers in residential districts
    (1) Jack v. Torrant
    (2) These are truly sui generic cases where the courts almost uniformly enjoin the operation of undertaking services in residential districts as a nuisance
    (3) Too depressing to have around
    (4) ***Rule is strictly limited to undertaker***
        (a) Does not extend to Cemeteries
        (b) Does not extend to AIDS hospices
iii) Half-way houses rarely
    (1) Arkansas v. Needler
        (a) Enjoined an already operating halfway house on the basis of
            (i) Real and reasonable fear for safety; and
            (ii) Demonstrated drop in property values
            (iii) Inclusion of sex offender and an incident with alcohol
        (b) Court fails to convincingly distinguish from the CT case
    (2) Nicholson sued prior to operation, but in Arkansas it was operating and there was no incasion
    (3) Westshore – Court will not enjoin on the precedent of Arkansas
iv) **Need an invasion, but in certain RARE events, may be about to get court to define something as a nuisance without an invasion**
    (1) Plaintiff's general objection is going to be a decreased property value associated with the challenged conduct

Nicholson v. CT Half-Way House
No court of equity should ever grant an injunction merely because of the fears or apprehensions of the party applying for it. Fears and apprehensions of neighboring property owners of future manifestations of criminal activity in the neighborhood could not justify the granting of an injunction to restrain the owner of a residential dwelling from using his property as a boarding house for state prison parolees on the ground of an alleged nuisance. ***Mere depreciation of land values, caused by subjective apprehensions of neighboring property owners and their potential buyers cannot sustain an injunction for nuisance***.

Jack v. Torrant
Undertakers are nuisance in fact, not per se. A study of the cases has satisfied us that the greater weight of recent authority is to the effect that the establishment and ***operation of an undertaking business in a purely residential section, under circumstances which would cause a depressed feeling to the families in the immediate neighborhood, and a constant reminder of death, appreciably impairing their happiness or weakening their power to resist disease, and depreciating the value of their property, constitutes a nuisance.***

Arkansas Release Guidance Foundation v. Needler
The halfway house operated an establishment for parolees and prisoners near a residential neighborhood. The homeowners filed suit against the halfway house, alleging that its operation constituted a private nuisance in fact. The trial court determined that the house was a nuisance, and the halfway house appealed. The court held that the trial court did not err as to the law and the chancellor's findings were not against the preponderance of the evidence as to the existence of a private nuisance. The evidence supported the finding of diminution of property values in the area attributable to the operation of the halfway house, including the real and reasonable fear and apprehension for the homeowners' safety, coupled with the inclusion of a sex offender as a resident and incidents involving the use of alcohol by one parolee. ***Equity would enjoin conduct that culminated in a private nuisance in fact where the resultant injury to the nearby property and residents was certain, substantial, and beyond speculation and conjecture.***

West Short School District v. Commonwealth
Where there was no evidence that escapees of correctional institution had ever perpetrated physical assault upon residents or school children of neighboring township, township and school district seeking to enjoin operation of community-related center for inmates on prerelease status, outside secured area of correctional institution, did not establish that contemplated use of property would necessarily constitute unreasonable use or that establishment and operation of center would be abuse of discretion justifying grant of injunction.

E. And, of Coase, Don't Forget Transaction Costs

a) Remedy is ordinarily judged by the standards of the marketplace: in effect, one landowner paid another landowner to refrain from engaging in a certain practice.
b) Coase Theorem
    i) In a marketplace with no transaction costs, two parties will always bargain their way to an efficient solution. An efficient solution in this case is one that maximizes the net total wealth that accrues to all parties affected by the activity
    ii) A well functioning market will always yield an efficient solution to a particular problem, and that solution will be the same regardless of how the court assigns rights and liabilities
        (1) However, the court's assignment of liability may have a great deal to do with how wealth is distributed between the market participants.
    iii) Two qualifications
        (1) Market at issue must be free of all transaction costs
            (a) Cost of using the marketplace
            (b) Once transaction costs are considered, it becomes impossible to say that the market will yield an efficient solution to the problem
            (c) Because real world transaction costs are high, it becomes critical that the legal system select the correct legal rule, assuming that the goal is to maximize efficiency.
            (d) A market failure is a situation in which high transaction costs prevent bargaining from reaching an efficient solution. A market failure may justify a government-dictated, non-market solution to a certain problem.
        (2) There must be no externalities or spillovers

VII. Private Land Use Controls

A. Introduction

1) **Servitudes**
   a) General term that covers a range of devices that parties use to deal with problems of land use
   b) Allow parties to negotiate amongst themselves to permit a party to either commit what would otherwise be a tort, OR bar a party from doing something that would otherwise be legally permissible
      i) Right to do something to someone else's land
      ii) Statement that you won't do something that you have the right to do on your own land.
   c) The are **privately negotiated, privately arranged agreements** restricting lawful uses or permitting unlawful uses
   d) **Law of servitudes distinguishes between methods by which parties make agreements about the use of land**
      i) **Easements**
         (1) A nonpossessory interest in land that involves a right to do something on or to somebody else's land that would otherwise be a trespass or nuisance (no actual possession). An easement must be created in the same way that other property interests are created (usually created by deed, but sometimes by prescription). Always rights with respect to a piece of land
      ii) **Covenants**
         (1) A covenant, sometimes called a real or running covenant, is in the form of a contract.
      iii) **Equitable Servitudes**
         (1) Differ from the above in the sense that they were developed much later. Oversimplified, the concept of equitable servitudes caught on because covenants and easements had technical requirements that could sometimes be hard to meet.

B. Easements

1) **Restatement Definition**
   a) §**450 Easement**
      i) An easement is an interest in land in the possession of another which
         (1) Entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
         (2) Entitles him to protection as against third persons from interference in such use or enjoyment;
         (3) Is not subject to the will of the possessor of the land;
         (4) Is not a normal incident of the possession of any land possessed by the owner of the interest, AND
         (5) Is capable of creation by conveyance.
2) **Terminology**
   a) Two critical distinctions
      i) All easements fall into one of two categories
         (1) **Appurtenant**
            (a) As easement is appurtenant when it benefits the land; the use right that the easement represents goes along with some piece of land that the holder of the land also possesses; **it's attached to a particular piece of land**. The land that is benefiting from the easement is called the **dominant tenement,** and the land subject to the easement is called the **servient tenement**.
         (2) **In gross**

(a) An easement is in gross when it benefits a person; it isn't connected to the use of the land. There's always a **servient tenement,** but never a dominant tenement because no land is benefiting

ii) All easements are either affirmative or negative
   (1) **Affirmative**
      (a) Right to do something to somebody else's land that would otherwise be illegal
   (2) **Negative**
      (a) The right to prevent someone else from doing something to their land that they would otherwise be able to do. The law is hostile to negative easements, because it would bind successive possessors of the property, because it applies to both contract law and property law.
      (b) **CL does not allow the creation of a negative easement** – That move by the CL is what led to covenants and equitable servitudes. The reason CL does not allow goes way back. Affirmative easements usually leave signs as evidence because they're doing something affirmative to the land, while negative easements leave no visible trails for the law, so CL developed hostility towards negative easements.

3) **Creating an Easement**
   a) Simplest most obvious way is through a grant or deed – do not have a consideration requirement
   b) Subject to the same qualifications/durations of possessory interests → must specify the duration when created
   c) Enforceability can depend on the recording statutes – questions of legislative choice whether an unrecorded easement was enforceable against subsequent parties.
   d) Rule Against Perpetuity and SOF applies
   e) **First Party Easement**
      i) A party to the conveyance receives the right
   f) **Third Party Easement**
      i) The person benefiting from the easement is not a party to the conveyance
      ii) CL was originally Hostile to 3rd party Easements
         (1) Modern trend is to allow
      iii) ***Cannot have a land transaction that creates an easement in a third party*** – Have to do it in 2 transactions – Willard case fudges that rule
         (1) Can give the easement away first – give an appurtenant easement since that will rung with the land
         (2) Can have the buyer give the easement after the buyer buys the land
         (3) Seller can sell the land minus the easement to himself, then transfer the easement, but the easement would then be *in gross* and would not run with the land

4) **License**
   a) Difference between license and an easement is how it ends. Once you create an easement you are stuck with it until the terms end, with licenses you can end it whenever you feel like. **Licenses are revocable.** Some limitations (cannot revoke in the middle of an act), but generally are revocable at any time, and can be done orally. As long as it is not written as an easement, it is a license.
   b) **Licenses do not travel with the land.** Just because it does not travel with the land does not mean that it is not an easement because it could be an in gross easement.
   c) **Exceptions to License Revocation**
      i) **License coupled with an interest** – I advertise my used car, you buy iy, then when you walk towards the car I say that you are trespassing. The interest in getting the car comes with an implied license to go on the land – cannot be revoked
      ii) The **licensee must be given a reasonable time** to gather effects and get off the land if notice is given while the licensee is in the middle of the land
      iii) A licensee who has made expenditures of capital or labor in the exercise of license in reasonable reliance on things said by the licensor is allowed to continue the license long enough to realize the expenditure. Some jurisdictions say this is ok, they will be granted some period of time where the license cannot be revoked. Called an **irrevocable license** – falls under the **doctrine of estoppel.**

Willard v. First Church of Christ Scientist
Court does away with the CL rule and allows the easement to be created in the third-party church based on the parties intent. Jurisdictions are split on this rule. CL rule – does not matter if parties are unaware of the easement. Modern recording statutes make notice of easements easier.

Shearer v. Hodnette
The real property owners entered into a contract with the licensee to use a private road to get to and from the licensee's property. The licensee's use exceeded that which was agreed upon by the parties. The real property owners dug a ditch at the licensee's entrance to the private road, prohibiting the licensee from using the private road. ***The court determined that the licensee held an irrevocable license to use the road because the licensee's expenditures and the grant of an easement to the water and sewage board conferred benefits upon the real property owners***.

5) **Easement by Implication**
   a) Lack paper that says easement – sometimes people mean to create them but mess up. Read between the lines and get easements by implication
   b) **Three Factors MUST be present**
      i) **A separation of title** – means that at one time on person owned all the lots, and then sold part of it off. *If there was no single owner, no implied easement*
      ii) **The use which gives rise to the easement shall have been so long continued and apparent as to show that it was intended to be permanent**
         (1) Means that when the original owner owned it all, he was doing things such that if the land was split up, you would expect easements – did not need them originally because one owner
         (2) What a reasonable person would surmise upon careful reflection.
         (3) Example: With underground pipes, it is self-explanatory that if a sewer pip is on one side of property and the main drain is on the other, that the pipes go beneath another property
      iii) **The easement is necessary to the beneficial enjoyment of the land** – pretty obvious with sewer pipes. Modern trend is generous to the person claiming easement – the weight of authorities supports the view that necessary does not mean indispensable, but reasonable necessary or convenient to the beneficial use of the property.
   c) **Exception** – when the grantor is claiming the easement across the property he sold – sometimes if he was stupid enough to forget then the law will use a strict definition of necessary.
   d) **Scope** – usually assumed in Fee Simple with implied easements

6) **Easement by Necessity –** Although technically an easement will be implied by necessity for any purpose if the easement is strictly necessary for the enjoyment of a parcel of land, easements by necessity involve access to and from landlocked property
   a) Landlocking property destroys much of its use that the law, as a matter of either public policy or an implied contract, presumes that the parties to the landlocking transaction could not have intended not to include a right-of-way onto the land.
   b) Necessary elements
      i) A common owner severed the property
      ii) Necessity for egress and ingress existed at the time of the severance (the severance caused the necessity); and
      iii) The easement is strictly necessary for egress from and ingress to the landlocked parcel

Romanchuk v. Plotkin
After defendants notified plaintiffs that the connection of common sewer drain between their property and sewer in the street would be severed, plaintiffs brought action to enjoin defendants from disconnecting their sewer connection and compel them to remove an encroaching fence. The district court found that plaintiffs had an easement for the use and maintenance of the sewer drain across defendants' property connecting with the sewer, subject to the requirement that they pay their proportionate share of the cost of repairing and maintaining the same, and that the fence encroached one foot and five inches on

plaintiffs' land. On appeal, the court affirmed the district court's holding, ***finding that the plaintiffs had an implied appurtenant easement under defendant's property that was necessary, apparent, and easily construed from the parties' language and actions.*** The court affirmed the enjoinment of the disconnection of the sewer line and ordered removal of encroaching fence.

7) Easement by Prescription

a) Essentially an easement by Adverse Possession – don't call it that because this is about USE rights and not POSSESSION rights
b) ***The statute of limitations for Use Rights is the same as the Statute of Limitations for Adverse Possession*** – this is how long the continuous use must be going on before one can claim a prescriptive easement
    i) Once all the legal attributes are in place, then that is enough
c) Application of ENCROACH
    i) **Actual** – Only affirmative easements can be implied by prescription
    ii) **Open and Notorious** – So open and visible that the landowner will or should notice the use.
    iii) **Exclusive** – concurrent use of property by the servient estate owner and the dominant estate owner is consistent with an easement – most states omit this requirement
    iv) **Continuous**
        (1) Applies but not in the same was as adverse possession – use rights are intermittent by nature
        (2) Easement will never give any more rights than you have already been enjoying
        (3) The fuzzier the continuity, the less use rights you will get
        (4) A successful ejectment or trespass action by the landowner destroys the continuity.
    v) **Claim of Right** – N/A
    vi) **Hostile**
        (1) In Adverse Possession – this means non-permissive – if you have permission then you are there by license and the statute of limitations cannot start running
        (2) Problem is that use rights by nature are permissible
            (a) Otherwise there would be trespass and nuisance claims
            (b) Permission is often NOT memorialized
        (3) Thus, the law creates a fiction that a use if NOT PERMISSIVE for the purposes of establishing a prescriptive easement unless it is memorialized in writing.
            (a) Thus, the permission must be memorialized in writing for it to be a valid defense to a prescriptive easement claim
        (4) In practice, this creates a presumption of hostility because this permission will rarely be memorialized.
        (5) Rules change by jurisdiction
        (6) Fischer v. Grinberg – use of driveway was permissive → it was granted by the waving and absence of hostilities
d) **Two theories for prescription that are logically inconsistent**
    i) Under the Adverse possession theory, use must be hostile, or else it would not be adverse possession
    ii) Lost grant theory – when you see somebody using another's property for a long time without complaint, the most likely explanation was that at some point there was permission. But the paper is lost. In this theory, permission of land use does not defeat prescription claim, but is required for one.
    iii) Modern Trend is toward analogizing to adverse possession. Grants don't get lost anymore.
    iv) Problem with Adverse Possession is the hostility requirement. Courts had to stretch this a bit to deal with prescriptive easements because when a person is using your driveway for 20 years, there is kind of implied permission.

Fischer v. Grinsbergs
The parties' predecessors in title jointly built and used a common driveway that extended over their respective, adjoining property lines. There was no written agreement in regard to the use of the driveway. The neighbors fenced the driveway along their property line and effectively prevented the property owner

from using the driveway as ingress and egress from her garage. The property owner contended that the presumption of adverse use and claim of right was applicable in the case, and that the neighbors did not overcome this presumption by a preponderance of the evidence. The neighbors argued that the presumption was not applicable, and that the trial court was correct in finding that the property owner's use of the driveway was permissive. The dismissal of the action was reversed. The court held that the presumption of adversity and claim of right applied, and the neighbors did not rebut that presumption, although it was their burden to do so. ***The court found that the property owner was entitled to a prescriptive easement*** under the facts of the case, and the evidence appeared sufficient to establish a location for the easement claimed.

8) **Scope**
   a) **What is the easement for**
   b) **Where?** What part of the land? How far do the use rights extend?
   c) **Temporal duration?** How long?
   d) **Is the easement defeasible?**
   e) **Are there any secondary rights that accompany the easement?** Farmer v. Kentucky Utils. What other rights are implicit in granting the easement?
   f) Problems occur when the parties forget to answer more specific questions that go along with the easement – so courts fill in the gaps. Difficult task for the courts. Easements by implication and prescription are not easements by grant. The parties never decided anything. The judge must determine the scope when the parties have not

Farmer v. Kentucky Utility Company
Respondent utility company held a primary easement over the property of movant landowner to hang utility lines. When respondent determined that the area beneath the wires needed to be cleared, it hired a contractor to remove trees and other vegetation from beneath the wires. Movant filed a suit charging trespass and sought damages. The trial court found that respondent had a prescriptive easement but did not have a right to enter the land. ***The Court of Appeals held that the prescriptive easement to hang lines included the right to enter the property underneath for maintenance and repairs. Movant appealed and the court affirmed. The court held that respondent had such a right by reason of its primary easement;***

9) **Transferability**
   a) **In gross easement -** If you have an easement in gross that is benefiting you personally and sell the land that you own because that easement is tied to you and not your land, it does not follow that whoever gets your land gets your easement. No reason that people cannot specify that in the transfer, but the natural assignment with in gross is just to deal with the people you said you would.
      i) **Cases where the in gross easement is transferable**
         (1) Give permission for its transfer in the grant
         (2) Some easements are **implicitly transferable**. This is reflected in general principle that **commercial in gross easements are transferable**. However, parties can contract out of transferability.
      ii) Generally commercial easements are transferable, but personal in gross easements are not – both are rebuttable presumptions (Martin v. Music)
      iii) **CL Answer** – when you're dealing with something that will result in a qualitatively different kind of use, go ahead an assign it, but assignees have to use it in more or less the exact manner as the original easement was intended (problems with enforceability)
      iv) ***Cumulative effect of multiple users cannot be greater than a single user*** – Difficult to make that determination or to enforce
   b) **Appurtenant easements –** The nature of the easement runs with the land. The benefits and use rights of an easement are part of the land.

Penn Bowling Recreation Center v. Hot Shoppes Inc.

The dominant tenement owner acquired property, which enjoyed an easement over the servient tenement owner's adjoining property. The servient tenement owner argued that the dominant tenement owner forfeited its easement by exceeding the rights associated with the easement. Specifically, the servient tenement owner argued that the dominant tenement owner exceeded the scope of the easement when it used the easement to service adjoining land that was not covered by the easement. ***The court rejected this argument, noting that the creation of an additional burden upon the servient tenement owner's property did not constitute forfeiture of the easement, provided that it was possible to server the increased burden. The court also rejected the servient tenement owner's argument that the easement was forfeited by the dominant tenement owner's misuse of the easement by parking cars over the easement. While such misuse could be enjoined, it was not evidence of forfeiture.*** The court concluded that fact questions as to the reasonableness of the enjoyment of the easement, and whether it was possible to sever the burden created by the enlarged use of the easement precluded summary disposition.

Martin v. Music
The owner allowed the builder to construct and maintain a sewer line under and through his property, and the builder agreed to place one intake connection in the line for the owner's use. When the contract was made, the property was unoccupied except for a garage building the owner used in his business. The owner sold six of his eight lots after the line was constructed, and the buyers obtained and built homes on three of them. When the buyers prepared to connect to the line, the builder filed suit for a declaration of rights, claiming that only the owner had the right to connect. On review, the court found that because the right to connect applied only to the occupancy of the land through which it ran, the easement was an easement appurtenant, and that the question was whether the use of the line by appellees would burden the servient tenement. ***The court found that under the contract, the owner had the right to build apartments, a hotel, or even a factory on his property and connect them to the line because the contract did not limit the kind of use, and that for that reason, the two or three dwellings would not increase the burden contemplated by the contract.***

C. Running Covenants

1) CL did not permit the creation of negative easements, but wants to accommodate negative easements, especially in late 19th, early 20th century when industrialization and urbanization become major issues
   a) There was the ability to bind through contract, but this was not freely transferable and could not bind future parties
2) Law realizes that there was a way to bind successors to negative type-easements through landlord tenant law
   a) Example: T1 cannot tear down building and erect a pub. T2 when assignment or sublease occurs is bound by these obligations.
   b) **Spencer's Case**
      i) Tenant promises to build LL a wall
      ii) Tenant assigns to lease to T2, who does not build a wall
      iii) LL sues to force T2 to build a wall
      iv) Ct laid out several obligations regarding LL & Tenants
      v) Develop "Running" Covenants – comes from the running with the land idea of easements
3) **Affirmative and Negative covenants**
   a) Affirmative covenants require the owner of the burdened estate to perform some act or to pay money
   b) Negative covenants restrict or prohibit the uses that can be made of the burdened land.
4) **Elements of Running Covenant: Contractual Obligations that Run with the Land**
   a) Special kind of contract that binds non-parties by merging property & contract law together
   b) Separate way of creating a servitude
   c) Cannot have an oral running covenant – deals with property therefore under the purview of the Statute of Frauds – needs a writing
   d) Needs consideration because of contract law

e) Parties must **INTEND** to have the covenant run with the land
   i) Must explicitly say that successors must be bound
   ii) Must use the word "assigns" as a noun – this wall is an assigns that bind the other party
   iii) In modern law, the strict form "assigns" does not exist, but must still be explicit. Need to mention the assigns without actually having the term assigns

5) **Specific Elements of Running Covenant**
   a) **Enforceable Contract**
      i) Enforceable between original parties
      ii) Sometimes run across SOF problems
      iii) Breach of contract result in $ damages
   b) **Intent to Bind Successors in Interest**
      i) Usually parties say something explicitly about binding successors, if not look at circumstances, intent, a jury question
      ii) In CA & In Spencer's Case (MINORITY RULE)
         (1) Writing must expressly state intention to bind successors, mention "assigns" or its equivalent which is rare today
         (2) But if item to which the promise applies already exists, parties do not need the word "assigns"
            (a) Example: I promise not to paint the fence brown
         (3) But if the fence does not exist, need to say "assigns"
            (a) Example: I promise not to build a fence
   c) **Privity**
      i) Relates to whether this contract can bind future parties
      ii) **Horizontal Privity**
         (1) Deals with the original parties to contract
         (2) **Common Law English Rule**
            (a) Must be in a special relationship between A and B
            (b) 99% of time this was L-T because they had simultaneous interests in property (present and future interests)
            (c) Parties must have an interest in the same property, but different parts of the timeline
            (d) So contract for a running covenant between two neighbors doesn't work here – must have some common interest in timeline
         (3) **Traditional American Rule**
            (a) **Strict Minority** – Simultaneous interest in the property between A and B OR
            (b) **Majority** – The Contract privity is part of an adjunct to transaction involve the land between the parties
            (c) Does not Permit a running covenant/contract between neighbors to succeed to the neighbors & heirs
               (i) So under this rule A cannot make deal with B saying no gargoyles but can include the requirement if selling land to B
               (ii) B sells land to A, then A sells land with B with a running covenant for B to not have gargoyles
               (iii) The agreement about the fense is incidental to the land transaction
            (d) 2 parties can thus make a running covenant by
               (i) Transfer the land from A to B
               (ii) B then transfers the land back to A with the covenant attached
               (iii) These transactions artificially create Privity
      iii) **Third Option – Get Rid of Privity**
         (1) **Lose American Minority**
         (2) **3rd restatement**
            (a) Would do away with all this and let parties make negative agreements that bind successors with only a restriction that it not violate public policy, impose undue restraints on trade/alienation, unconscionable, or lack rational justification
   d) **Touch and Concern the land**
      i) Promise must touch & concern the land

ii) A way to limit the class of promises that run with the land; no one really knows that this means
    (1) Physical structures definitely touch and concern
    (2) Promise not to eat sausage in the morning – does not touch and concern
iii) Promise not to open a barber shop across the street – ambiguous
    (1) Covenants not to compete generally run with the land, does not touch and concern but does effect property values
iv) Successors – bound by the provisions of the contract between the landlord & tenant that "Touch & Concern the land"
v) Usually all important provisions run with the land.
vi) Restatement (Third) approach: get rid of the touch and concern requirement
    (1) Touch-or-concern doctrine Superseded
    (2) Replacement for Touch and Concern: Invalidate the Servitude if:
        (a) It imposes unreasonable restraints on alienation (transfer)
        (b) Undo restraints of trade
        (c) It is unreasonable OR
        (d) It lacks a justification

Candlewood Lake Association v. Scott
Does the covenant to pay upkeep dues to the homeowner's association "touch and concern" the land? Facially, it just a promise to write a check – is this close to rent? ***Bottom line is that the fees are going to run with the land – do go to pay for things that touch the land.***