Contents

What is Property?

Rule of Law: Property is often conceptualized as an aggregate of rights ("bundle of sticks") protected by the government. Blackstonian definition is that which is peculiar or proper to any person and belongs exclusively to one.

- Competing conceptions of property: Blackstone vs. Bentham
- Lawson's alternative to the bundle of sticks: roll of toilet paper
    - You can rip off sheets larger or smaller. However, there are certain places where it's easier to rip on the perforations. It's possible to rip in places with no perforations, it's just harder and doesn't work as well
- What does it mean to own the land?
    - Right of possession – use and enjoy land
    - Right of exclusion – keep other people from using the land
    - Right of disposition – trade or transfer land (note: includes things attached)

Acquisition of Property

Capture, Find and Conquest

Original acquisition is a way in which ownership can be established other than through voluntary conveyance from a previous owner.

Wild Animals

Rule of Law: In general, wild animals must be killed, captured, or mortally wounded to be reduced to possession. Occasionally, established custom can modify this relationship.

Pierson v. Post p. 81

Bottom line: To reduce an animal ferae naturae to possession, one must kill it; mere pursuit is insufficient to acquire the right of first possession.

- Facts: Post pursuing fox on "uninhabited and unpossessed" beach. Pierson saw Post and killed and carried away the fox
- Mere pursuit cannot confer property rights because too much confusion/uncertainty.
- Dissent focuses on social good of hunting, incentives argument
    - Believes reasonable prospect of capturing animal confers proprietary rights

Ghen v. Rich p. 88

Bottom line: Given the custom of trade, π's killing of the whale was enough to reduce it to possession; Δ's seizure violated π's possessory rights.

- Facts: marked bomb-lancing fin-back whales as customary in MA community. Π shot whale, Δ found whale when washed up on beach and sold it at auction instead of contacting π.
- Established custom in this industry allows π to claim ownership as soon as he kills whale.

Land

Rule of Law: Landowners' rights [nearly] always supersede those of trespassers.

Notes:

- *Trespass* as a "super tort." Ordinary tort suits require proof of actual damage ('no harm, no foul").
    - TRESPASS AS EXCEPTION TO MANY OF THE BASIC TORT LAW PRINCIPLES
    - Trespassers tend not to fare well in tort suits.
- Trees and structures are real property and belong to the land

Jacque v. Steenberg Homes, Inc. p. 1

Bottom line: Court allowed the award of nominal and punitive damages for intentional trespass when no actual damage had occurred.

- Facts: π owned house, Δ neighbor purchased mobile home and wanted to deliver over π's property. Π said no, Δ did it anyway. Π sued for intentional trespass, Δ argued no compensatory damages needed so punitive couldn't happen
- Court holds real loss in intentional trespass is NOT property damage, but loss of right of exclusion
    - Society has interest in protecting property owners from intentional trespass
    - State must punish trespassers to uphold legal force of right of exclusion

Fisher v. Steward p. 227

Bottom line: Even if π first discovered the honey, π had no right to the land or anything on it because Δ's land. Trespassing cannot create a right that beats out landowner's right.

- Facts: π finds honey tree, marks tree, notifies Δ landowner who cuts down tree and uses honey. Dispute in re: who made original discovery of bees/honey?
- Bees and honey belonged to tree, which belonged to land, which belonged to Δ

Reese v. Hughes, Supp. p. 9

Bottom line: Landowner/trapper wins. Fox is still wild animal; kill/capture rule applies.

- Facts: "escaped fox" case, farmer gets rare fox breed for pelts, fox wanders onto trapper's property, trapper kills escaped fox. Farmer sues trapper for first possesion
- Trying to distinguish between "fox" case and "skin" case
- Π argues domesticated animal – no longer wild

The Ad Coelum Rule

Rule of Law: Generally, the ad coelum principle gives the property owner rights extending into the earth and sky from the surface. Courts typically limit this to the extent of use and enjoyment.

- Ad coelum is conceptual not literal. Not intended to grant property rights infinitely into the sky

Hinman v. Pacific Air Transport p. 9 – AD COELUM

Bottom line: Planes flying in airspace above property that do not substantially interfere with property owner's use and enjoyment do NOT constitute trespass.

Edwards v. Sims p. 175 – AD INFEROS

Bottom line: Court allows survey of land to determine if Δ's cave is under π's property.

- Facts: Cave case – entrance on one owner's property, cave goes under another owner's property.
- "Whatever is in a direct line between the surface of the land and the center of the earth belongs to the owner of the surface. Ordinarily that ownership cannot be interfered with or infringed by 3rd persons."

The Irving Principle

Property's Theory of General Relativity

Rule of Law: Ownership generally means a claim good against all those beneath your claim on chain of possession. Blackstonian ownership is a claim good against all the world.

- How prior does your possession have to be? Once you've won the suit, what have you won?
- All else being equal, being a prior possessor is enough to beat a subsequent possessor
    - Unless subsequent possessor has title, don't need title (absolute/Blackstonian ownership) to win
    - Possession as proxy for ownership
- **Action of replevin:** filed to regain or recover personal property.
- **Action of ejectment:** cause of action showing π's title is superior to Δ's

Bradshaw v. Ashley, Supp. p. 6

Bottom line: All that is required to win an action of ejectment against Δ is to have a higher/better claim than the person against whom you are filing the claim. Need not be able to show absolute Blackstonian ownership.

Wild Minerals

Gas & Oil

Rule of Law: Step one in oil and gas law is check jurisdictional legislation. If silent, case precedent may indicate preference for ferae naturae OR domesticated point of view.

- Fox rules of wild animals discussed "fugitive" character. Minerals/oil and gas also move around
- Today, oil and gas law is largely dealt with by statute/leg, but common law determined early contours of the law
- Huge underground reservoirs – what if different people own surface property over same reservoir.
    - Ad inferos starts to pretty important – litigation goes through the roof in mid-19th century
- Prudent oil & gas companies will purchase/lease land rights over entire reservoir to avoid problems
- ANALOGY to animals ferae naturae: minerals ferae naturae
    - Adopted rules for dealing with oil and gas
    - Have to reduce oil or gas to ownership by extracting
    - *Reese v. Hughes* argument that once it escapes into wild, no longer owned – accepted in *Hammonds,* rejected in *Lone Star Gas*
- Political pressure in states like TX for cts and legs to create policy favoring oil/gas companies

Hammonds v. Central Ky. Natural Gas Co., Supp p. 12

Bottom line: Oil and gas has a "migratory trait" that makes it the property of landowner until reduced to possession by drawing it out.

- Facts: Δ buys empty underground reservoir, injects $2M worth of gas in. π owns surface land above 54 acres of reservoir. Π sues Δ for trespass
- Court finds gas is "ferae naturae" again because released back into land – oil in land belongs to landowner, not gas co. so not trespass

Lone Star Gas Co. v. Murchison, Supp p. 19

Bottom line: Rejects Hammonds, rules that gas injected into reservoir was property of injector and unjust enrichment for landowner to remove the gas.

- Facts: Π purchased gas and injected into underground reservoir, Δ owned tract of land and extracted oil. Π sues Δ for conversion
- Court holds this is unlike gas in natural state – makes analogy to "domesticated" animals
- Scientific evidence says gas doesn't roam around underground like animals
    - Π argues gas in reservoir like fox on leash – it has boundaries to keep it from wandering

Texas American Energy Corp v. Citizens Fidelity Bank & Trust Co., Supp p. 29

Bottom line: Construes ferae naturae analogy -capturing the fox but releasing into confinement, not back into the wild. Similar to extracting oil and then reinserting it into the reservoir

Wild Wallets (Personal Property)

Rule of Law: Lost/Found personal property is subject to the Irving principle. Claims are judged on relative scale against other claims in order of possession.

- Animal/oil and gas analogy of *ferae naturae* doesn't hold much water here
    - Law of lost property develops with no reference at all to the law of animals.
- **NOT FINDERS KEEPERS, LOSERS WEEPERS** – See *Ganter v. Kapiloff*

Prior Possessors

Rule of Law: All else equal, being a prior possessor is enough to beat a subsequent possessor. Does not apply if subsequent possessor has title, since possession is a proxy for ownership.

- Finders, keepers does not apply.
- Generally the finder's claim will be good against all the world except the true/original/prior owner.
- **IF THE PRIOR POSSESSOR SHOWS UP, BEATS SUBSEQUENT POSSESSOR UNLESS YOU CAN SHOW SOMETHING THAT BUMPS YOU UP ON THE CHAIN.**
- *Statutory dispossession –* Statutes of limitation can affect chain (jurisdictional)
    - Sets limit of time during which you can sue to recover property.
    - After limit expires, your claim on chain is eliminated
    - If you're true owner, then
        - As a result, first in time possessor USUALLY becomes top of chain
        - Sometimes it's the person on whose land the property was found (rare)
- Bring **action of replevin** to recover personal property
- Bring **conversion/trover** suit if stamps destroyed to recover the VALUE of items damaged/destroyed by someone else

Ganter v. Kapiloff, Supp. p. 33

Bottom line: Losing track of personal property does NOT divest ownership. Finders keepers = FAIL.

- Π lose track of stamps, 7 years later see in Δ's catalogue. Bring action of replevin
- Π NEVER voluntarily transferred stamps and were prior possessors. They win.

Nemo Dat (p. 884)

- a.k.a. the "derivation principle" (because the transferee's rights derive from those of the transferor)
- "No one can give that which he does not have."
- When an owner of piece of property (land or personal) transfers property to another, he only conveys his spot on the chain of possession.
- Your right of possession occupies a certain position on the chain of claims to ownership.

- Voluntary transfer CANNOT change that sequence.
- Some exceptions to nemo dat principle
  - Legislature can move your claim up or down on the chain by statute
  - Good faith exception

Kunstsammlungen Zu Weimar v. Elicofan, p. 885

Bottom line: Δ purchased spot on the chain of possession and could defend claims against everyone LOWER than he on the chain. If someone with a better claim comes along, he can't defend.
**Thieves cannot convey title to buyer because never had anything to convey under nemo dat.*

- Δ purchased paintings from thief, π museum claims ownership. Issue becomes whether Δ purchased paintings from someone incapable of conveying title.

The Good Faith Purchaser (p. 890)

- UCC § 2-403 as the good faith purchaser exception to nemo dat
  - Summary: if you purchase something in good faith from a merchant, nemo dat doesn't apply.
  - You keep item, true owner can only sue seller
  - NOTE: DOESN'T REMOVE ORIGINAL OWNERS CAUSE OF ACTION, JUST LIMITS TYPE (DAMAGES INSTEAD OF REPLEVIN)
- Reasoning behind good faith purchaser: normal assumption that if you buy something in a legit store, then seller has the right to sell it to you
  - Element of consumer protection , designed to foster trust
  - Seller is leading you to believe he has ownership right to transfer to you.

Ex: A voluntarily hands over property to merchant B (to clean it, hold it, whatever) and B sells it to C, who buys in good faith. **Nemo dat does not apply**

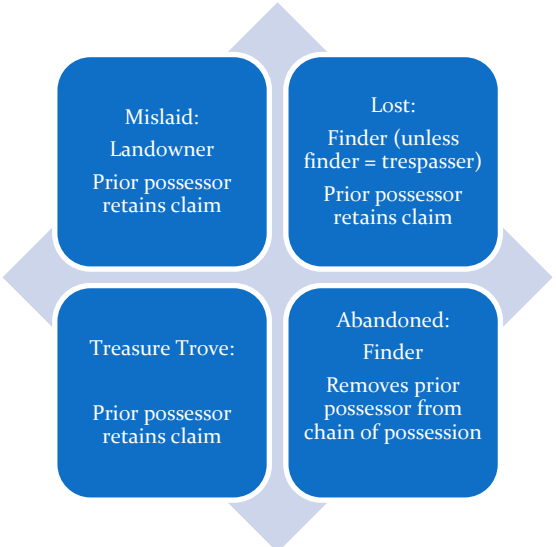
- C keeps property (A may not successfully bring action for replevin)
- A may sue B for **monetary damages**

Kotis v. Nowlin Jewelry, Inc., p. 891

Bottom line: Good faith as inherently ambiguous concept, highly subjective and dependent on judgment of people's intentions and thoughts.

Chain of Possession (Next in Line)

Rule of Law: After the original owner, must choose order of multiple claimants to personal property. Then see if statute provides for who should get it. Finally, CHOOSE ON BASIS OF CHARACTER OF PROPERTY between finder and landowner/locus of found item.



Notes:

- Character of Property
  - Mislaid
  - Lost
  - Treasure Trove
  - Abandoned
- Ignore treasure trove, it's super random and only works as a subcategory of mislaid, but the exception to landowner wins.

MENTAL STATE OR PRIOR POSSESSOR DETERMINES THE CHARACTER OF THE PROPERTY

How do we normally determine mental state?

- **Ask** the person. Option is **NOT** usually available in these cases.
- Criminal cases attempt to **infer** mental state from surrounding circumstances
- Civil cases only require what's most likely: **reasonable guess**

LOST	MISLAID	ABANDONED
Prior possessor **ACCIDENTALLY** lost possession, did NOT know he was parting with possession. Consequences: FINDER [usually] wins **Exceptions: **Trespassers** do NOT beat landowners. May contract around default (plumbers, hotels, etc)	Prior possessor **INTENTIONALLY** parts with possession but does NOT mean for it to **be permanent.** Consequences: LANDOWNER wins *Rationale: prior possessor more likely to return to PLACE where property lost.	Prior possessor **INTENTIONALLY** parts with possession, **DOES** mean for it to be permanent. Consequences: FINDER [usually] wins, **prior possessor removed from chain of possession**.

Benjamin v. Lindner Aviation, Inc., Supp. p. 38

Bottom line: Illustration of labeling character of property. DETERMINATION IS QUESTION OF FACT and is thus reviewed on appeal deferentially.

- $$$ found inside airplane in hangar. Prior possessor gone, current locus owner (plane) = Bank, finder = Benjamin
- Analysis of character of property:
  - Can't be lost – prior possessor clearly knew $$$ was in wing of airplane
  - Choosing between mislaid and abandoned
    - Go with mislaid, seems unlikely anyone would ditch $18K in Depression era
- MATTERS BECAUSE DETERMINES WHO GETS THE MONEY
- Dissent rejects majority's characterization of facts, thinks plane was drug mule

PROCEDURE FOR CHAIN OF POSSESSION

1. Prior possessor
2. Finder vs. Landowner determination
   a. Statute?
   b. Lost, mislaid or abandoned?

Who's the Finder?

- What acts do you have to perform to be the finder?
- Law makes decisions about what constitutes finding along a continuum.
- Analogous to *Pierson v. Post* case
    - Marking a boat isn't finding just as seeing isn't possessing a fox.
- Legal consequences of being a finder:
    - **Legal obligation to seek out whoever was prior possessor**
    - Rights against everyone lower than you on chain of possession
        - Can you sell the item?
            - Yes as long as buyer understands nemo dat.

What if you change the item?

- For the worse
    - Could be liable for *conversion (*Raises questions of degree of care to be taken)
- For the better
    - Increased value, likely no damages available to prior possessor.

Eads v. Brazelton, p. 102

Bottom line: Court determines finder on the basis of some kind of act (other than just locating)

- Shipwreck case, B located boat, marked boat. E put gear in position and raised boat.
- Court called E finder.

Home run baseballs p. 108

Bottom line: Considered abandoned property when they leave the field. Mobs fighting over balls, finder difficult to determine here, up to discretion of judge.

Bailments

Rule of Law: Bailments are voluntary transfers of **possession** (not ownership) to another.

- Bailor entrusts property. Bailee assumes possession
    - Note: **both sides** must agree to make a bailment.
- Bailor retains legal ownership rights
- May be done by contract, though it need not
    - In the absence of a contract, up to the court to determine degree of care
- **Bailee's duty of care:**
    - Implausible for bailee to be responsible for everything that happens.
    - Common law creates sliding scale based on who benefits from bailment
        - Bailor benefits → bailee only liable if **grossly negligent**
        - Bailee benefits → bailee responsible if **at all negligent**
        - Both benefit → bailee liable if **negligent**
- However, courts often uncomfortable with sliding scale, prefer "reasonable care" standard (although who benefits has bearing on what is reasonable)
- **Finder as quasi-bailment** – bailment-ish. Finding property is similar to bailment in that it requires the finder to exercise reasonable care.
- Bailee need not know **worth** of property that is subject of bailment, but probably no bailment if never saw property (i.e. diamond in the trunk of car)
- **Bailee's rights** depend on the agreement creating bailment

- Bailee holds possessory rights
- If property stolen, bailee may sue thief (although not if bailor sues)

Allen v. Hyatt Regency—Nashville Hotel, p. 497

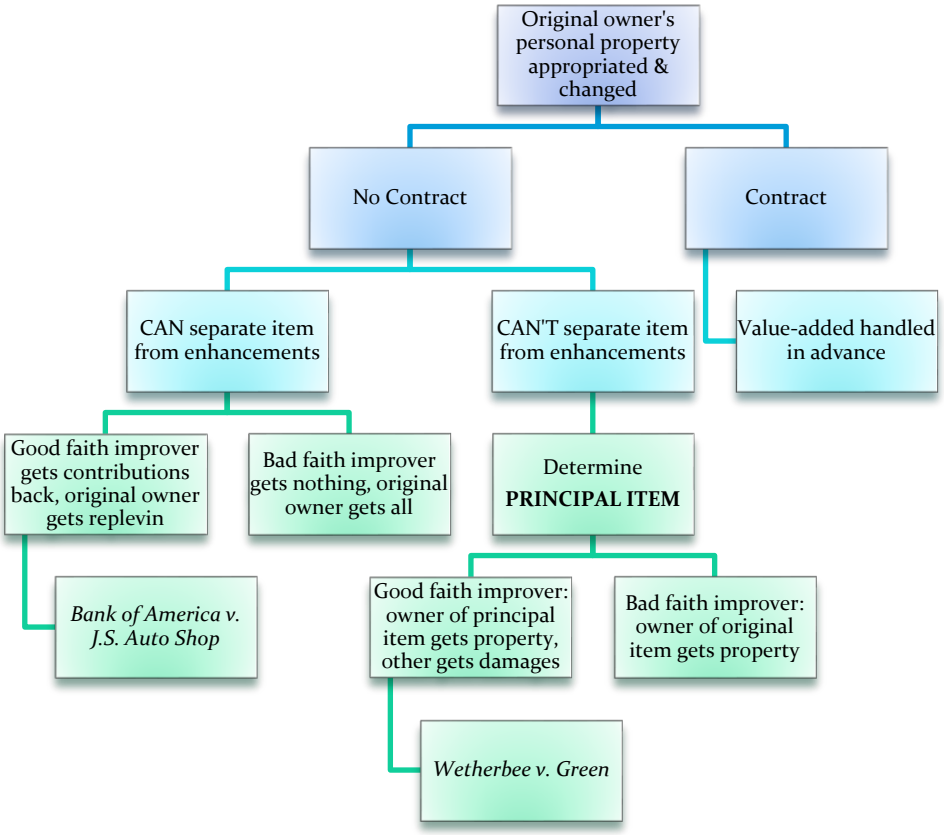
Bottom line: Bailment created when π left car in Δ garage. Bailee had duty of reasonable care. Notes precedents in which open air parking lots and/or meters do NOT create bailments

- Courts are widely split on issue of what EXACTLY a bailment is
- Factors to consider:
  - Control of ingress/egress, valet, degree of control, assumption of custody
- Court here refuses to enforce clause on back of ticket disclaiming liability.
- **Legal consequence of calling it a bailment instead of servitude = imposition of std of care**

Accessions

Rule of Law: Accession occurs when someone mistakenly takes up a physical object that belongs to someone else and transforms it through his or her labor into a fundamentally different object.

- One person adds value to an item when someone else has an ownership stake in the item
- Usually handled by K – i.e. car mfg. Amts dealing with value-added are handled in advance by K
- Difficulty occurs when NO K
  - Mistakes
  - Found property
  - Intermingling (physical or addition of labor) of things
- Remedies available if owner's **personal** property has wrongfully been appropriated



Wetherbee v. Green, p. 166

Bottom line: Example of good faith actor, inseparable items. MI court compares relative value and determines improver may keep hoops, original owner entitled to conversion damages (because value has increased soooo much that replevin is no longer fair).

- Barrel hoops case. Π acted in ***good faith***, not really a trespasser, did everything a reasonable person could do. HOWEVER, doesn't alter the relativity of title. Π had no actual right to trees

Bank of America v. J. & S. Auto Repairs, Supp p. 47

Bottom line: AZ court allows separation of improvements to car because good faith improver.

- Serious judicial split on this – At what point do the elements become inseparable?

Real Property – Building Encroachments

- Remedies available

Traditional common law approach (*Pile v. Pedrick*)

- Normal rule = trespassers don't fare well in common law
- Harsh, but requires removal of permanent trespass in the form of encroachment.
- Leaves no room for judicial discretion.

Modified approach (*Golden Press Inc. v. Rylands*)

- Reserves discretion for judge to award injunction or not
- Allows reasonable awards of damages instead of destroying entire building
- Brings trespass law into conformity with the body of law.
- ***PREFERRED JUDICIAL APPROACH***

Innocent improver statutes control in some jurisdictions

- Innocent improvers are typically given leniency, not held to strict traditional approach

Pile v. Pedrick, p. 50

Bottom line: Applies general common law response to trespassing, strict and unforgiving application. Requires removal of encroaching wall.

- Wall encroaching by less than 2 inches because of surveyor error. Trespass by ad inferos rule.

****Golden Press, Inc. v. Rylands, p. 51****

Bottom line: Appellate court relaxes traditional common law approach. Allows π to recover damages and does not require removal of encroachment.

- Court reasons injunctions are for serious situations when damages are impossible AND courts have discretion to weigh societal values. Brings trespass exception into

Producers Lumber & Supply Co. v. Olney Building Co., p. 68

Bottom line: Law is NOT sympathetic to those who "self-help" or take the law into their own hands.

- Party builds house on land they thought they still owned. Builder gets annoyed with proceedings and destroys house. Builder has to pay landowner

Wild Land

Originating Land Titles

- Quitclaim deed vs. Warranty deed
  - Nemo dat issue – can only transfer what you have
  - **Quitclaim** deed sells you house by transferring whatever seller has to buyer (even if not Blackstonian ultimate right) (so buyer takes risk)
    - MA and some other jurisdictions, this is the only kind of deed
  - **Warranty** deed involves seller guaranteeing to buyer that seller has ultimate title to house, Blackstonian ownership

Proving Land Titles

- **Action to quiet title** – lawsuit against the world in which you try to assert you can beat anyone. Attempt to prove Blackstonian title. Binding on anyone with proper notice of your action
  - Note: HUGE digression about **gold standard of property ownership: grant from European monarch**
  - In action to quiet title, may be necessary to trace back to European grant
- To determine what precisely the seller owns, looking for a chain of transactions done in conformity with the rules, in which each prior possessor had the full Blackstonian right to the land.
  - RECORDING STATUTES – designed to make it easier to trace
    - Founded in European discovery rules

CHEROKEE PROBLEM

Legal right is nearly worthless without an enforceable remedy. Judgments are not self-enforcing and require additional steps to turn a legal right into a good for the winner.

Hauck v. Crawford, p. 897

Bottom line: 3rd party good faith purchaser given equitable relief, π given damages

- Π signed lease believing transferring oil and gas rights, Δ fraudulently included mineral rights
- Δ then sold mineral rights to 3rd party
- 3rd party retains rights, π given monetary damages. (π's error won't screw good faith purchaser)

Recordation, p. 917

- LAND RECORDATION SYSTEM
    - County-by-county repository for all records with respect to land transactions in county are kept so that people have access to transactional history of land
    - Only works to the extent that all of the relevant transactions are
        - Recorded in the office
            - Law encourages (although mostly doesn't REQUIRE) people to file records
            - **Designed to attach legal consequences to failure to record, incentivize recordation**
                - Changes normal rule of nemo dat
                - A → B. If B doesn't record transaction and there is a later transaction (A → C) and C records transaction, C moves up chain of possession
        - Filed in coherent/organized way
            - Recording process is not perfect (title insurance designed to protect against this) and only goes back so far
            - Statutes deal with this by cutting off # of years required in record search

Time – ADVERSE POSSESSION

Rule of Law: Statutes of limitations impose time limits on filing a cause of action. DIFFICULT to acquire land through the passage of time because running of st. of lim. is one of many requirements (ENCROACH).

- Statutes of limitations attach to each cause of action – π owner can lose cause of action for a piece of land if fails to file within st. of lim.
    - Typically 5-40 years, with shorter statutes in Western states (but additional requirements)
    - Makes no difference how good/valid claim was
- For continuing torts (like trespassing), st. of lim. **begins running when tort is FIRST committed**
- Running of time is only the beginning of AP requirements
- **COMMON LAW ADVERSE POSSESSOR REQUIREMENTS:**

E – Exclusive
N – Notorious
C – Claim of
R – Right
O – Open
A – Actual
C – Continuous
H – Hostile

- **Exclusive**
    - Relatively few cases address this element
- **Open and Notorious**
    - Has to be visible and available to true owner if he's looking
    - Only cases in which NOT open and notorious:
        - Theoretical – AP of property 200 ft. underground (caves, gas reservoirs, property foundations) does ad inferos work in AP? never actually happens…
        - Realistic – Mistake in survey leads to small encroachment. Plainly visible, but is the property owner responsible for

knowing exactly where his property line is?

- **Claim of Right**
  - NOT objective state of affairs, subjective intentions of trespasser
    - Good faith vs. bad faith
      - Many jurisdictions claim to ignore intentions
      - BUT good faith AP tends to win WAAAY more than bad faith
      - Helmholz: most courts use good faith even when they say they don't
  - Ex: Carpenter v. Ruperto
    - Π owns property, uses neighbor's overgrown cornfield. St of lim has run. Meets other requirements of ENCROACH/AP
    - Ct. rejects AP claim because not an honest mistake, bad faith
      - IA says must have acted in good faith with reasonable belief she had the right to use the land.
- **Actual**
  - Fact-bound, specific to each case. Usually not an issue
  - Courts have generally found you must do **something** with the land
  - **Must do what a reasonable person owning THIS piece of land would do.**
    - Act in conformity with the land
  - Ex: Jarvis v. Gillespie
    - Π used land for grazing, maple, firewood, put up fence, etc.
    - Ct finds π acted in conformity with the character of the land
    - Probably on the low end of spectrum of what court will count as use
  - Ex: Lessee of Ewing v. Burnet
    - Trespassers dig out sand and gravel, ct finds this to be actual possession of land because a reasonable person would have done the same thing
- **Continuous**
  - Some question on how literally we must take "continuous" requirement.
  - Standard is usually **what a reasonable person genuine owner of this land do**
    - Accounts for vacation homes and other seasonal property
    - Burden generally rests with adverse possessor to prove std.
    - Question of fact
  - Ex: Jarvis v. Gillespie
    - Π says never gone as long as a year could have been as short as a month
      - Again, represents outer limits of acceptability
    - Ct finds reasonably continuous, VT property ok to avoid during winter

**Note: states split on seasonal occupation, some jurisdictions read continuous more strictly

  - Ex: Howard v. Kunto
    - Inept surveyors, everyone winds up owning neighbors' land
    - Current occupant only there 1 year of 10 year st of lim, tacking issue
    - Ct. oks tacking prior possessors AP trespassing
- **Hostile**
  - Objectively **NON-PERMISSIVE** – has nothing to do with ill-will or intentions
  - Nearly always there…

Jarvis v. Gillespie, Supp p. 60 – Actual or Continuous

Lessee of Ewing v. Burnet, p. 194 – Actual

Carpenter v. Ruperto, p. 203 – Claim of Right

Howard v. Kunto, p. 208 – Continuous or Tacking

Tacking & AP

- Affects "continuous" requirement
- See *Howard v. Kunto*, p. 211
- Tacking: adding periods of AP together. Generally allowed if successive occupants are in **privity** (any voluntary handing over of possession – random successive trespassers are not in privity)
    - "the deed running between the parties purporting to transfer the land possessed trad'ally furnishes the privity of estate which connects the possession of the successive occupants."
    - Under nemo dat, generally can transfer AP Irving principle spot on chain

Color of Title

- Believe you have title – have a document (will, deed, judicial decree, etc.) purporting to convey title but doesn't do so because of some legal defect.
- Most states don't require color of title to be part of AP, but it may play a role in "good faith"ness for the claim of right requirement

Exceptions to AP st. of lim: extended if in prison, lack the legal capacity to bring action, etc.

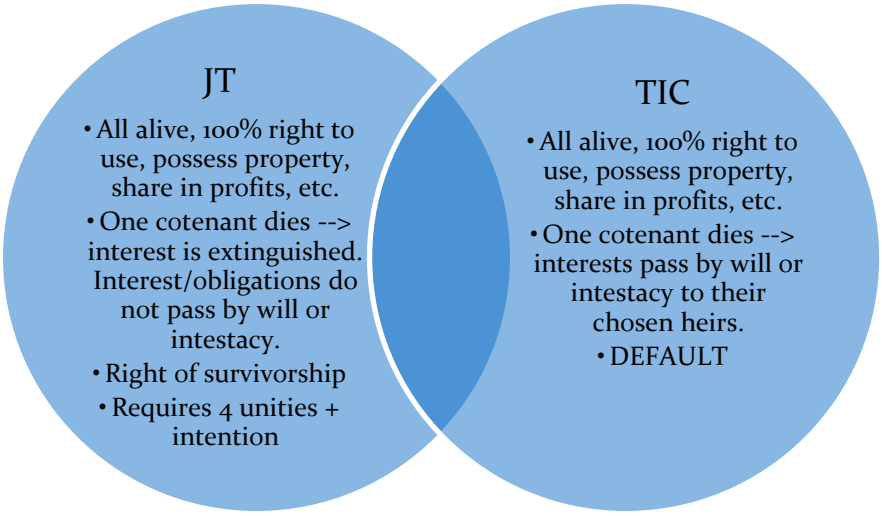
Co-tenancies

Joint Tenancies and Tenancies in Common

Rule of Law: Distinctions between JT and TIC are irrelevant as long as all cotenants are alive. Consequences appear when one cotenant dies.

PRINCIPAL FORMS OF COTENANCY FOR PURPOSES OF THIS CLASS

Tenancy in Common (TIC) **&** **Joint Tenancy (JT)**



Why choose one form over the other?

- JT is administratively easier when someone dies if you don't care what happens to stake
- TIC allows you to choose what happens to your cotenancy interest
    - Default

How do you **establish a joint tenancy?**

1. Live in a **jurisdiction** that allows JT.
2. **Intend** – must include in document creating co-ownership
   + FOUR UNITIES
3. **Time** – everyone had to get interest at the same time
4. **Title** – acquire title by same instrument or joint AP
5. **Interest** – co-owners must own the same slice of the timeline" Same temporal dimension
6. **Possession** – until recently, all owners had to have same financial stake. (NOW parties can stipulate to unequal financial stakes)

How do you **maintain a joint tenancy?**

- All six requirements must continue to be true to stay a joint tenancy
- Severance may end it

Hoover v. Smith, Supp p. 95

*Bottom line: Case requires language in deed to prove intent of parties to create JT. "establish joint tenants with **right of survivorship** and not tenants in common."*

The Rights of Cotenants

Two rights implicated in co-ownership

- **Use/possession**
    - **TIC & JT** – everyone has equal 100% rights
    - May seem contradictory – how can each party have full right to do what he wants with the land? What if the uses are at odds?
        - See *Swartzbaugh*.
- **Financial stakes**
    - **TIC & JT** – financial rights may be different stakes, but total 100%

- **TIC** - financial rights and responsibilities pass to inheritor
- **JT** – RIGHT OF SURVIVORSHIP – your financial stake and encumbrances (i.e. mortgages) disappear when you die. Other cotenants interests expand proportionally to fill the gap

Swartzbaugh v. Sampson, Supp p. 99

Bottom line: Each JT co-tenant has full use rights. Mr. lease was valid and cannot be voided.

- Married couple owns land as JT. Walnut trees (Mrs.) vs. boxing arena (Mr.) lease to Sampson

Partition

PARTITION is the most important legal remedy available to cotenants. Any cotenant can sue for partition whenever for whatever reason. AUTOMATIC RIGHT TO TERMINATE COTENANCY.

- Theoretically easy
- Practically hard
  - Qualities of land make it difficult for equitable partition (**partition in kind)**
    - Each co-owner may want same plot
    - Physical difference in land may be compensated by **owelty** – side payments
  - Partitioning may destroy value of land (See *Delfino*)
- **99% of the time: parties sell the land and divide the proceeds (partition by sale)**
  - Causes problems because even if interests began equal, doesn't provide for maintenance, repair and improvement costs incurred over the years.
  - May request **accounting**, but VEEEEERY expensive. Usually not worth it

Delfino v. Vealencis p. 637

Bottom line: Delfino liked land, had the right to stay on unless partition by sale is actually in the best interest of ALL parties. Allowed to stay but forced to make owelty payments.

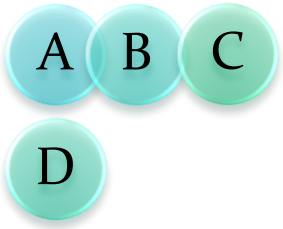
Ouster

OUSTER occurs when a co-owner affirmatively prohibits other co-owners from using their legal rights to the land.

- Note: does NOT end co-ownership, must actually demand partition for that
  - Very narrow subcategory, generally not available
- Ousted co-owner may charge the ouster a reasonable rental, but it also starts the AP clock
- Often not good option for out-of-possession owners. Only good if you want damages instead of use.
- While everyone has equal use rights, you reach a point where denying co-owners too much

Gillmor v. Gillmor p. 645

Bottom line: sheep grazing issue, essentially π charged ouster and was awarded a reasonable rental for the co-owner in possession's monopoly on the use rights.



Severance

SEVERANCE is the process of changing JT into TIC.

- May affect TIME requirement
  - A sells to buyer D, D is TIC not JT because got cotenancy later than B & C
- May affect TITLE requirement
  - A sells to buyer D, D is TIC not JT because got cotenancy in different document
- May affect INTEREST requirement

- Leases by one co-tenant sometimes construed to sever JT
- *Alexander v. Boyer* (p. 656) – ct asks whether unity of interest affected because JT no longer holds same piece of the timeline
- 7 years later, CA softens hardline of unities and examines intentions of lessor.
  - **Lease can but need not sever JT**

- Law does NOT require notice to B & C that A severed.

Note: Severance need not be permanent. Possible to realign JT interests through "fake transaction"

Harms v. Sprague p. 650

*Bottom line: Depending on jurisdiction's view of mortgages, a mortgage may sever JT making it TIC. Under **lien theory**, mortgage does NOT sever JT. Under **title theory**, mortgage DOES sever JT.*

- Note: Banks/lenders prefer title theory, want lien theory states to pass statutes making JT take land/property with the encumbrances.

The System of Estates in Land

Introduction to Estates

Important general notes:

- Land is going to go on infinitely. Legal system has to work around the fact that assets last longer than people
- Present owners can control future uses and users
- Law has an inherent preference for the transferability of land
- **Words of purchase:** determine who gets the property (grantee)
  - To Lord W, To Britney, To Amy, etc.
- **Words of limitations:** determine how long they get it (duration)
  - Ex: "for his life" "and his heirs" etc.

Heirs: CANNOT have an heir until you die.

1. Fee Simple
2. Life Estate
3. Tenancy

Future Interests:
Reversion (grantor keeps)
Remainder (s/o else gets)
Possibility of Reverter (grantor)
Executory Interest (s/o)
Right of Entry (grantor)

OWNERSHIP FORMS:

- Temporal dimensions
- At single instant of time, more than one person can be owner (co-tenancies)
  - Possible outcomes of future interest
    - Contingency occurs, future interest becomes present interest
    - "Fizzles out", definitively fails to vest
    - Hang out forever waiting to happen
      - NOTE – CHECK TO SEE IF RAP APPLIES!!!!!!!!!!

Present Interest	Examples	Typical Future Interest

Fee Simple Absolute	Grants x to M Grants x to M in fee simple Grants x to M and her heirs	None None None
Life Estate	Grants x to M for life. Grants x to M for life, then to N Grants x to M for life, then to her adult children Grants x to M for life, then to N if Condition Y occurs Grants x to M for life, then to N, but if Y occurs, then to K. Grants x to M for life, then to her children [if N is only child at time of grant]	Reversion Remainder; indefeasibly vested Remainder; contingent (subj. to RAP) Remainder; contingent (subj. to RAP) Remainder (in N); vested subject to complete defeasance Remainder (in N); vested subject to open (subj, to RAP)
Fee Simple Determinable	Grants x to M as long as Y occurs, then to O.	Possibility of reverter in O
Fee Simple Subject to Condition Subsequent	Grants x to M, but if Y occurs, the O has the right to reenter & take the premises.	Right of entry in O
Fee Simple Subject to Executory Interest	Grants x to M as long as Y occurs, then to N. Grants x to M, but if Y occurs, then to N.	Executory interest in N (subj. to N)

Life Estates, Reversions, and the Law of Waste

Life Estate

- Interest in property that extends for some person's lifespan (durational measure)
    - Note: if lifespan is anyone other than grantee, LE *pur autre vie*
- LE holder may grant/transfer property to someone else, but under nemo dat, it ends when LE ends

Granting & ending life estates:

- If original grantor has FS and grants LE, when LE ends, future interest called:
    - **Reversion** if kept by original grantor
    - **Remainder** if gives future interest to another party

Problems

- Difficult accounting for worth of life estate because imprecise durational measure
- Monitoring (especially when pur autre vie) requires successor in interest to know when LE ends

Law of Waste

- Set of legal doctrines mediating claims between future and present interest holders
    - Default rule, can be modified by K
    - Controls when interests of present and future do not align
- Law of future interests presumes reasonableness for landholders in the absence of K for present interest holders
- Future interest holder has **no** present right to use/enter land BUT law of waste allows them to control/restrain present interest
    - **Do have the right to stop LE holder from devaluing the land**
        - Includes right to compel them to pay property taxes and/or mortgage debt
        - Essentially, use and possess the land but **be reasonable**

- Generally, if LE holder **increases** the value of the property, not waste (modern trend)
    - Some jurisdictions differ on this, see *Brokaw* (in which waste is anything materially altering nature of property)
- STANDARD, not a rule
    - Takes into account facts, circumstances particular to the property
    - Expensive to litigate

What kind of **remedy** available to future holders when LE holder violates law of waste?

- No way to predict how long the LE holder's interest will be, affects the value of damages one can receive for future interest
    - EARLY law – if you catch LE holder not paying prop. tax, you get it, LE forfeits interest
    - Some jurisdiction ramp up the damages to 3x their worth (usually only for malicious waste)
    - Sometimes can get equitable remedies (positive or negative injunctions)

Brokaw v. Fairchild, p. 596

Bottom line: Court finds LE's materially altering property to increase value to be waste.

- 19th century mansion surrounded by condos. LE holder wants to maximize value. FI holders aren't worried about $$, sentimental value of house.
- Ct. holds **waste is anything that materially changes nature of property (even if increase value or worth)**

Fee Simple

FS means a grant that lasts potentially forever

- **FS Absolute** - there is NO FUTURE INTEREST. Owner has land potentially forever
    - Grantor intends to convey away everything they have to give
    - **Ex:** To Amy and her heirs.
    - Creating: can get by legitimate European grant, AP, combining all present/future interests or inheriting
- **FS Defeasible** – present interest holders possessory right is potentially infinite, but dependent on defeasibility condition.
    - **Ex:** To Amy and her heirs so long as she stays clean.
    - Potentially branching timelines exist at every moment where she could relapse
    - Grantor always has the right to create contingencies, if does, then retains some of the timelines
        - **Because there is at least one possible set of events/timeline where present interest holder controls forever (clean Amy) but others where it reverts, (potentially infinite but contingent) fee simple defeasible.**

Restatement of Property § 14

An estate in fee simple is an estate which

(a) Has a duration

(i) Potentially infinite; or (FSA)

(ii) Terminable upon an event which is certain to occur but is not certain to occur within a fixed or computable period of time or within the duration of any specified life or lives (FSD – D); or

(iii) Terminable upon an event which is certain to occur, provided such estate is one left in the conveyor, subject to defeat upon the occurrence of the stated event in favor of a person other than the conveyor (FSD – SCS); and

(b) If limited in favor of a natural person, would be inheritable by his collateral as well as by his lineal heirs. [note: FEE TAIL – not responsible]

Defeasible Fee Simples

DETERMINABLE → Possibility of reverter

- Operates just like a reversion – if the condition/contingency happens, the future interest ***automatically*** takes effect, becomes present interest, ends future interest
- Usually still need to bring action of ejectment or to quiet title to enforce POR
- *Effect on AP* – clock starts running as soon as condition broken

SUBJECT TO CONDITION SUBSEQUENT → Right of entry

- Also called power of termination
- If contingency happens, does NOT automatically end future interest
- Holder of future interest has the right to affirmatively act to end the present interest (common law, no time limit)
    - Note: Some legislatures have statutorily limited time for ROE
- Usually something in writing is enough to exercise ROE
    - Action of ejectment or to quiet title
    - Certified letter
- *Effect on AP* – clock doesn't start until ROE exercises right

How do you know POR or ROE?!?!

LANGUAGE IN THE GRANT

- Note: Some jurisdictions have abolished the FSD – determinable
- Easier to just ASK for one or the other in the grant. BE CLEAR
- Strong presumption in favor of SCS
- **Determinable**
    - To [A] so long as [A stays clean].
    - Flows, Part of the thought, "so long as" "until"
- **Subject to Condition Subsequent**
    - To [A], but if [A drinks she's out].
    - Grammatical STOP in the grant
    - Looks like an afterthought – commas, "but" "if" "subject to"

Mahrenholz v. County Board of School Trustees of Lawrence County, Supp. p. 69

Bottom line: 15 years later, M loses, school district wins. Distinction between FS defeasible determinable and FS defeasible SCS makes a difference between legal outcomes.

- Ridiculously long case in re: grant to be used "for school purposes only" and subsequent transfer
- Grantor had a BAD LAWYER – should have been clear which FS form his clients wanted AND specified exactly what school purposes meant in contingency
    - Note: precision comes at a cost – interrogating what client means takes time/resources

Remainders and Executory Interests

- Reversionary interest: refers to any future interest kept by the grantor (reversion, POR, ROE)

- Future interests aspire to become present interests. If it becomes a present interest, must be FS, LE, or tenancy
- Future interests take names **when created**. KEEP SAME NAMES when transferred.
    - Means Grantor can't create remainder in himself, but can create it in someone else and acquire a remainder through transfer

FUTURE INTERESTS HAVE FIRST AND LAST NAMES

- First name = what kind of future interest
- Last name = type of present interest it will become
- Ex: **Grantor has FSA, grant: To Amy for her life.**
    - Grantor keeps a reversion. When Amy dies, it will become a FSA. Therefore, Grantor's future interest is a "*reversion in fee simple absolute*."
- Ex: **Grantor has a LE, grant: To Amy for her life.**
    - Grantor MAY keep a reversion (depends on who dies first). If it becomes a present interest, Grantor's future interest will be a "*reversion for the life of the grantor*."

Grantors convey away future interests in transferee

REMAINDER

Future interest that can satisfy FOUR CRITERIA

1. **Interest to transferee**
2. **Capable of becoming possessory as soon as prior interest expires**
    Meaning at least one scenario or timeline in which it is possessory (usually means no waiting period i.e. "then one day later")
3. **Cannot divest the prior interest**
    Waits patiently for prior interest to expire/run its course. Cannot force present interest out
4. **Cannot come right after a fee simple defeasible**

EXECUTORY INTEREST

Future interest created in transferee that is NOT a remainder

Ex: To Amy for her life, then to Lindsay and her heirs.

Grantor has created a (present interest) LE in Amy. To determine what Lindsay gets, apply four criteria:

1. Interest to L --OK
2. No waiting period, in at least one scenario L will be alive when A dies --OK
3. Term "then" usually indicates waiting for LE to end –OK
4. Follows a LE in A, not FS-D –OK

Therefore, Lindsay receives a **remainder in fee simple absolute.**

Similarities:

- Both future interests created in transferees, not in the Grantor
- AUTOMATICALLY occur/become present interests when condition occurs
    - Only way for transferee to get a future interest that operates like a ROE is for Grantor to keep ROE and transfer it to someone else (depends on jurisdiction if possible)

REMAINDERS ARE EITHER VESTED OR CONTINGENT

Vested

1. Identifiable beneficiary ("point to him")
    - At least one person in the world can be identified (i.e. not unborn potential children).
    - Can BECOME VESTED (i.e if Amy has kid can start contingent and become vested)
2. No condition precedent other than prior interest's expiration
    - Not vested: Ex: To L for her life, then to B and her heirs IF B re-marries K
    - Prior interest running out isn't enough to transfer property to L

Contingent

- If contingent then NOT vested

Ex: To L for her life, then one day later to B and her heirs.
L = LE, B = EI (because CANNOT immediately take possession after prior interest runs out) and Grantor keeps a reversion in FS.

Note: reversion in FS because certain to occur, no fixed determinable time and it's NOT a LE (can't grant himself a tenancy)

SEE NOTES P10-21-08N, P10-22-08N, P10-27-08N FOR EXAMPLES

The Rule Against Perpetuities (RAP) p. 612

FUTURE INTERESTS SUBJECT TO POSSIBLE INVALIDATION BY RAP:

* **Executory interests (EI)**
* **Contingent remainders (CRm)**
* **Vested remainders subject to open (VRmSTO)**

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

Translation: Some existing lifespan + 21 years. Every timeline must end uncertainties within this time (by becoming possessory, definitively failing to vest, or transforming into something that doesn't jeopardize marketability) otherwise grant invalidated.

- GRANTOR'S INTENTIONS HAVE NO BEARING ON RAP
- Common law legal mechanism for invalidating grants
    - Decides if RAP invalidates *as soon as grant takes effect*.
    - Ex ante approach: doesn't matter if it actually ruins marketability, just if it could
        - Therefore RAP invalidates a lot of potentially valid interests
- RAP = Check on "dead hand control" (MS) and marketability and transferability of land (Lawson)
    - Anything other than FSA decreases marketability because future interests raise transaction costs in trying to reunite the timeline
    - Balancing marketability with landowners' ability to do what they want with their land
- Only applies to **future interests**
    - Difficulty in valuing land because of future interests:
        - Some remainders and EIs create future interests in people who don't exist yet
        - Less worried about LE because it's not forever, has to end

How do you identify a validating life? Collect 'em, count 'em, and kill 'em.

If there is a validating life, it's like to be in one of three categories or people.

Example: To A for A's life, then to B's kids and their heirs.

1. Beneficiaries of grant: A, B's kids (if B currently has kids)
2. People who can directly and specifically affect beneficiary: B
3. People who can directly and specifically affect conditions

(if not identifiable people, leave category empty)

- Goal: narrow class of people to be examined as validating life from the whole world to 1-20 people
- Law then makes you promise that by last surviving member + 21 years, interest will fix itself
- This test smokes out bad interests, **doesn't prove valid**

Ex: To A for A's life then to B's kids and their heirs. B currently has no kids.

- A = LE, B's kids = contingent remainder in FSA.
- CRm → DOES RAP INVALIDATE?
- Possible validating lives: A & B
- If both die right now, + 21 years, will the future interest still be a drag on marketability?
    - A doesn't work as a validating life
    - B does – if we assume B's death means no kids, then her life + 21 years will not invalidate future interest

Ex: To B and her heirs so long as the property is used for school purposes only, then to A and her heirs.

- B = FS-SEI, A = EI in FSA
- EI → DOES RAP INVALIDATE?
- Possible validating lives: A & B
- If both die right now, + 21 years, THERE WILL STILL BE A FUTURE INTEREST HANGING AROUND, so invalidates grant of future interest
    - Granter gets POR, A gets nothing, B gets FS determinable

Note: Be suspicious of conditions that don't depend on the actions of SPECIFIC people.

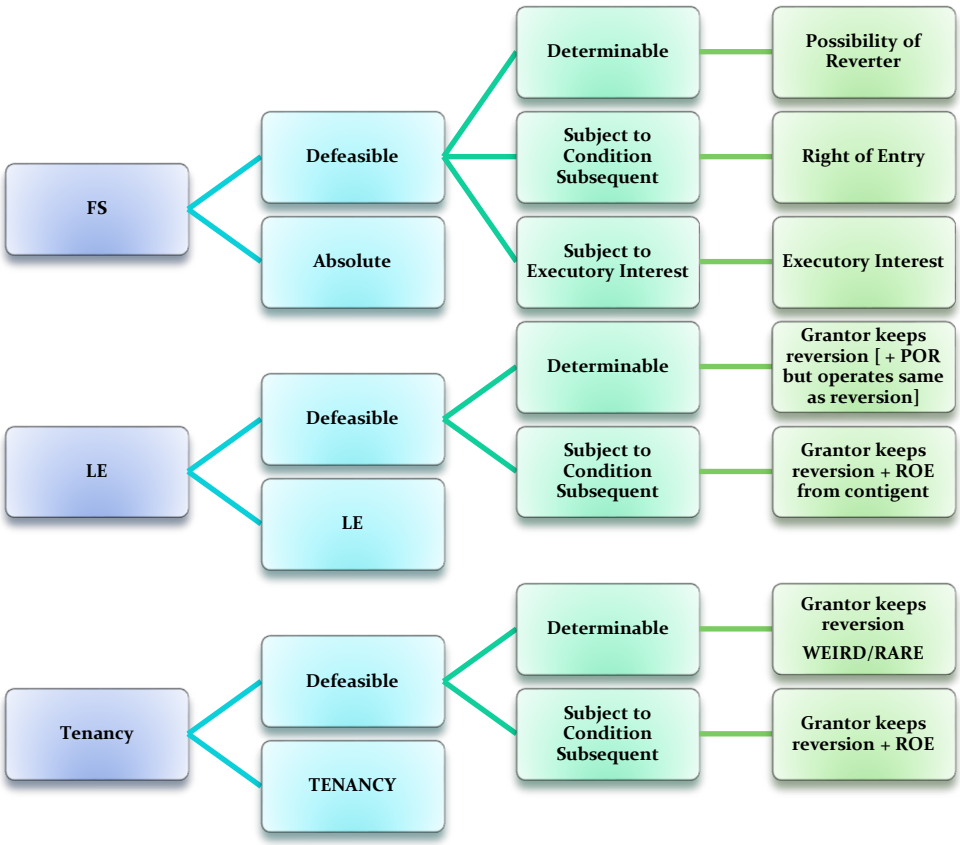
Symphony Space, Inc. v. Pergola Properties, Inc., p. 620

*Bottom line: NY uses broader RAP statute than common law RAP. No validating lives so you only get 21 years. There's at least one timeline in which option could be exercised in **23** years.*

Transferability of Property

RAP to stifle *intent* of grantors who want to create future interests that tie up marketability for a long time.

SUMMARY



Landlord-Tenant Law

Introduction

The Nature of the Leasehold Estate

See p. 689, Types of tenancies

- **TERM OF YEARS**
  - Lease has fixed ending point.
  - Requires no notice at end, just ends
- **PERIODIC TENANCY**
  - Automatically renews at end of term unless one party affirmatively ends it (with notice)
    - What counts as notice, and when must it be given?
    - WHEN – usually measured from RECEIPT
      - Lease may specify notice term
      - Common law default: periodic term or six months (cap)
      - Statutes: mechanical and technical coding to govern notice provisions (tends to shorten common law default)
      - Note that death does NOT constitute automatic notice – passes by will or intestacy until heirs give notice

        - FORM – very little common law specifications
            - Because termination of lease is transfer of property interest, Statute of Frauds requires it be **in writing**
            - Parties can agree to whatever form they want
            - Not a lot of statutes
        - If form is right but timing is wrong, law makes it valid for NEXT notice period
- **TENANCY AT WILL**
    - Dual defeasibility condition, SUPER rare
    - Under common law, no notice is required.
        - Many states and most parties will stipulate an advance notice requirement

Transfer of Leasehold Estates

Rule of Law: Presumptively, tenants and landlords can transfer interests. Parties *can* make transfer a defeasibility condition.

- Lease created, tenant has present possessory interest and landlord holds future interest in reversion

Mullendore Theatres, Inc. v. Growth Realty Investors, Co., p. 743

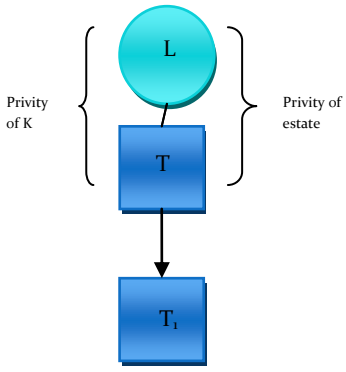
Bottom line: Some promises transfer with the property interests and some don't. The ones that transfer to successors of original parties are those which ***touch and concern the land****.*

- L-T relationship, lease had specific provision for security deposit
- If default, can use security deposit to fix the property. If not, tenant gets $ back
- WA court holds K binds original parties, not new landlord.
    - Promise to return security deposit does **not** touch & concern the land, simply affects the parties.

Is it weird that some of the provisions don't transfer, or that any do?
By allowing some of the provisions to transfer, you're binding parties to K they didn't sign – weird interaction between property conveyance and contractual element. Provisions that touch and concern the land, kind of become part of the land. ***The parties can imbue the property interests with provisions***.

Assignment and Sublease

Privity of contract: contractual obligation between landlord-tenant
Privity of estate: property obligation, including law of waste



ASSIGNMENT

- Moves privity of estate down chain of possession and is now between L-T_1, binding them
- Removes privity of estate from rel. btw. L & T
- Privity of K between L & T remains and DOES NOT automatically transfer to T_1 these parties CAN contract
- New tenant is responsible for provisions of K that "touch and concern the land" if original parties intended them to run with the land

Summary: In an assignment, L & new T have privity of estate AND some contractual provisions (those that touch and concern the land). L & old T have privity of K until released. Therefore L can sue both or either Ts if contractual provisions violated

SUBLEASE

- L & T have privity of K and privity of estate
- T & T_1 have privity of K and privity of estate
- No actual link between L & T_1. If rent isn't paid, L cant sue T_1. If T_1 has maintenance request can't ask L
    - T remains the middleman
- Legislature can change this relationship, overruling the common law and causing L & T_1 to interact
- L & T_1 can also agree to contract between themselves

Attempting to distinguish between assignment and sublease

- **If tenant transfers ALL of its future points on the timeline → assignment**
- **If original tenant keeps even one second of term, keeps reversion → sublease**
- **Distinction between assignment and sublease DOES NOT CARE about intentions of party. Unflinching conformity to what happened, not intentions.**
    - Just check to see whether original tenant kept anything

Most standard leases restrict transfers by tenants. Far fewer care about landlord transferring.

Reasons tenants might want out: plans change, businesses go under, market value increases (tenant wants to pocket increased rent)

Under common law, L can refuse consent for whatever reason (or none) unless they promise not to in lease.

Chicken Systems Case, supp. 112

Bottom line: Default under lease does not mean automatically defeasibility. L may restrict transfer. Original tenants CAN be released from privity of K if provide for it

Legal effect of assignment is to move privity of estate FROM one party TO another.

- Chester Atkins owns land, 3 guys want to make chicken restaurant, Bank = trustee
- Prohibition of transfer w/o written consent of landlord, landlord agrees to be reasonable in approval. T builds restaurant, transfers to PSI (TransfT)
- TransfT defaults, L wants its rent

Jaber v. Miller, p. 750

Bottom line: lease has defeasibility condition ending if fire. Under nemo dat, validity of underlying transfer depends on assignment vs. sublease. Courts are split on whether retaining ROE constitutes "keeping something" for the purposes of distinction.

- AK Court uses parties' intentions to determine type of transfer
- Not a lot of courts openly adopt Jaber approach without formally adopting Jaber

Kendall v. Ernest Pestana, Inc. p. 755

Bottom line: CA rules commercial lease K generally requires landlords must be reasonable focus on fitness of new tenant.

- Tenant has tenancy, increases in value, wants to transfer to earn profit. T finds TransfT who is better or as good as T. L wants $ from increased value. T sues, saying unreasonably restricting transfer.

Bad Landlords

Rights of tenants against landlord:

- Lots of changes in last 50 years. Building codes enforced by government agencies at time, by 1970s tenants became able to enforce codes against landlords.
- Three places to look to find rights
  1. Lease, K enumerates rights
  2. Statutes and enactments, mandate certain provisions true of every lease
  3. Common law, lots of things true about leases even if lease is silent

Law of waste

Covenant of quiet enjoyment – same notion as action to quiet title. Promise implied on part of L that L has a valid interest to convey to T (equivalent of a warranty deed)

- MAY contract around this
- Covenants are *independent*
  - Presumptively, breach is not a defeasibility condition. Other party must still comply with terms of lease.
  - Nonperformance by one party does NOT exclude other from performance
  - Exception: if L breaches covenant of quiet enjoyment, T can get out of the lease
- **Breach of covenant of quiet enjoyment** – L doesn't have good title or interferes with T's possessory right

Constructive Eviction

Rule of Law: L's breach is so egregious and condition of property is so altered it's uninhabitable. Close enough to eviction and law will treat as covenant of quiet enjoyment.

Notes:

- Note: very hard to prove, law is stretching covenant of quiet enjoyment
  1. Big fat **breach**
  2. Must render land **uninhabitabl**e
  3. Tenant must **leave** (necessary, not sufficient)
     a. T's departure is risky – if court disagrees with you, you could end up with old uninhabitable lease AND a new lease.
     b. Some jurisdictions will get declaratory judgment in advance so T knows if likely to win
  4. Give L **chance to fix** it
     a. What counts as reasonable chance to fix it? Depends on circumstances – jury Q

Blackett v. Olanoff, p. 703

Bottom line: L doesn't like T, puts in motion neighbor who's a pain in the ass. Limits to how far T can push doctrine of constructive eviction. L's affirmative action to annoy T

The Implied Warranty of Habitability

Name is kind of a misnomer

- Implied - Pretty express, codified in state statute
- Warranty – implies representation in K of kind of quality – couched in K, isn't since can't bargain around it
- Habitability – only sometimes concerned whether property is habitable
- The – no single unitary doctrine to make "the" appropriate. ALWAYS varies across jurisdictions

IWH changes obligation of L to T – **one way street**

- Operative effect of IWH – T not paying rent in lease is NOT sufficient to show breach by T warranting eviction

REMEDIES

- Remedies – damages or rent-reduction
    - Percentage reduction approach
        - Diff between what paying and fair rental value? Usually leads to ZERO DAMAGES
    - Hypothetical fair market value
        - Diff between what paying and what would pay in good housing market? SO expensive to get experts on this it isn't worth it

Medico-Dental Building Company of Los Angeles v. Horton and Converse, p. 712

Bottom line: Shift toward K understanding of law

- Assuming L breached provision allowing no competition for pharm. Can pharm. Terminate lease?
- Under traditional property common law, only if defeasibility condition or covenant of quiet enjoyment. Here, neither applies so T should be on the hook.
- CONTRACT law, however, allows rescission.
- If T wants to end lease, T can.
    - Breach of IWH treated like breach of covenant of quiet enjoyment
    - Dependent covenant excusing future performance

Javins v. First National Realty Corp., p. 719

Bottom line: Reading the lease is just the starting point. Statute tend to trump lease, provides for many lease conditions. Attempts to put minimum quality standard on residential housing leases.

- Check **state statutes, county/city ordinances, common law court decisions**
    - Some laws designed to target specific kinds of leases (residential vs. commercial, urban vs. suburban, single family vs. multi-unit, etc)
- The farther the departure from objective standard, the more expensive and the harder to litigate (so IWH suits aren't brought very often)
    - Building codes – puts the pre-existing building codes into the lease
        - Says L is effectively promising T compliance with codes
        - Easy to apply, clean standards. Unlikely to be a good fit for what people actually care about
            - Overinclusive
            - Underinclusive
    - Habitability standard – more closely approximates what people want
        - Still likely underinclusive because of doctrine of constructive eviction
        - Litigating habitability is like standard, it's hard and costly
            - Cost far outweighs value of slum housing
    - "Reasonable fitness for purpose" general standard – gets closer to what doctrine has in mind, difficult to know in advance if it is or is not a violation

- Nearly always, **IWH IS NONWAIVABLE**
    - It's a regulatory issue, just like you can't waive building code regulations

Bad Tenants

Abandonment vs. Surrender

Sommer v. Kridel, p. 735

Bottom line: Abandonment

- T has left premises, turned in key, permanently intended not to honor the lease
- Zero legal effect, doesn't reduce T's obligation in 1833. It **does** constitute an offer to get out of the lease.
- If L accepts, becomes surrender. Terminates property law relationship between L & T.
- Does L's acceptance of keys and releasing property prove that L accepted surrender?
    - No evidence, but not conclusive question of fact
- T responsible for damages – privity of estate terminated, but under privity of K need mitigation of damages. K law is all that is left after surrender

Summary Remedies

Lease usually has nonpayment of rent as defeasibility condition → Cherokee problem

- What about when T still on the property?
    - **EJECTMENT**
        - Problems: takes a long time, T can stay and wreck property in mean time, no incentive for T to take care of property
    - Some jurisdictions have reaffirmed **peaceful self-help** for Ls
    - Payoff for removing self-help is **quickening legal system's response**
        - Most jurisdictions have either (or both) specialized housing cts (to speed up claims) or streamlined procedure for eviction
        - Note that judgment doesn't guarantee enforcement

Berg v. Wiley, p. 428

Bottom line: Law doesn't want you taking matters into your own hands. No self-help for L.

Housing Discrimination

Common law baseline: deal or not with anyone you want, don't need to explain yourself. Lots of exceptions, and statutes have modified significantly

FHA of 1968

- Based on CRA of 1964
- Primarily targets discrimination based on race & religion

Shelley v. Kraemer, p. 456

Bottom line: K not to K transferring prop with anyone other than white people is unconstitutional.

The Fair Housing Act, p. 467

§3604 – Discimination in the sale or rental of housing and other prohibited practices

- Can't refuse to deal **because of** race, color, religion, sex, familial status (having children), disability or national origin
- Can't misrepresent unavailability on these bases
- Realtors – can't make cant make people worry about neighborhood based on protective characteristics
- Targeted ads – and people who printed/published ads -- prohibited

§3603(b) – Exemptions

- Doesn't apply to single family homes (Mrs. Murphy exception) if:
    - Can only own 3 or fewer houses to exercise exemption
    - Can only use once every 2 years
    - Realtors cannot use it
- Renting rooms – no more than four families/units if owner maintains and occupies unit as well

§3607 – Religious organization or private club exemption

- Religious purpose for having housing – seminary – is ok UNLESS membership is restricted by race, color, national origin
- Private clubs with lodgings – designed for old people communities, don't have to let in kids

FHA LITIGATION

- Must show action because of protected category
- Seldom clear & obvious proof – often have suspicion of such discrimination
- Bait with potential clients with same economic profile – expensive
- If member of protected class, apply for rental or sale and are rejected, presumptively survive 12(b)(6) because burden shifts to Δ
    - Δ's answer must explain reason for rejection NOT based on protected class, then trial proceeds on credibility of Δ's reason
    - Relaxes proof structure
        - "pretext" argument – questions sincerity of Δ's rationale
            - **proxy argument** - Δ's reason tends to correlate with protected class?
                - i.e. height
            - **disparate impact** – selection criteria results in de facto discrimination
                - often used in public housing cases
                - too expensive and difficult to get statistically significant data for small lessors

Attorney General v. Desilets, p. 471

Bottom line: Adds other bases upon which housing markets may not discriminate.

STATES CAN'T NARROW FEDERAL RESTRICTIONS, BUT MAY EXPAND THEM.

The more things regulated, the harder the litigation is. Countervailing problems = freedom of religion, freedom of association

Protecting Ownership

Nuisance and Trespass

Trespass vs. Nuisance

Trespass protects possessory interest
- Not available to future interest holders
- Broader power, narrower scope

Nuisance protects use and enjoyment rights
- Applicable for future interest holders
- Harder to get injunction

Defining Trespass

- Tort, protects possessors of property against those that violations of land in a non-permanent way
  - "Super tort" – don't have to prove damages, cuts through normal requirements
  - Exceptions – privileges: must give reasonable time to leave, can stop a crime, etc.
  - §158 – basic provision of liability for trespass
    - Need not cause harm to property owner to be liable. Anything interfering with boundaries is trespass
  - §159 – ad coelum/ad inferos rule applies to trespass
    - Airplanes – only if really low and substantially interfering with use and enjoyment of the land
  - §163 – no harm necessary – irrelevant unless trying to get monetary damages
    - Usually seeking injunction
  - §164 – if you think you own it in good faith but have bad title, still liable for trespass
    - *Wetherbee* case

Restatement (2nd) of Torts

§158 Liability for Intentional Intrusions on Land

One is subject to liability to another for trespass, irrespective of whether he thereby causes harm tto any legally protected interest of the other, if he ***intentionally***

(a) Enters land in the possession of the other, or causes a thing or a third person to do so, or

(b) Remains on the land, or

(c) Fails to remove from the land a thing which he is under a duty to remove.

§159. Intrusions upon, Beneath, and Above Surface of Earth

(1) Except as stated in Subsection (2), a trespass may be committed on, beneath, or above the surface of the earth.

(2) Flight by aircraft in the air space above the land of another is a trespass if, but only if,

a. It enters into the immediate reaches of the air space next to the land, and

b. It interferes substantially with the other's use and enjoyment of his land.

§163. Intended Intrusions Causing No Harm

One who ***intentionally*** *enters land in the possession of another is subject to liability to the possessor for a trespass,* ***although his presence on the land causes no harm to the land, its possessor, or to any thing or person*** *in whose security the possessor has a legally protected interest.*

§164. Intrusions Under Mistake

*One who **intentionally** enters land in the possession of another is subject to liability to the possessor of the land as a trespasser, **although he acts under a mistaken belief of law or fact, however reasonable**, not induced by the conduct of the possessor, that he*

(a) Is in possession of the land or entitled to it, or

(b) Has the consent of the possessor or of a third person who has the power to give consent on the possessor's behalf, or

(c) Has some other privilege to enter or remain on the land.

Defining Nuisance

- Tort, non-trespassory invasion interfering with the use and enjoyment of owner's property
- **Messy** – Law protects your interest with tort law in nuisance
- If you hold a future interest (i.e. reversion)
    - **Cannot** bring trespass action – you don't have right to possession
    - **Can** bring nuisance action
- Weighs gravity of harm vs. social utility of Δ's actions
- **NUISANCE IF SEE IT, FEEL IT AND TOUCH IT WITH THE UNAIDED SENSES**
- Nuisance isn't really about fault, just incompatibility of uses
    - Premised on who's the invader

Private Nuisance as Defined by the Restatement (2nd) of Torts

§821D. Private Nuisance

A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land.

§821E. Who Can Recover for Private Nuisance

For a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected, including

(a) Possessors of the land,

(b) Owners of easements and profits in the land, and

(c) Owners of nonpossessory estates in the land that are detrimentally affected by interferences with its use and enjoyment.

§821F. Significant Harm

There is liability for a nuisance only to those to whom it causes 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.

§822. General Rule

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

(a) Intentional and unreasonable, or

(b) Unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

§825. Intentional Invasion – what constitutes

An invasion of another's interest in the use and enjoyment of land or an interference with the public right, is intentional if the actor

(a) Acts for the purpose of causing it, or

(b) Knows that it is resulting or is substantially certain to result from his conduct.

§826. Unreasonableness of Intentional Invasion

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

(a) The gravity of the harm outweighs the utility of the actor's conduct, or

(b) 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.

§827. Gravity of Harm – factors involved

In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) The extent of the harm involved;

(b) The character of the harm involved;

(c) The social value that the law attaches to the type of use or enjoyment invaded;

(d) The suitability of the particular use or enjoyment invaded to the character of the locality; &

(e) The burden on the person harmed of avoiding the harm.

§828. Utility of Conduct – factors involved

In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important:

(a) The social value that the law attaches to the primary purpose of the conduct;

(b) The suitability of the conduct to the character of the locality; and

(c) The impracticability of preventing or avoiding the invasion

§829A. Gravity vs. Utility – Severe Harm

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.

§840. Coming to the Nuisance

The fact that the π 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.

TRESPASS vs. NUISANCE – affects standard of proof, cost of litigation, likelihood of getting an injunction

Hendricks v. Stalnaker, p. 23

Bottom line: Well vs. septic system. No bad guy, they just can't coexist.

Adams v. Cleveland-Cliffs Iron Company, p. 938

Bottom line: deals with line between trespass and nuisance

- Nuisance requires nontrespassory invasion interfering with use and enjoyment of land
- Apply restatement sections to see if it qualifies
- At issue here – **unreasonable** under §822 -- §826(a) gravity of harm outweighs utility of action?
    - Weighing nuisance claim against large civilian employer
- Jury deadlocks on risk-utility, as a matter of policy, we don't really want neighbors of industry shutting it down

Note: has been some movement toward expanding trespass view, which has blurred line between trespass and nuisance

Hydrocarbon exception of normal trespass/nuisance relationship – treated as trespass

Applying Nuisance

Harm and Utility

Rule of Law: Discretion. §826(a) may not actually depict what courts do.

Morgan v. High Penn Oil Co., Supp. p. 127

- Use of refinery is intentional invasion and interfering with use and enjoyment. NOT a trespass
- At issue = unreasonable §822
- Court doesn't use 826(a) inquiry
    - No pretense of attempting balance of utility with harm – assumes unreasonable
    - Would seem odd otherwise, free pass for companies who employ enough people so that they're never liable for nuisance
- Establishes 826(b) test – **harm caused is serious and compensation of π and similarly situated πs wouldn't shut down Δ**
    - MUCH easier to prove than 826(a)

Awarding Harm/Utility Analysis

Rule of Law: 826(a) & (b) are means to proving **liability** for nuisance. Balancing of equities is process for determining **remedy**.

Boomer v. Atlantic Cement Co. Inc., p. 956

- Nuisance claim – seems to meet 821(d), 821(f) significant harm, definitely intentional
- Rests on **unreasonable**
    - At time, Rest. only recognized 826(a)
        - Same inquiry as determination of injunctive relief
        - If nuisance claim is dependent on 826(a), they can't even get liability
- Lots and lots of πs, damages are going to be so expensive that they amount to same thing as an injunction
    - 826(b) takes this into account – requires that Δ can pay off πs without shutting down operations under alternative route to liability
    - If has potential to shut Δ down, requires separate 826(a) R/U determination
- 826(b) allows courts to make threshold determinations to create liability
    - Separate from R/U test

Crest Chevrolet-Oldsmobile-Cadillac, Inc. v. Willemsen, Supp p. 132

- Water diversion case – Glass co. improves land, diverts water onto car company. Water drains, Crest sues for nuisance (water is always nuisance, not trespass).
- Weighs 826(a) – court has to inquire whether π or Δ is more socially valuable
    - Δ probably would have won under this thoery
- Weighs 826(b) – case for π becomes a lot easier
    - I was seriously harmed. They can fix it.
    - Alternative mechanism of liability that expressly excludes risk utility
- 821(f) "significant harm" vs. 826(b) serious harm
    - Unclear which is worse, which applies a higher standard, or if they even differ

Remedying Nuisance

- 826(b) is easier and better for π IF THE REMEDY YOU WANT IS DAMAGES
- If you want injunction, you need the 826(a) determination anyway

Estancias Dallas Corp. v. Schultz, Supp. p. 142

- Establishing liability does NOT guarantee SP. Must balance the equities.
- Judge's discretion plays a role in equitable remedies (except injunction for trespass)

Spur Industries, Inc. v. Del E. Webb Development Co., p. 964

- Cattle ranch in AZ with expanding neighborhood development, residents sue for stench Δ argues we were here first.
- Doesn't matter, nuisance is just two incompatible uses
- **Does not traditionally recognize temporal priority**
    - Typically just concerned with the legal cause of the invasion
    - Here, πs are forced to pay for Δs relocation costs because π too stupid to put home in the right place

Invasions

Rule of Law: USUALLY REQUIRES TANGIBLE INVASION. Legal emanations aren't invasion. Competing businesses are not invasion w/o something passing from Δ's property to π's property. Non-invasive nuisances: garbage dump before it gets there, funeral homes, dynamite

Nicholson v. Connecticut Halfway House, Inc., Supp

Bottom line: Halfway house in neighborhood is not an invasion

- Π lives in nice neighborhood, Δ brings halfway house. Destroys property value. Π sues for nuisance
- No actual invasion, cant justify injunction. Cant get liability for decreased property value because of subjective fears of neighbors and prospective buyers
    - NOT inevitable that crime rate increases

Jack v. Torrant, Supp

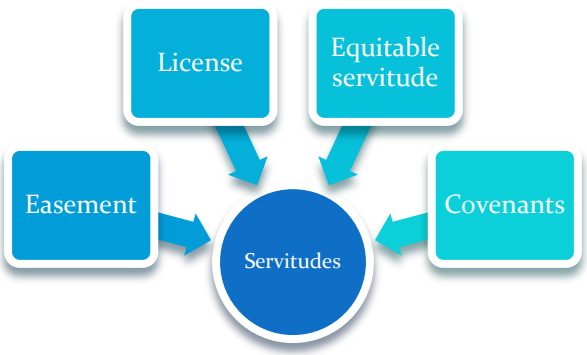
Bottom line: CT case, funeral homes are invasion because of depressing effect, grants injunction

- Nearly universally adopted – funeral homes in residential areas are nearly always enjoined as nuisance. BUT cemeteries aren't

Arkansas Release Guidance Foundation v. Needler, Supp

Bottom line: AK ct. does something weird and landowners win. If evidence shows decreased property value and real and reasonable fear for safety, nuisance without invasion.

Private Land Use Controls



Introduction

Servitudes

Servitudes are **limited use rights**, NOT possessory rights.

- Right to forbid lawful use on neighboring property or right to do something on your land that would ordinarily be nuisance
- 3rd Rest. of Property essentially tries to combine all the forms of servitudes, has had almost zero effect
- Unavoidable problem: What happens to promises made by original parties when successors in interest come along?

Baseball Publishing Co. v. Bruton, p. 972

Bottom line: Lease vs. license. THEN license vs. easement

- Permission from owner of possessory interest to put up sign, which would normally be a trespass, advertising on building wall
- Legal consequence of license: can be revoked whenever (subject to some conditions)
- If lease, greater degree of protection for signholder –MA SJC says no possessory right, not a lease
- USE right – analysis license vs. easement
- MA SJC says easement so not revocable

No legal form required for law to recognize LICENSE because consequence is pretty small – doesn't bind successors. When you die, your license dies too. Not entitled to notice in common law (may be modified by statute).

Easements

Easements vs. Licenses

- Easement is **irrevocable** (generally), licenses may be revoked whenever
- Easements run with the land and bind successors in interest. Licenses are generally not transferable

Legal form:

- Sometimes Statute of Frauds requires to be in writing (most jurisdictions). **Some recording statutes apply** (depends if requires possessory interest or any interest)
- Consequences of an easement are substantially bigger, more powerful than license.
- Writing should describe physical scope and temporal duration
    - Documents OFTEN fail to anticipate scope problems (i.e. advances in technology, growth in business, etc.)
    - Usually, easements are general, don't include detailed scope because too costly to pay for attorneys, open to litigation
- If parties intend easement, but don't comply with form → license (see *Holbrook)*

Two types of easements

- *Appurtenant* – runs with the land automatically by virtue of type of easement. Travels with transactions (gifts, sale, grant, etc.) for the term agreed upon by the parties
    - Designed to benefit the land
- *In gross* – designed to benefit specific people or entities. Passes with land for business purposes but not personal uses (usually)

Willard v. 1st Church of Christ Scientist

- Church parking lot case, church has easement on prop. Owner of prop is transferring the property

- Suggests appurtenant easement, designed to benefit the church as the owner of the piece of property. Servient tenement's transfer of interest will allow the easement benefiting the dominant tenement(church on land) to run with the land
    - Church is an interested party in the new contract, but not party to K
    - Law has weird issue with easements for 3rd parties in the document that transfers the land
        - Way around this has been to create easement in separate document prior to transaction, then the purchaser buys the land subject to an easement.
    - CA SC overrules need for two documents

Easement by implication

- Objective elements indicate the existence of easement by implication.
- INDEPENDENT of intentions of parties
    1. Convince the court that implying an easement is **necessary** for your use of the property
        a. Necessary means helpful, but unclear how helpful it must be.
        b. Standard, at court's discretion
    2. Use had **already to be in existence** when you bought the land, and had to be **apparent and obvious**
        a. This is the killer for these claims
        b. Use in question wasn't there in the 19th century when land was broken into several parts in this case

Easement by necessity/Easement by prescription

- Only concerned with access
- HARD HARD HARD claim to prove
- Property must be landlocked, absolutely cannot access land
    - Some jurisdictions allow access easements (easier to prove and neighbors can't say no)
- FREE – court will give it to you and you don't have to pay for it
- Same general idea as AP, do a wrong long enough and it turns into a right
- Imprecise and unclear compared to negotiated-for easements, creates lots of litigation
    - Very limited contexts in which they require paying the servient property owner
- How long is long enough?
    - Use AP statutes of limitations
- What do you have to do?
    - Use the land
    - Continuous? – depends on the use, can be continuously intermittent
    - Open and notorious
    - NO EXCLUSIVITY requirement
    - Hostile? Not quite like AP, varies by jurisdiction
        - Lost grant theory – permissive character of use supports the claim of prescriptive easement
        - Hostility requirement – in jurisdictions like these, permission from the landowner defeats rather than supports prescriptive easement claim

Schwab v. Timmons, p. 979

- Π bought land bordered on one side by water, on other side by bluffs. Sold off the part of their land that had access to a road, surrounded on 3 sides by other property and on one side by water

- Normal, non-idiots preserve themselves an easement when they sell land (negotiate scope, duration, defeasibility conditions, etc.)
- Attempt to invoke easement by implication – doesn't work
- Also make an easement by necessity claim. -- fails

Warsaw v. Chicago Metallic Ceilings, Inc., p. 986

Bottom line:

- Truckers follow definite course and pattern, easement for delivery trucks backing up
- CA has AP 5 years statute of limitations
    - CA says if post sign, then covered for easement by prescription, protection for owner
    - Question here: HOSTILE – was it permissive?
        - In the absence of evidence of permissive use, the presumption will be for hostile.
            - Burden rests with property owner to affirmatively indicate permissive use (i.e. "welcome trucks" sign)

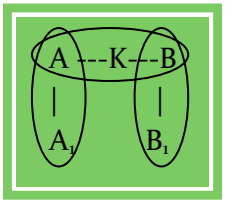
Holbrook v. Taylor, p. 997

Bottom line: irrevocable license available but rare, usually happen when failed easement

- NEIGHBOR issue – awkward to ask for easement since it implies lack of trust
- Possible to have long pattern of use that looks permissive (i.e. not hostile, so easement by prescription is impossible). May have even been intended to be an easement, but it's a license
    - License can be revoked whenever
- Have a FAILED easement (so license) and build a house accessible only by easement.
- Estoppel – court will prevent you from making unfair argument in court (here, see neighbor spend a jillion dollars to build house and then pull the license
- Doesn't last as long as easement, they only last a **reasonable time** or some time necessary to recoup what you lost
    - Tend NOT to run with the land

LIMITATIONS ON TYPES OF EASEMENTS:

- POSITIVE VS. NEGATIVE
    - Servitudes generally can be positive or negative
    - **Easements run with the land. Can't get a negative easement (usually)**
        - Pre-writing evidentiary considerations of negative easements were hard to prove
        - Narrow farm-related exceptions
        - Contracts law has allowed it, but has limited circumstances (running covenants)



Running Covenants

Rule of Law: When two parties K in re: some [usually negative] use of one of the parties' land, can sometimes circumvent the law of easements

- Circumstances in which law allowed negative use promises to run with the land and bind future parties:
    - **Enforceable K**
    - Parties **intend** for the promises to run with the land

        - Manifestation of intent: today, just say you intend it. Sometimes courts will infer intent from surrounding circumstances
        - Long ago, needed to use the word "assigns" to indicate people to whom the property was to go
    - **Privity**
        - **Horizontal privity**
            - *American rule:* As long as the promise is made in connection with a transaction involving the land, that will meet the requirements to have it bind successors
            - *To circumvent*: B transfers entire property to A, A sells it back to B and makes negative promise in document & manifests intent to run w/ land
                - "straw transaction" – manufactures horizontal privity
                - Why keep it? BIG DEAL to bind successors to land interests to K provisions to which they never agreed
            - *3rd Rest. of Property*: kills horizontal privity requirement
                - Some jurisdictions have gotten rid of it. Most have not.
        - **Vertical privity** – succeeding to exactly the same temporal interest possessed by the original party
            - Strict understanding: matters whether original landowner had FS – if successor doesn't ALSO get FS, then no vertical privity.
            - Requirement has substantially eroded over centuries
                - Generally not enforced in most jurisdictions
    - Must **touch and concern the land**

Neponsit Property Owners' Assn, Inc. v. Emigrant Industrial Savings Bank, p. 1019

Bottom line: Touch and concern the land often plays a role in deciding if covenant will run.

- Developer puts together planned residential community, wanted weird tax-like covenant of $4 to pay for community upkeep. **Intended** to run with the land, **enforceable** between contractor and original purchaser of the land. **Horizontal privity** exists under American rule.
- Subsequent purchaser doesn't want to pay tax, homeowner's assn. wants to foreclose
- *Issue:* Does the promise touch & concern the land? Open-ended/indeterminate
- *Other problem*: prop owners' assn. doesn't own any land, just a corporate shell for collecting fees

Equitable Servitudes and Subdivision Restrictions

Equitable servitudes

Rule of Law: Shorthand – take a running covenant, eliminate the horizontal privity requirement, and add the requirement of NOTICE.

- Requirements of an **equitable servitude**
    - Enforceable K
    - Intent
    - Touch and concern
    - **Notice**

Note: Eliminates horizontal privity requirement

Remedy: Presumptively equitable, i.e. injunction
Recording statutes often have the effect of requiring notice/recordation for the covenant to be binding

Tulk v. Moxhay, p. 1014

Bottom line: Issue = notice of running covenants

- Equity court says no running covenant, can't be an easement, so basically just makes up a new servitude
- Leicester Square, GB case – park owned, sells to Elms, in transaction with Elms, promises he and his heirs/assigns would keep land open and maintain as park

REMEDIES FOR RUNNING COVENANTS AND EQUITABLE SERVITUDES:

- Used to make a big difference, common law held a hard line.
  - Running covenants → Damages
  - Equitable servitudes → Injunctions
- Line has been blurred. Can get (usually) either for either now.

Residential Subdivision Developments

Issues occur when grantors/developers try to make covenants for entire neighborhoods. If gaps occur in promises made,, then there are differences in enforceability for residents. Can **only** enforce and agreement if you are one of the people to whom promises were made.

Sanborn v. McLean, p. 1036

- Development, 38/91 lots didn't include the covenants of the restrictions. Restrictions were only on 53/91 lots. Someone wants to put in a gas station. Their deed doesn't have the negative covenant, but 53 of their neighbors do.
- Court finds enough deeds want quiet residential community, enough to have notice of residential requirement/use of property.
  - Kind of a ridiculous finding, turning legal somersaults
  - Courts seem to enforce come what may, as long as there's any evidence at all.