PROPERTY

Chapter 1: General Stuff

Justifications of Property

- First Possession *(21)*
    - whoever gets there first owns it
- Locke's Labor Theory *(22)*
    - "Someone who mixes his labor with a piece of land gains an equitable claim to the land itself"

    - *Arnold v. Mundy* (N.J. 1821) – planting oysters in a public river does not give exclusive rights to harvest oysters in that part of the river
- Utilitarian Theories *(23)*
    - Instrumental justification – Hume – self-interest in our own happiness leads us to create and enforce property rights
- Property, Freedom, and Democracy *(25)*
    - Jefferson – widespread private ownership of land is essential to a successful democratic republic
        - "Farmers who owned their own land had exactly the virtues and independence needed to be valuable citizens" *(26)*
    - Friedman – private property reduces the need for central planning
    - Sunstein – "In a state in which private property does not exist, citizens are dependent on the good will of government officials, almost on a daily basis."
- Personhood *(26)*
    - Hegel – object (i.e., property) "bound up" in future plans; future plans are part of you >> personhood is bound up with the object
- Anti-property *(27)*
    - Marx, Plato, Rousseau . . .

Chapter 2: Basic Rights and Responsibilities of the Landowner

The Right to Exclude *(53)*

Trespass
- nominal, actual, punitive damages
- sometimes criminal
- c-l ejectment
- unlawful detainer (quicker statutory vehicle)

- *Jacque v. Steenberg Homes* (Wisc. 1997) *(54)*
    - *Deliverers of a mobile home trespassed across the* **π***'s land to effect a shorter delivery route, over the repeated explicit protest of the* **π***s.*

    - General rule: nominal damages only in absence of actual harm; no punitive damages *(56)*
    - HERE: Actual harm = loss of individual's right to exclude others, which may involve punishment of the offender by a large damage award despite the lack of measurable harm
        - otherwise a trespasser may deem it more profitable to pay nominal damages for the trespass – but a large punitive damages award will be effective restraint *(57)*
        - need to prevent self-help measure
    - Injunctions available if damages would be an "inadequate" remedy *(57)*

- *Maguire v. Yanke* (Id. 1978) *(59)*
    - *Yanke's cattle broke through a pasture fence and crossed to Maguire's land, causing damage to his alfalfa field. The district court allowed actual damages of $3,818 but set aside the $10,000 punitive damage award.*

    - Fence laws – a landowner with a legal fence has a CoA against another whose animals break into the enclosure *(60)*
    - Herd districts – places duty on animal owner to fence animals in (rather than requiring others to fence animals out)
    - Open range – no liability for ranging animals' damage unless they cross a legal fence *(61)*

    - No duty for a livestock owner to confine his cattle to his own land, except in herd districts, villages, cities; no liability unless damaged landowner's property is enclosed by a legal fence. *(62)*

- Externalities
    - a cost/benefit a decisionmaker will ignore because it does not affect him (in *Maguire*, e.g., damage to others' property from ranging cattle) *(63)*

- Also: environmental considerations; invasive species; law vs. local norms (e.g., ranchers in Shasta County) *(66, 67)*

Encroachments

- *Peters v. Archambault* (Mass. 1972) *(68)*
    - *Archambault house encroached on Peters' property, though neither knew it at the time that the parties acquired the deeds to their properties, and the discovery of the encroachment was accidental.*

    - A landowner is generally entitled to mandatory equitable relief (an injunction) to compel removal of a significantly encroaching structure, even if:
        - encroachment is unintentional or negligent
        - cost of removal > harm to **π** *(69)*
        - *minority view*

    - some exceptions – equitable considerations – estoppel, laches, trivial encroachment

    - *property rule* (injunction) vs. *liability rule* (equity) – cf. p. 165

- *Somerville v. Jacobs* (W.V. 1969) *(71)*
    - ***π**s accidentally built a structure on **Δ**'s land. They sought either an injunction forcing **Δ**s to sell their land or payment from **Δ**s equal to the value of the improvement.*

    - If one has made a bona-fide error in building a structure on another's land, and the other did not know of the building until after it was (substantially) completed, the other must:
        - purchase the building at cost, to avoid unjust enrichment to the other; or
        - sell the land at its value less improvements to the builder *(74)*
    - if the other had known of the error and said nothing, he would be guilty of fraud

- Accession – one finds property and converts it to a more valuable good; original owner asserts title *(79)*
    - common law: the greater the increase in value, the more likely the converter will retain title

Limits on the Right to Exclude

- *Brooks v. Chicago Downs Association, Inc.* (7th Circ. 1986) *(79)*
    - ***π**s got kicked out of a horse racing stadium and precluded from placing bets. No reason was given.*

    - Private enterprise may exclude individuals for any or no reason except on the basis of race, color, creed, national origin, sex
        - common carrier exception: trains, planes, innkeepers

- Privilege to trespass in cases of necessity – putting out fires, etc. *(83)*

- *New Jersey Coalition v. J.M.B. Realty* (N.J. 1984) *(85)*
    - Property rights evolve (expand and contract) over time in response to developing policy and social circumstances *(91)*

- *State v. Shack* (N.J. 1971) *(93)*
    - "Property rights serve human values. They are recognized to that end, and are limited by it."

- *Matthews v. Bay Head Improvement Association* (N.J. 1984) *(94)*
    - Expanded public trust doctrine to include a right of access to public lands, even if over private lands
    - *Incidental rights* associated with use of the public trust
        - "Without some means of access, the public right to use the foreshore would be meaningless . . . reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed." *(98)*

Adverse Possession *(102)*

- Basic elements (*see Notes, p. 119*)
    - Open
    - Continuous (for the statutory period, and consistent with the normal usage of ownership – *Ray* 104)
    - Exclusive
    - Actual (not just constructive – *East 13th Street*)
    - Notorious (cf. Open)
    - Hostile (nonpermissive)
    - *Clear and convincing evidence* (cf. *Ray*) vs. "substantial evidence" (cf. *Quarles*)

- *Ray v. Beacon Hudson Mountain Corp.* (N.Y. 1996) *(102)*
  - **π**s granted title under adverse possession because:
    - **π**s occupied property ~1 month/year, 1963–1988 (= most of the time that Col. Ray was on leave from the Army)
    - paid taxes on property
    - maintained fire insurance
    - installed phone and electric service
    - claimed site as voting residence
    - posted "no trespassing" signs, shuttered and padlocked doors and windows, apprehended and prosecuted vandals

- *East 13th Street Homesteaders v. Lower East Side* (N.Y. 1996) *(105)*
  - Must show *actual*, not *constructive*, possession
  - Title under adverse possession *denied* because:
    - No continuous occupancy by any given resident for ten years.
    - No privity between successive occupants; sometimes the apartments were vacant with no contact between successive occupants.
  - Despite:
    - Repeatedly breaking seal on buildings and reentering

- Justifications for Adverse Possession *(108)*
  - Avoid difficulty of resolving "stale claims"
    - old claims to title may depend on faded memories, witnesses who have died, documents that have been lost
  - Increase marketability
    - getting in touch with holder of legal (non-adverse) title can be difficult or impossible after much time has passed
  - Punishment for owners who "sleep on their rights"
  - Reliance interests of those who have long held occupancy
    - cf. estoppel

- Tacking *(111)*
  - Need for some connection between successive occupants to distinguish them from mere squatters/trespassers
  - "unbroken chain of privity"

- *Quarles v. Arcega* (N.M. 1992) *(113)*
    - Mistake vs. intent *(115)*
        - *Mistake* – no intent to claim adversely – claimant "merely intends to claim what is truly his"
            - No claim to title under adverse possession
        - *Intent* – claiming what was considered to be the claimant's own
            - "The intent to retain possession under an honest belief of ownership is adverse possession." *(116)*
            - here evidenced by a fence that was widely regarded as the boundary line, by both **π**s and other local residents; use of the fence as boundary description "in deeds dating from the early 1900s" *(117)*
    - Color of title *(116)*
        - Statutory requirement in some jurisdictions – there must be a deed that purports to convey a fee

- *Devins v. Borough of Bogota* (N.J. 1991) *(123)*
    - *Question*. Does adverse possession apply to municipally held land? (sometimes)
    - *"Nullum tempus occurrit regi"* – time does not run against the king
        - Original reasons
            - king was too busy taking care of his subjects to keep track of his land and bring suit in a timely fashion
            - king gets to make the rules
    - Nullum tempus does not apply to municipally-owned land held for non-governmental purposes.
        - Applies only when land is held for public use
        - land entirely unimproved by city, acquired by foreclosure
        - *con*
            - public should not suffer for the neg of its agents.
            - absent express direction from the State, SoL should not be read to adversely affect the state.
            - public trust >> only leg can divest the State of title
            - occupying public lands = unjustifiable public nuisance
        - *pro*
            - SoLs allow a fixed period of "repose" and avoid use of stale evidence
            - adverse possession promotes certainty of title *(125)*
            - protects possessors' reasonable expectations
            - promotes "active and efficient use of land"
    - what satisfies the "public use" test? *(127)*
        - "potential future use" by municipality

The Right to Use *(128)*

Private Nuisances

- Restatement (2d.) of Torts *(134)*
  - § 826
    - unintentional harm: **π** must show negligent, reckless, or abnormally dangerous activity
    - intentional harm: need only show "unreasonableness"
      - = harm is serious + cost of avoidance + paying cost does not make the conduct unfeasible
      - § 829(A): unreasonable: harm > "what the **π** should be expected to bear without compensation"
  - § 827 – gravity of harm
    - applies to 'intentional invasions'
    - extent of harm
    - character of harm
    - social value attached to the use or enjoyment invaded
    - suitability of the use or enjoyment to the particular locality
    - burden on the person harmed of avoiding the harm
  - § 828 – utility of conduct
    - applies to 'unintentional invasions'
    - social value attached to primary purpose of the invasive conduct
    - suitability of conduct to the locality
    - impracticability of preventing the invasion

- *McCarty v. Natural Carbonic Gas Co.* (N.Y. 1907) *(129)*
  - ***Δ** operated a 'manufactory' that caused extensive smoke, soot, and dust to settle on and about **π**'s house.*

  - Private nuisances are a question of *degree* – extent more than nature of injury *(130, 131)*
  - "It is better [] that profits should be somewhat reduced than to compel a householder to abandon his home, especially when he did not 'come to the nuisance' but was there before."

  - Factors re: what is "unreasonable" use *(131)*
    - location
    - nature of the use
    - extent and frequency of injury
    - effect on enjoyment of life, health, and property
    - intent
    - utility *(see p. 135)*

- *Prah v. Maretti* (Wisc. 1982) *(138)*
    - *On appeal from a dismissal; court decided only whether there was a valid claim for access to light for solar panels, not whether the plaintiff would win the case.*

    - Allowing **π** access to sunlight will not "unduly hinder" **Δ**'s use of adjoining land – **Δ**'s planned structure could be moved a few feet *(141)*
        - societal interest in development and encouragement of new sources of energy

    - rejection of the "ancient lights" doctrine *(140)*

- Spite fences *(144)*
- Visually offensive uses
- Unusually senstive plaintiffs *(145)*

Public Nuisances
- Most pollution nuisances are covered not by the common law, but by regulatory statutes. These typically include a "citizen suit" provision. Standards are usually health-based, rather than being based on a balancing test. *(147, 148)*

- NIMBYism
    - *Armory Park Neighborhood Ass'n v. Episcopal Church* (Az. 1985)
        - "Even admirable ventures may cause unreasonable interferences. We do not believe that the law allows the costs of a charitable enterprise to be visisted in their entirety upon the residents of a single neighborhood." *(150)*
- LULUs
    - Locally Unwanted Land Uses – statutorily-recognized land uses for which developers must make special arrangements

Remedies
- Measuring damages *(157)*
    - basic measure: [land value before] – [land value after]
    - special damages possible for injury to crops or health
    - sometimes includes mental suffering

    - other measures
        - 'special market value' – greater than market value
        - 'contract price' – what a business would have to pay for the servitude

- *Boomer v. Atlantic Cement* (N.Y. 1970) *(151)*
    - Court should leave matters of broad public policy to the legislature and focus on equity between parties presently in dispute
    - General rule: damages to **π** ≥ $100 → injunction against **Δ** *(153)*
        - here viewed as inequitable
    - *Permanent damages* awarded, and an *injunction until damages paid*
        - remanded for determination of damages
        - respect for **Δ**'s $45m investment and 300 employees
        - unlikelihood of any timely improvement in control technologies

- *Spur Industries v. Del E. Webb Development* (Az. 1972) *(158)*
    - *Feedlot (Spur), which expanded over time, emitted scents and flies that decreased the quality of life for residents of Webb's development, which had also expanded over time.*

    - Feedlot (Spur) enjoined, found not at fault but forced to relocate in the interest of public health:
        - based on scent, flies, threat to health of Webb's residents.
        - despite residents "coming to the nuisance."
    - Webb must indemnify Spur:
        - duty of courts to public when sitting in equity *(162)*
        - choice of reisdents to live in a remote area with benefits like lower costs and traffic can reasonably be expected to come at some cost. *(163)*
        - Webb brought residents to the nuisance.

- Right-to-farm statutes, protecting farmers from nuisance suits brought by suburban neighbors *(165)*

Protecting Natural Services *(167)*

- Ecosystem services – valuable economic functions (e.g., water purification) performed by land in its natural state *(174)*

- Lateral and subjacent support *(176)*
    - Lateral support – landowner at bottom of hill who removes land from hillside is liable for damage to property and structures caused by subsidence
    - Subjacent support – liability for subsidence caused by removal of minerals, oil, water

Protection from Governmental Expropriation *(179)*

The Public Use Limitation

- *Kelo v. City of New London* (U.S. 2005) *(179)*
    - majority interpreted "public use" requirement of takings doctrine to mean "public purpose"
    - deference to city's judgment that economic redevelopment was needed *(184)*
    - economic redevelopment can qualify as a public use *(185)*
    - O'Connor's dissent *(188)*
        - "Public use" does not mean "general welfare" – if the 5th amendment mean to refer to the general welfare, it would have done so explicitly, as was done elsewhere in the Constitution *(191)*

- *County of Wayne v. Hatchcock* (Mich. 2004) *(194)*
    - condemnations involving a transfer of condemned property to a private entity are for a "public use" only in three situations:
        - "public necessity of the extreme sort otherwise impracticable" – e.g., highways, railroads, canals, other instrumentalities of commerce
        - when the private entity remains accountable to the public in its use of the property
        - basis of condemnation is public concern – "facts of independent public significance" – e.g., condemning blighted housing and reconveying to private persons *(195)*
        - *local economic benefits of the future use cannot constitute "public use"*

Chapter 4: Land Sales

The Contract of Sale *(331)*

The Statute of Frauds

- Two main exceptions *(343)*
    - part performance
    - estoppel
- *What it requires:* Parties' names; description of prop; purchase price; words that demonstrate an intent to buy and sell; terms of the sale; signatures of the parties to be charged

- *Baliles v. Cities Service Co.* (Tn. 1979) *(336)*
    - **Δ** attempted to use the statute of frauds as a defense against enforcement of a contract to sell real estate for which the **Δ** had given a loan. Use of the defense barred because to allow it would have practically constituted fraud.

    - **Δ** had placed **π** in possession of land, on which **π** had partially constructed a residence. Along with this, **Δ** had given **π** a $5,000 loan. The contract between them had specified that **π** would gain title to the land once the structures were 'substantially completed' – and **Δ** sought to have the contract nullified based on the statute of frauds, which would have placed **Δ** back in possession of the land, with the improvements, **π** still $5,000 in debt.

- *Hickey v. Green* (Mass. 1982) *(339)*
    - See Rest. § 129
    - Hickeys agreed to purchase a property and residence from Mrs. Green. Hickeys, (reasonably) relying on this agreement, sold their own house; Green then told the Hickeys that she had agreed to sell to another for $16,000. Hickeys offered to match that price, but Green refused.
    - Court held Green to her original agreement based on equitable estoppel.
        - The purchase and sale agreement had not been completed, but the offer had been accepted; "no public interest . . . will be violated" if Green is held to her "precise bargain." *(341)*

Conditions - Financing

- *Bushmiller v. Schiller* (Md. 1977) *(344)*
  - ***Δ*** *sought to buy a house.* ***Δ*** *made a down payment of $13,000; the purchase was approved subject to* ***Δ****'s ability to obtain "within 10 days of the contract date, a written commitment for a mortgage loan in the amount of $100,000, for a term of 20 years at the 'prevailing' interest rate."*

  - Question: is **Δ** entitled to recover her $13,000 deposit? (no)
    - **Δ** had made no good-faith effort to satisfy the conditions of the purchase; "we cannot equate 'no' efforts with 'reasonable' efforts." *(350, 349)*
    - **Δ** was in breach of contract → loses her $13,000, must pay adverse party's costs

  - the financing condition benefits buyer; time limit benefits seller

- *Kovarik v. Vesely* (Wis. 1958) *(351)*
  - Courts will sometimes strictly enforce specifications of financing institutions in contracts of sale
    - K says loan must come from Bank X → loan from Bank Y is unacceptable

Conditions - Title

- *Conklin v. Davi* (N.J. 1978) *(352)*
  - Marketable and insurable title, not perfect title, is required for a valid sale
    - An insured title supports a claim of marketability
      - title that a title insurance company is willing to insure as valid; need not be as good as a record title
    - title may be held by adverse possession
    - marketable – "one that can be held quietly without fear of litigation to determine its validity"

- record title =! perfect title (an imperfect instrument may be recorded) *(355)*

- zoning restrictions do not constitute encumbrances *(356)*

- *Limpus v. Armstrong* (Mass. 1975) *(357)*
  - Timing provisions may not be held to be of the essence unless specifically otherwise stated
    - if both **π** and **Δ** fail to perform within the time specified, contracts may still be enforceable

Remedies

- Buyer breaches – see *Kuhn*
- Seller breaches, buyer may get:
    - lien on seller's title *(358)*
    - "benefit of the bargain" – maybe – namely if breach is in bad faith *(but see Flureau)*
    - reliance damages – out-of-pocket expenses
    - restitution – rescission – return of down payment

- *Centex Homes Corp. v. Boag* (N.J. 1974) *(358)*
    - *Before the court on Centex's motion for SJ*

    - Specific performance has historically been the remedy for seller of unique (real) property whose buyer is in breach
        - "mutuality of remedy"

    - The condominium "has no unique quality but is one of hundreds of virtually identical units" *(360)*
        - sales prices fixed
        - units sold by means of a sample
        - only variants btw units with the same floor plan is where in the building they are located

    - Centex's liquidated damages limited to Boags' initial deposit ($525); no specific performance. *(361)*

- *Kuhn v. Spatial Design, Inc.* (N.J. 1991) *(361)*
    - ***π**s contracted to buy a home from **Δ**, and in the process of so doing, falsified their mortgage application.*

    - Question: how to calculate damages? *(363)*
        - Two sources of damages
            - decreasing value of the house due to general market conditions
            - cost of holding the house until resale *(not an issue on this appeal)*

        - Buyer breaches:
            - seller can resell "in a manner that is reasonable as to method, manner, time, place and terms" *(364)*
            - defaulting buyer must have reasonable notice
            - public sale → defaulting buyer must have notice and may buy

- Seller resells, may recover:
    - [unpaid K price + incidental/consequential damages] – [resale price + expenses avoided (e.g., commissions)]
        - diverges from majority rule that damages are measured by market value at time of breach – not the resale price *(366)*
    - "reasonable time" allowed for resale – need not and generally cannot be immediate (some fluctuation in price is unavoidable)
- When seller does not resell, may recover:
    - [unpaid K price + i/c damages] – [fair market value + expenses avoided] *(365)*

- *Flureau v. Thornhill* (G.B. 1776) *(367)*
    - Refusal to give "benefit of the bargain" damages; damages limited to out-of-pocket expenses
    - Followed by approximately 15 jurisdictions

Risk of Loss

- *Skelly Oil Co. v. Ashmore* (Missouri 1963) *(369)*
    - U.S. default rule – from time of K of sale, burden of fortuitous loss is on the buyer, even if the vendor is in possession *(373)*
        - being replaced by rule placing burden on whoever is in possession *(376)*

    - "implied rights" only arise in absence of a K provision for who bears the risk of loss

- Insurance proceeds – *Raynor v. Preston*
    - English rule – seller entitled to retain proceeds free of any claim by buyer
    - American rule – *Hillard v. Frankin* – buyer entitled to insurance proceeds (prevents seller from getting windfall)

Closing the Contract: The Deed *(379)*

- Deed defined
    - A document conveying (purporting to convey) title (ultimate legal right to ownership) from grantor to grantee
- Other terms
    - *premises* – part of the deed including the names of the grantor and grantee; word of grant; background facts and purposes; consideration; description of the property ("this indenture"/"together with")
    - *habendum clause* – describes interest taken by grantee and any conditions on the grant ("to have and to hold")
    - *execution clause* – grantors' signatures, seal, date ("In Witness Whereof")
        - seal generally no longer required
    - *acknowledgment* – notary's signature
        - required by a minority of jurisdictions

- Three basic ways to describe property
    - by U.S. survey number
    - by platt number
    - metes & bounds

- Deed construction *(382)*
    - irreconcilable conflict → granting clause controls over habendum clause

- Delivery
    - need *intent to convey + actual conveyance of deed*
        - no conveyance = presumed lack of intent
        - conveyance = presumed intent (and acceptance)
        - cannot convey to recipient unwillingly (*Hood v. Hood*, p. 384)

    - *Wiggill v. Cheney* (Ut. 1979) *(384)*
        - grantor retains sole possession and control of deed until death → no actual conveyance

Chapter 5: Title Assurance

The Record System *(445)*

Types of recording acts
- notice
- race
- race-notice

Statutory conditions of protection – purchaser without notice
- *Mister Donut of America, Inc. v. Kemp* (Mass. 1975) *(452)*
- *Gagner v. Kittery Water District* (Me. 1978) *(454)*
- *Miller v. Green* (Wisc. 1953) *(457)*

Statutory conditions of protection – purchaser for value
- *Daniels v. Anderson* (Ill. 1994) *(465)*

Chapter 7: Dividing Ownership Across Time

Present Interests in Land *(571)*

- Terminology
    - *transferee* – third party who holds a future interest for someone
    - *words of purchase* – who takes the estate
    - *words of limitation* – what type of estate

    - *inter vivos* – transfer during the owner's lifetime

    - *per stirpes* – inheritance through fee simple absolute; property is proportionately divided between beneficiaries according to their intestate ancestor's share

- Fee Simple Absolute *(572)*
    - Greatest estate in land recognized by the law
    - No transfer of the estate during owner's lifetime >> transfer by will or succession
    - Words of limitation
        - traditionally, "to B and the heirs of his body"
            - not "A to B to hold forever" or "A to B in fee simple absolute"
        - general abandonment of formal language requirement; today's courts tend to default estates to fee simple absolute unless otherwise specified *(policy of marketability)*

    - Inheritance
        - Through a will, a *testator* pases real property to a *devisee* and personal property to a *legatee.*
        - If an owner dies *intestate,* his property will go to his *heirs* as specifed by the *statute of descent.*

- Fee Tail *(574)*
  - Stipulation in a transfer of land that it stay in the family
    - "to B and the heirs of his body"
  - generally abolished *(policy of marketability)*
  - *fee simple conditional* – limitation on the fee tail that permitted the future breakup of estates *(575)*

- Life Estates *(577)*
  - Current landowner's (attempt to) control future ownership
  - Words of limitation
    - "to B for life, then to C"
      - B gets life estate; can possess but not destroy the land
      - C gets *remainder* in fee simple absolute
    - "to B for life"
      - A holds implicit *reversion interest*
  - Transferable inter vivos
    - conveying an interest to X gives X a life estate *pur autre vie* (estate measured by another's life)

- Defeasible Fees *(578)*
  - Fee Simple Determinable
    - also "fee simple on a special limitation"
    - automatically ends ("determines") upon occurrence of a specified event
      - A holds *possibility of reverter*
    - words of limitation
      - "to B so long as the land is maintained in its natural condition, otherwise to revert to A"
      - "so long as," "until," "while," "during"
    - SoL for adverse possession begins as soon as the condition is violated

  - Fee Simple Subject to Condition Subsequent *(579)*
    - like determinable, but no automatic reversion of title
      - grantor gains a right of entry
      - grantor can file suit of ejectment
    - words of limitation
      - "on the (express) condition that"
      - "to X, but if . . . then A may enter and retake"
      - "to B, provided, however, . . ."
    - SoL for adverse possession begins running only after right of entry is exercised
      - there may also be a SoL for the right of entry

- Fee Simple Subject to Executory Limitation *(580)*
  - sometimes ". . . Executory Interest"
  - triggering condition transfers title to a third party
  - words of limitation
    - "A conveys Greenacre to B so long as the land is undeveloped, and then to C"

- Covenants *(581)*
  - A contract regarding land's use – grantor can use to enforce its provisions

- Defeasible fees have been historically held too speculative to be transferable inter vivos; also, intestate deaths may produce multiple heirs with complex resulant title issues

- *Marhenholz v. County Board* (Ill. 1981) *(581)*
  - deed said "this land to be used for school purposes only; otherwise to revert to Grantors."
    - = fee simple determinable (limited grant, not full grant subject to a condition)
  - "only" plus "revert" equals fee simple determinable

- Presumption against forfeiture – promote freer marketability *(585)*

Future Interests *(588)*

- Terminology
  - *shifting interest* – cuts short a previously granted estate (cf. modern divestment by executory interest)
  - *springing interest* – a freehold estate that comes into existence after a triggering condition (cf. modern executory interest)

- Classification
  - Future Interests Retained by the Grantor
    - *reversion* – an interest held by the grantor of a life estate, fee tail, or leasehold
    - *reversion in fee simple absolute* – what A holds when A (in f.s.a.) grants B a leasehold
    - *reversion in a life estate*

    - *possibility of reverter* – follows fee simple determinable
    - *right of entry* – follows fee simple subject to condition subsequent

- Future Interests in Transferees
  - remainder
    - "A to B for life, then to C and his heirs" (C's interest)
  - executory interest
    - "A to B so long as no house over two stories is built on the premises, then to C" (C's interest – would *divest* (cut short) an earlier estate)
- Complex estates
  - "A to B for life, then to C for life, then to D so long as the property is used for residential purposes"

- Trusts *(593)*
  - Historically, "active use"
  - A conveys to *trustee* T real and/or personal property in a *trust*, to hold and manage for the *trust beneficiary* B.
  - T holds legal title.
    - may sell property in the trust and reinvest.
  - B holds equitable title.
  - may be dissovled by consent of the beneficiaries.

- Shelley's Case *(593)*
  - "A to B for life, remainder to the heirs of B" interpreted as "A to B and his heirs" = fee simple absolute
    - prevented grantors from dodging the payment of *incidents*
  - intervening estates
    - "A to B for life, then to C for life, remainder to the heirs of B" – only delays application of Shelley's Rule

- Doctrine of Worthier Title *(594)*
  - "A to B for life, remainder to the heirs of A"
    - held invalid: A has a reversion interest; grant gives nothing to A's heirs
    - what if B died before A? – at that point A has no heirs but only *heirs apparent*
  - widely abolished

Vesting of Future Interests *(595)*

- Vested interests
    - No contingency that must be met before the interest can become presently possessory (other than the natural termination of the preceding estate)
    - Persons(s) who will be entitled to possession are immediately ascertainable
    - most vested remainders are indefeasibly vested

    - *vested remainder subject to complete defeasance (596)*
        - "A to B for life, then to C, but if C does not survive B, then to A" (for C)
            - *vs.* "A to B for life, then to C, if she survives B"(C has contingent remainder)

    - *remainder interest subject to partial divestment* (or *"subject to open"*)
        - "A to B for life, then to B's children"
            - B has no kids at time of conveyance to B: B's kids have contingent interest
            - One kid (C) at time of conveyance: C has *remainder interest subject to partial divestment*
            - how does this differ from "A to B for life, then to B's heirs?"
        - "O to A for life, then to children of B"
            - passes to only such children of B as are living when A dies
                - later kids = no
                - coming back to life = no

- Contingent interests
    - not vested

    - *contingent remainders*
        - "A to B for life, then to the heirs of C" (for C's heirs)
            - *contingent because C's heirs are not immediately ascertainable*
        - "A to B for life, then to C, if she survives B" (for C)
        - generally saleable nowadays

    - *alternative contingent remainders*
        - "A to B for life; then to C, if she survives B; otherwise to D" (for C&D)
        - "O to A for life, then to B if B reaches 21, otherwise to C"
            - if B dies before C is 21, property revers to A until C dies or turns 21

- *destruction of contingent remainders*
    - "A to B for life, then to C when she turns 21"
        - if B dies before C is 21, property revers to A; C's interest evaporates
    - *merger*
        - multiple interests in a property merge under a single owner
        - e.g.,
            - lessee acquires reversion interest >> f.s.a.
            - life tenant sells his life estate to holder of remainder >> f.s.a.

Rules Promoting Alienability and Marketability

- The Rule Against Perpetuities *(601)*
    - Classic formulation: "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."

- Restraints on Alienation *(621)*
    - Direct vs. indirect restraints
    - Scope
        - Total (prohibits all transfers)
        - Partial (limits transfers for a specific period of time)
    - Method
        - Disabling (withholds all power of alienation)
        - Forfeiture (interest lost upon attempt to transfer)
        - Promissory (contract remedies in case of attempted transfer)
    - Nature

Type of Restraint	Fee Simple	Life Estate	Leasehold
Disabling	Invalid	Prohibited	Okay
Forfeiture	Invalid	Okay	Okay
Promissory	Possibly okay	Okay	Okay

Restraints on Alienation *(621)*

- *Alsup v. Montoya* (Tenn. 1972)
    - General presumption against restraints on alienation
        - Three daughters were granted life estates, remainder to the children; daughters could not alienate; they wanted to sell the land and reinvest because it was not being put to good use
    - **Emphasis on what the original grantor's intent *would have been* if he knew the actual circumstances of his successors in title** *(here, grantor had apparently expected the land to be used actively for farming, which it was not)*

- *Mountain Brow Lodge No. 82 v. Toscano* (Cal. App. 1967) *(626)*
    - "Said property is restricted for the use and benefit of the second party, only; and in the event the same fails to be used by the second party *or in the event of sale or transfer by the second party of all or any part of said lot*, the same is to revert to the first parties herein, their successors, heirs or assigns." (emphasis added)
    - Restraint on alienation = void
    - Restraint on use = fee simple subj. to condition subsequent
    - *goal of deed construction is to determine the intent of the grantor*

- *Horse Pond Fish & Game Club v. Corkier* (N.H. 1990) *(630)*
    - In order for restraints on alienation to be valid, "they must be reasonable in view of the justifiable interests of the parties." *(631)*
        - A restraint on alienation requiring unanimous agreement of Club members before Club land could be sold would generally be considered unreasonable
    - *Exception for charitable entities* – the restraint on alienation would be OK *(632)*

- Indirect restraints (e.g., *Horse Pond*) voided if they "offend some independent notion of desirable public policy" *(633)*
- Restraints on marriage sometimes upheld
    - Father to Son until Son marries = ok
    - Father to Son so long as Son does not marry before age 25 = ok
    - courts suspicious of provisions encouraging divorce, restricting familial relationships; those concerning religion, education, occupation
- Charitable exception

- *Policy stuff re: alienation*
    - Marketability of land = good
    - No tying up of property
        - banks want security, e.g., property, for loans → restraints on alienation hinder acquisition of credit
    - Inability of grantors to see far into the future
    - Let the land be controlled by the living, not the "hand of the dead"

Protection of Future Interests *(634)*

Avoiding Waste

- Kinds of waste *(638)*
    - *affirmative waste* – deliberate damage (strip mining; dumping; clear-cutting; punching holes in the wall)
        - exception – when a resource (like oil) is already open
    - *permissive waste* – more than normal wear and tear
        - life estate holders must pay property tax, mortgage interest (but not principal), insurance premiums; keep property in good repair *(636)*
    - *ameliorative waste* – changed use of property w/ increased value
        - what was grantor's intent?
        - what were remaindermens' expectations?

- Remedies *(640)*
    - Damages – only for reversioners and indefeasibly vested remaindermen
        - sometimes treble damages upon a showing of maliciousness
    - Injunctions – for holders of contingent interests
        - relatively high standard to obtain court action
    - Forfeiture (in minority of states)

- *Moore v. Phillips* (Kan. App. 1981) *(634)*
    - SoL for waste does not commence until end of the relevant tenancy
    - No obligation for remaindermen to sue for waste before the death of a life tenant; option only; can wait until after death

    - life tenant has duty to maintain the property

    - When holders of current and future interests must work together
        - sale of property
        - encumbering property with debt (e.g., mortgage)
        - condemnation
        - change of use in defeasible fee

- *Baker v. Weedon* (Miss. 1972) *(641)*
    - Holder of life estate wished to sell the property because it was not providing her with adequate support (through rental as farmland). Grandchildren of grantor were remaindermen; they objected to the sale as economic waste.

    - Need for "necessity" before court-ordered sale – to be "exercised with caution and only when the need is evident" *(645)*
        - "Deterioration and waste of the property is not the exclusive and ultimate test"
        - consider also *best interests of all the parties* – both life tenant and remaindermen
    - Full sale would cause "great financial loss" to remaindermen

    - *Equitable remedy:* sale of part of the land to provide for life tenant

Protecting Future Interests in Eminent Domain

- *City of Palm Springs v. Living Desert Reserve* (Cal. App. 1999) *(646)*
    - Benefactor gave the Living Desert Reserve to the City, reversion interest in grantor if property no longer used for "the exposition of desert fauna and flora." City wanted to turn it into a golf course and adopted a "resolution of necessity" stating that acquiring the reversion interest was necessary for "the public health, safety, and welfare" → city could then make golf course without losing title.
    - Was the reversion interest compensable? *(here – yes)*
        - Not in absence of "exceptional circumstances" *(649)*
        - "Exceptional circumstances" = e.g., "otherwise reasonably imminent" violation of use restriction
            - "otherwise" = apart from condemnation proceedings
            - voluntary violation of use restriction was rsbly imminent here because condemnor was also grantee (condemnation only taking place because City wanted to make golf course)
            - condemnation of future interest <> divest City of present interest in the land → could have continued using Land pursuant to use restriction *(decision to violate = voluntary)*
        - possibility of reverter was not remote *(652)*
    - High standard of conduct for pub. entities – "Public entities should exemplify equitable conduct" *(653)*

- Valuing future interests – calculations of present value *(654)*

Chapter 8: Landlord Tenant Law

Leasehold Estates *(658)*

- Terminology
    - *Term of years* – fixed duration
    - *Periodic tenancy* – continuous; notice required for termination
    - *Tenancy at will* – terminable at any time
    - *Tenancy at sufferance* – wrongful continuance of possession
        - landlord can treat "holdover tenant" as trespasser & sue to evict, or hold tenant responsible for rent

Tenant Rights and Remedies *(659)*

The Right to Possession

- British Rule – landlord must provide physical possession
    - denial of any portion of the premises → tenant can rescind lease unilaterally
        - tenant can also recover "loss of bargain" dmgs ([cost of other comparable housing] – [contract cost]) & consequential dmgs (moving expenses, etc.)
    - no rescission → tenant can recover dmgs for diff in val; lost profits; cost of substitute premises; possibly legal fees for removing holdover tenant
- American Rule – landlord need only provide legal possession *(661)*

- When tenant is not liable for bldg burning down
    - Tenant rents only a portion of the bldg
    - Bldg was necessary to meet the purposes for which the land was expressly rented

The Right to Quiet Enjoyment

- Can be breached only if a tenant has actually taken possession. (If tenant has not taken possession, right to possession may have been violated.) *(669)*
    - can only be breached by action directly attributable to the landlord *(670)*
        - *Stewart v. Lawson* - landlord not liable for noise of other tenants
        - growing trend to hold landlords liable when the landlord could control the offensive use
            - *Blackett v. Olanoff* - held that tenants had been constructively evicted by the noise from a cocktail lounge that leased from the same landlord
    - actual and partial evictions both require *substantial interference* – more than *de minimis*

- *Barash v. Pennsylvania Terminal Real Estate Corp.* (N.Y. App. 1970) *(662)*
    - **π** alleged "partial actual eviction" because landlord had not provided the promised "continuous flow of fresh air" without which the office building became "hot, stuffy, and unusable and uninhabitable" by 7 PM.
        - lease did not specifically provide for 24-hour air circulation → no (partial) actual eviction w/o reformation of lease

    - eviction = *a wrongful act by the landlord* that deprives the tenant *of the beneficial enjoyment or actual possession* of the premises *(664)*
        - actual eviction = ends physical possession
            - remaining in possession → no actual eviction
        - constructive = substantial and material deprivation of beneficial use and enjoyment of premises

    - Lack of air flow "is analogous to . . . a persistent offensive odor, harmful to health, arising from a noxious gas or defective plumbing" → constructive eviction *(665)*
        - substantial reduction of beneficial use of premises

- *East Haven Associates, Inc. v. Gurian* (N.Y. 1970) *(666)*
    - Landlord **π** sued for rent; **Δ** claimed no duty to pay rent because of a constructive eviction: A/C emitted "quite steadily a green fluid and a stream of water overflow" that fell on the terrace; ashes from incinerator fell on terrace → terrace effectively unusable → **Δ**s abandoned terrace despite its being a major reason they rented the premises
        - court found partial constructive eviction → treated like partial actual eviction → **Δ**s got $
    - "Abandonment must occur with reasonable promptness after the conditions justifying it have developed" *(667)*
        - Terrace was abandoned but not the rest of the premises

    - "The very idea of requiring families to abandon their homes before they can defend against actions for rent is a baffling one in which decent housing is so hard to get, particularly for those who are poor and without resources. It makes no sense at all to say that if part of an apartment has been rendered uninhabitable, a family must move from the entire dwelling before it can seek justice and fair dealing."

The Warranty of Habitability

- Developed primarily out of concern for the urban poor (e.g., NY Tenement House Act of 1867)
    - persistent problem with lack of enforcement

- *Javins v. First National Realty Corp.* (D.C. 1970) *(672)*
    - Warranty of habitability "implied by operation of law"
        - reversed old assumption that the land, not the structure, is what tenants value
        - Those seeking shelter seek "a well known package of goods and services" including heating, lighting, ventilation, plumbing, sanitization, etc. *(674)*
            - urban tenants are not interested "in the land, but solely in 'a house suitable for occupation'" *(677)*
        - lessee no longer required to make repairs: no time, no resources, no long-term interest *(675–6)*
    - analogy to consumer protection cases – modern housing is like other commodities such as cars
    - protection of tenants' legitimate expectations
        - also, emphasis on statutory housing regulations *(678)*

    - *Policy*. "Poor housing is detrimental to the whole of society, not merely to the unlucky ones who must suffer the daily indignity of living in a slum" (*678)*

    - Invoking the implied warranty of habitability does not require abandonment *(cf. constructive eviction)*

- Tenant must give landlord notice of the problem before filing suit for breach of warranty of habitability *(682)*
    - Remedies: rescission and damages
    - Self-help *(684)*
        - rent withholding
        - abatement – redux in rent equal to redux in value of property
        - repair and deduct – tenant fixes problem; deducts costs from rent
    - Warranty is generally unwaivable *(685)*
    - Retaliatory evictions generally forbidden

- Warranty generally does not apply to commercial leases (exception: TX)

- Discussion of the effectiveness of the Warranty of Habitability *(686)*

The Right to Assign and Sublet

- Assignment *(700)*
  - Tenant
    - assigns lease → transfers entire estate, no longer in privity with the landlord
    - Still in privity of K → remains personally liable on leasehold obligations for duration of term
  - Assignee
    - Not in privity of K with landlord
    - Is in privity of estate → Bound to perform leasehold covenants, e.g., rent and repairs
    - Privity of estate ends if assigned to another

- Subletting
  - Tenant
    - sublets → transfers less than entirety of estate (e.g., 6 mos of 2 year term)
    - In privity of K & estate with landlord
  - Sublessee
    - No privity of K or estate with landlord
    - No leasehold covenants enforceable against sublessee
    - *Is* in privity of K and estate with orig. tenant → tenant effectively becomes landlord & holds reversionary interest
  - law allows absolute restraints on alienation of leaseholds (possible damage to landlord's property interests, e.g., sublessee doesn't pay rent & orig. tenant can't be found → landlord loses $)

- *Funk v. Funk* (Id. 1981) *(701)*
  - When subletting is allowed in lease & subject to approval of the landlord, sublessees may only be *reasonbly refused* – no arbitrary refusal (minority rule)
    - "No desirable public policy is served by upholding a landlord's arbitrary refusal of consent merely because of whim or caprice or where, as here, it is apparent […] consent was withheld for purely financial reasons" – landlord wanted to "enter into an entirely new lease agreement with substantial increased financial benefits to the landlord." *(703)*
  - *Standard of review:* whether "a reasonable person in the position of a landlord owning and leasing" land of the subject property's type would lease to a given tenant
    - "from the point of view of *any* landlord" – *Planned Parenthood v. Yeshiva (706)*

Landlord Rights and Remedies *(707)*

The Landlord's Rights
- Tenant cannot:
    - commit affirmative waste
    - (historically) commit permissive waste (though the burden to keep the premises in good repair is shifting to the landlord)
        - ". . . the lessor is in the better position, from the viewpoint of economic situation and interest, to make repairs" → no duty for lessee to repair absent a specific covenant

Rent
- Lessees need pay no rent unless lease expressly so requires *(708)*
- When commercial rent is entirely based on % of sales, the business has a duty to continue operating

- Rent control – used during wartime – arguably counterproductive otherwise (cap on rent → landlord economic situation deteriorates → housing deteriorates → slums persist or worsen)
    - housing as "necessity of life" *(709)*

The Landlord's Remedies – Regaining Possession *(712)*
- Apply when the tenant is in breach but refuses to move out

- Forfeiture of the lease
    - Common-law remedy – in disuse b/c of modern leases & statutes – usually superceded by provisions in lease that specifically provide for termination in certain circumstances
        - statutes in 40 states allow for eviction following nonpayment of rent
    - Trad'ly, tenant breach does not allow landlord to enter & retake (only allowed action for damages, specific performance, or injunctive relief)
    - Still relevant in two contexts *(713)*
        - 1. leads courts to interpret narrowly the categories of breaches that can lead to forfeiture of a lease
        - 2. courts often view acceptance of rent after a breach as a landlord's waiver of right to terminate/evict
            - *Community Housing Alternatives v. Latta*
            - *Winslow v. Dillard* (waiver even though lease stated delay in default does not waive breach)
    - Summary Proceedings *(714)*
        - can take a really long time – possibly months or even over a year

- *Berg v. Wiley* (Minn. 1978) *(715)*
    - Landlords must make use of judicial remedies when attempting to dispossess a tenant who has neither abandoned nor voluntarily surrented the premises, but claims possession adversely to landlord
        - self-help is generally outlawed *(721)* – otherwise required to be peaceable

    - Traditional common-law rule for when self-help is OK *(718)*
        - landlord is legally entitled to possession
        - means of reentry are peaceable

    - Entering with assistance of locksmith and changing locks not OK because:
        - Not accomplished in a peaceable manner
            - *Gulf Oil Corp v. Smithey* (TX) – locking tenant out was forcible as a matter of law
        - Any self-help reentry against a tenant in possession is wrongful

    - *Policy (720)*
        - The potential for violent breach of peace inheres in any situation where a landlord attempts by his own means to remove a tenant who is claiming possession adversely to the landlord

- Other remedies for the landlord *(722)*
    - *distress* – also *distraint* – allows a landlord to seize personal property on the premises as security for rent
    - *statutory lien* on tenant's personal property on the leased premises

- Constitutional limitations *(723)*
    - Retaking possession of premises without using judicial machinery → no state action → no due process violation

The Landlord's Remedies – Damages *(723)*

- Apply when a tenant moves out and refuses to pay rent

- *Surrender of the lease* – landlord can treat tenant's actions as offer to surrender the lease and accept the offer → lease is over; landlord can relet
- *Reletting on the tenant's account* – landlord can recover from the breaching tenant for the difference between old rental rate and new rental rate
- *Damages for anticipatory breach* – landlord can recover anticipated difference between old rental rate and reasonable rental value

- *Austin Hill Country Realty, Inc. v. Palisades Plaza, Inc.* (Tx. 1997) *(724)*
    - Landlord has a duty to mitigate damages from a breach of lease (≈ contract law duty)
        - Cannot claim damages for entire rental rate without first attempting to find a new lessee

    - *Policy (727)*
        - Discourages economic waste & encourages productive use of the property
        - Helps prevent destruction of or damage to the leased property
            - property sits vacant → increased chance of accidents or vandalism
        - Consistent with trend disfavoring contract penalties
        - Recognizes that leases are not personal in nature but essentially business arrangements

    - How to discharge the duty to mitigate *(728)*
        - "objectively reasonable efforts to fill the premises"
            - "not an absolute duty" – tenant must be "suitable under the circumstances" *(729)*
        - failure to mitigate bars recovery by the landlord to the extent that damages reasonable could avoided (not an absolute bar)
        - tenant bears burden of proof re: whether landlord has mitigated and to what extent

    - When duty to mitigate arises
        - when suing for "anticipatory repudiation"
        - not when lease is maintained and suit is filed as rent becomes due unless:
            - landlord actually reenters, or
            - lease allows landlord to reenter without accepting surrender, forfeiting the lease, or being construed as evicting the tenant

- *Aurora Business Park v. Michael Albert, Inc.* (Ia. 1996) *(730)*
    - Acceleration clauses = valid expansions of landlords' remedies *(731)*
        - Rest. (2nd) of Property, Landlord & Tenant § 12.1 cmt. k
    - Liquidated damages *(such as those in an acc. clause)* are OK when:
        - they reasonably approximate actual damages *(732)*
        - not a "penalty" *(otherwise void under public policy)*
        - no unjust enrichment
        - mitigated by income from reletting
            - *policy purpose: place injured party in the position they would have occupied if the K had been performed*
            - discount for future value?

- Security deposits: remedies for damages generally ineffective in residential leases; security deposits help ensure tenant performance of lease obligations *(735)*
    - tend to be limited by common law and statutes

Chapter 9: Shared Ownership

Common Law Concurrent Estates *(737)*

- Tenancy in common *(738)*
    - most common kind of concurrent estate
    - interests need not be equal
    - *unity of possession* – right to possess the entire parcel, no matter how small the interest

    - transferrable *inter vivos*, by will, by intestacy

- Joint tenancy *(739)*
    - historically favored by the common law
        - still favored esp. by married couples

    - *right of survivorship* – joint tenant dies → interest goes to other joint tenants automatically
        - no transfer by will or by intestacy
        - transfer *inter vivos* → becomes tenancy in common (allows for unilateral termination of joint tenancy)
    - Four Unities *(741)*
        - Interest *(equal undivided shares)*
        - Title *(all acquire title by same instrument or act of adv. pos.)*
        - Time *(all interests acquired or vested at the same time)*
        - Possession *(all tenants must be entitled to possess the whole estate)*

- major benefit: avoidance of probate (no need for court involvement when a tenant dies; interest automatically goes to survivors)
- creditors' interests may evaporate on a joint tenant's death

- Severance of joint tenancies
  - *Tenhet v. Boswell* (Ca. 1976) *(742)*
    - A lease by a joint tenant to a third party does not destroy the joint tenancy, but the lease expires on the joint tenant's death
      - otherwise, would "defeat the justifiable expectations of the surviving joint tenant" *(745)*
      - e.g., lease of 99 years for $1/yr → surviving tenant has fee simple but severely encumbered

  - *Riddle v. Harmon* (Ca. 1980) *(747)*
    - One may destroy a joint tenancy by conveying one's interest to oneself directly, creating a tenancy in common (one can enfeoff oneself)
    - *Policy*
      - Historical need for a "straw man" has become an empty procedural requirement
      - "Handing oneself a dirt clod is ungainly" *(748)*
      - "Common sense as well as legal efficiency dictate that a joint tenant should be able to accomplish directly what he could otherwise achieve indirectly by use of elaborate legal fictions." *(749)*

  - How to ensure a cotenant cannot unilaterally destroy the right of survivorship
    - Tenancy in common for the lives of the cotenants, remainder interest in the surviving cotenant

  - *Divorce* → generally viewed as intent to sever joint tenancy *(750)*
  - *Simulatenous deaths* → Uniform Simultaneous Death Act *(751)*

- Disagreements among cotenants *(751)*
  - Remedies
    - *partition* – dividing the property in kind or selling and dividing proceeds
    - *accounting* – court-ordered pmts from one cotenant to another to ensure equitable distribution of benefits and burdens of ownership

- Can a cotenant act unilaterally?
    - *Carr v. Deking* (Wash. App. 1988) *(751)*
        - One cotenant cannot invalidate a lease enterest into by another cotenant; may join in costs/benefits of lease or petition for partition
        - cotenant lease → lessee "steps into the shoes" of the leasing cotenant and becomes tenant in common for duration of the lease *(753)*

    - *Threatt v. Rushing* (Miss. 1978) *(754)*
        - Cotenants may not harvest timber without (a) agreement from the other cotenants or (b) a judicial partition
            - commercial harvesting = waste of future value *(dicta) (755)*
            - improving or maintaining estate OK

    - Conservation issues *(756)*

- Accounting to cotenants *(757)*
    - *Martin v. Martin* (Ky. App. 1994)
        - Majority rule – cotenants do not need to pay each other rent absent an ouster or agreement to pay *(758)*
        - Occupation of a portion of an improved part of an estate does not constitute ouster, even when the improved part would otherwise have been rented

    - Net rent only, not gross, from third-party tenants need be distributed among cotenants – costs deducted *(763)*

    - Farming income
        - if one cotenant does the farming, no accounting to other tenants required
        - third party farmer → accounting required

    - Natural resources
        - divergent treatment in the courts
        - some say no (e.g., *Threatt)*
        - some allow taking of fractional share w/o accounting

- *Estate of Hughes* (Ca. App. 1992) *(759)*
    - ouster → adverse possession clock begins ticking
        - must be *physical dispossession* – "unambiguous intent to exclude"
            - such as filing a petition with the courts to have onself declared the 100% owner of a property
    - a cotenant would has been forcibly excluded or prevented from using the land can make a written demand for occupancy *(760)*
        - compliance req'd w/in 60 days else considered ouster

- *Mastbaum v. Mastbaum* (N.J. Eq. 1939) *(764)*
    - "Tenants in common are not required to let their property stand vacant under penalty of paying rent to their cotenants"
        - If occupying cotenants had not moved in, the property would have sat idle; other cotenants did not want to move in; tried to rent but found no lessees; other cotenants had sued for rental pmt

- Constructive ouster
    - occupancy by one spouse after divorce → accounting for rent (*Adkins v. Edwards*) *(765)*

- Partition *(766)*
    - *Schnell v. Schnell* (N.D. 1984)
        - forced sales disfavored
        - option to sell if partitioning would cause great prejudice
            - "great prejudice" = value of partitions < value of sale: "serious financial injury" *(statutory)*
            - without great prejudice, presumption favoring partitions in kind
        - other factors to consider besides economic/financial efficiency *(768)*
            - situation of the parties & respective financial abilities
            - financial ability of one of the parties to purchaes the property
            - location and character of the property
                - is one party deeply committed to the property – long term residence, use, dependence for livelihood? *(770)*
            - size and utility of the respective shares
            - sentimental interests (esp. re. preserving a home) – subordinate to financial interests

- *owelty* – compensation to party w/ lesser valued parcel
- *allotment* – court allocates part of the property to a cotenant (may include owelty to other cotenants) and sells the remainder *(773)*

- *Chuck v. Gomes* (Hi. 1975) *(771)*
  - *Policy*. High value of keeping land in family → strong presumption favoring partition over sale

Property Rights of Husband and Wife *(778)*

- Treatment varies considerably among the States *(779)*

- Common Law System *(780)*
  - *coverture* – husband and wife considered a single person at law; women lost power to own, manage, and dispose of real property after marriage
    - man had *jure uxoris* – exclusive right to control, occupy, and profit from wife's lands
  - *dower* – woman's right, if she survived her husband, to a life estate in one-third of the lands that the husband had owned during marriage
    - attached at the moment of marriage; could not be defeated w/o wife's consent; no defeat by husband's transfers
  - *curtesy* – husband's right to a life estate in all wife's freehold lands

  - essentially outmoded

- Tenancy by the Entirety *(781)*
  - Married couples only
  - Requires four unities
  - Exclusive rights vested in husband
  - historically preferred by the common law; no longer

  - *Sawada v. Endo* (Hi. 1977) *(782)*
    - Sawadas injured in car accident with Endo. Endo and his wife had tenancy by the entirety. Endo transferred property to his sons between the accident and the commencement of the suit. *Question*. Was the transfer fraudulent?

    - Overview of differing approaches to tenancies by the entirety *(783)*
      - Group I *(MA, MI, NC)*
        - same as traditional rule, subject to possibility that wife gets entire estate if she survives the husband
        - (all such states have since changed their laws)

- Group II *(AL, AK, NJ, NY, OR)*
  - spouses' separate interests can be sold to cover their own debts (but not each others')
  - subject to contingent right of survivorship
    - essentially, can only sell life estate *pur autre vie*
- Group III *(DE, DC, FL, IN, MD, MO, PA, RI, VT, VA, WY)*
  - Joint agreement needed for any conveyance
  - Estate not subject to separate debts of a single spouse
- Group IV *(KY, TN)*
  - survivorship is alienable – creditors can attach liens
  - surviving spouse must pay all debts

- Transfer only fraudulent if the creditors (plaintiffs) could have gotten access to **Δ**'s real property assets, which they could not *(follows Group III)*

- "There is obviously nothing to prevent the creditor from insisting upon the subjection of property held in tenancy by the entirety as a condition precedent to the extension of credit." *(785)*
  - *never mind that this is completely meaningless here*

- *Policy*
  - echoes *Chuck v. Gomes* – importance of SFRs esp. in HI
  - subjection of SFRs to debts incurred by a single spouse would make it more difficult to keep prop in the family

- Dividing Property Upon Divorce or Death *(788)*
  - death
    - dower/curtesy
    - "forced share" statutes
      - trumps wills @ option of the survivor
      - ⅓ - ½ of spouse's property

  - divorce
    - each spouse keeps their separate property
    - marital property divided
    - tenancy by the entirety → tenancy in common
    - assets often sold, proceeds shared
    - prenups usually enforced when fair & made with benefit of full disclosure

- varying treatment *(789)*
  - some courts authorized to divide all property equally
  - some courts have rebuttable presumption that equal is equitable, esp. in a long marriage
- Uniform Marriage and Divorce Act
  - factors – duration of the marriage, prior marriages of either part, antenuptial agreements, age, health, station, occupation, amt & sources of income, vocational skills, employability, estate, liabilities, needs of each party
  - etc etc etc, including "constribution of a spouse as a homemaker or to the family unit"
- N.Y. Dom. Rel. Law. § 239(B)(5)(d) – list of 13 factors to consider, incl. any "factor which the court shall expressly find to be just and proper"

- alimony doesn't come up much (<20% of women receive alimony)
  - emphasis on what is required for *maintenance*

- Defining Marital Property *(800)*
  - *In re Marriage of Graham* (Co. 1978)
    - Wife supported husband while he got an MBA worth $82k; divorced after graduation; wife seeks to recover her portion of the value of his degree *(no)*

    - Property must have exchangeable value.

    - Wife might still have gotten maintenance alimony from husband, but did not request it.
      - cf. "reimbursement alimony" – *Mahoney v. Mahoney* (N.J. 1982) – should "cover *all* financial contributions used by the supported spouse in obtaining his or her degree or license" *(810)*

  - *Dugan v. Dugan* (N.J. 1983) *(804)*
    - "Goodwill" = "summation of all the special advantages, not otherwise identifiable, related to a going concern. . . . includ[ing] such items as a good name, capable staff and personell, high credit standing, reputation for superior products and services, and favorable location."

- Goodwill of a business is property subject to equitable division upon divorce (unlike earning capacity)
    - goodwill is not "remote and speculative"
    - may be difficult to fix its value

- Ascertaining value *(808)*
    - compare to what a comparably experienced and educated professional would be earning as an employee rather than a business owner
    - excess subject to a "capitalization factor"
        - "the number of years of excess earning a purchaser would be willing to pay for in advance in order to acquire goodwill"

- Distinction between goodwill personal to the spouse and goodwill intrinsic to the spouse's business and apart from the spouse's connection to it *(811)*

- *Elkus v. Elkus* (N.Y. App. Div. 1991)
    - appreciation in earning capacity as a singer is marital property to the extent that the appreciation is due at least in part to the spouse's efforts and contributions

- Unmarried Couples *(812)*
    - *Connell v. Francisco* (Wa. 1995)
        - "meretricious" relationship – stable, marriage-like, cohabitation, parties know there is no legal marriage

        - Man has vastly greater assets – increased from $1.3m → $2.7m during ~7-yr relationship
        - Woman helped maintain man's businesses and worked to increase their worth

        - Marriage laws provide "guidance"
            - Property acquired during relationship → presumptively community property
            - Burden on non-acquiring partner to rebut this presumption
                - e.g., by showing that a given article of (real) property was purchased with funds that would have been characterized as his separate property had the parties been married
            - *overruled historical presumption that property belonged to the person in whose name title to the property was placed*

- *Marvin v. Marvin* (Ca. 1976) – was there any "tacit understanding" between the parties re: division of property? *(817)*

- Same-sex relationships – courts can divide property based on equity or contract considerations
    - treatment of such relationships vary widely; some courts do not recognize at all; others preserve some marital property rights

Chapter 10: Easements, Covenants, and Equitable Servitudes

Types of Nonpossessory Interests *(819)*

- License
    - revocable at will
    - generally untransferrable
    - may become irrevocable (cf. *Stoner,* p. 847)
- Affirmative easements *(820)*
    - would otherwise constitute trespass/nuisance
    - irrevocable *or* revocable only on occurrence of a specific condition
- Profit à prendre
    - right to resource removal
    - "easement '*plus*'"
- Negative easements
    - prohibits otherwise lawful use of land
    - historically limited to easements for light and air, subjacent and lateral support, unimpeded flow of an artificial stream *but* broadened to include easements for a view, conservation easements, historic preservation easements
- Affirmative covenants
    - promise to do something; enforceable like a K
- Negative covenants *(821)*
    - also called "restrictive covenants"
    - promise not to do something
    - gives rise to *damages* (cf. equitable servitudes → injunction)
- Equitable servitudes
    - like negative covenants but equitable
    - gives rise to *injunction* (cf. negative covenants → damages)
- Restatement (3rd) of Property
    - advocates abolishing distinctions between separate categories of equitable servitudes (viz., real covenants and equitable servitudes) and between negative easements and negative covenants (treating both as the latter)

- Elements of nonpossessory interests *(822)*
    - Benefit and burden
    - Appurtenant (attaches to land) and in gross (attaches to person)
    - Servient vs. Dominant estates
    - Whether benefit/burden "runs with the land"
        - "runs with the land" = binding on successors in interest
        - courts more likely to hold that a benefit runs with the land than a burden
        - burden runs if purchaser had received notice of the easement *(863)*
            - use of an easement constitutes *inquiry notice*

Express Easements *(823)*

- Most typical = utility easements & rights-of-way
- Created through grant or reservation

- Interpretation and application – express language controls; then circumstances surrounding formation in determining intent *(825)*
    - scope & purpose
    - courts may find that an unused easement has been "abandoned"

- *Chevy Chase Land Co. v. U.S.* (Md. App. 1999) *(826)*
    - What uses of an easement are contemplated in a grant to a railroad "for a free and perpetual right of way?"
        - could be interpreted as fee simple or easement only (court took the latter route based on public policy)
    - intent: transportation
        - broad language used
    - *Unreasonably increased burden* test
        - no such unreasonable increase here: use of railroad easement as recreational trail

- Easement vs. fee simple
    - *City of Manhattan* – CA Supreme Ct favors fee simple *(832)*
        - cf. *Chevy Chase* preference for easements

- *Marcus Cable Assoc. v. Krohn* (Tx. 2003) *(834)*
    - *minority rule*
    - Easement granted for use of priv. prop. to construct and maintain "an electric transmission or distribution line or system"
        - held not to include cable TV lines (such lines would constitute trespass)
            - despite there being no significant increase in burden (relative burdensomeness not a factor here)
            - *but* would have been an expanded use and benefit that would come without compensation to landowners
            - language of grant was narrow

    - Original intent > public policy
        - use as cable TV lines was unimaginable in original 1938 grant

Appurtenant Easements vs. Easements in Gross *(839)*

- *O'Neill v. Williams* (Me. 1987)
    - Presumption favoring appurtenant easements

    - Webster (O'Neill's predecessor in title) granted strip of land to William's p.i.t; cut off Webster's land from access to the sea; deed said "Reserve being had for Webster the right of way by land or water"

    - Ambiguity resolved in favor of appurtenant easement esp. because interpreting the easement as in gross would have substantially reduced the value of O'Neill's land

- Considerations of relative value *(840)*

Transferring Easements in Gross *(841)*

- *Miller v. Lutheran Conference & Camp Assoc.* (Pa. 1938)
    - Easements in gross divisible?
        - Yes – but must be shared "as one stock" – "joint user" *(843)*
        - cannot be split into two or more unrelated projects
            - otherwise would essentially duplicate the easement; increased burden in use, etc.
    - Assignment is OK *(844)*
    - Assignable divisions (licenses) only by consent of all holders of the easement (in commercial context)

- Courts generally look to intent re: assignability *(845)*
    - furthers policy of free alienability

Easements by Estoppel *(847)*

- *Stoner v. Zucker* (Ca. 1906)
    - License granted upon which licensee relies to (significant) financial detriment → irrevocable license (easement by estoppel)

    - *here: permission given to construct irrigation ditch; cost over $7,000; held that permission to use land for ditch was irrevocable despite only having given license to do so.*

Easements by Implication and Necessity *(852)*

- *Williams Island Country Club, Inc. v. San Simeon* (Fl. 1984)
    - Common ownership of parcel later divided; one part had been used for benefit of the other → "quasi-easement"
        - may become implied easement upon division of property
    - Factors *(854)*
        - use must be apparent *(here, golf cart path = in existence and use)*
        - use must have been intented to be permanent *(here supported by testimony of the original parties and the language of their K)*
        - use must be reasonably necessary for the use and benefit of the dominant tenement *(here, loss of the path would render the golf course essentially incapable of continued operation)*

- *Dupont v. Whiteside* (Fl. 1998) *(855)*
    - Necessity = strict necessity = "no other practicable solution"
        - not mere convenience
    - Court pulled funky technical analysis and suggested that an irrevocable license may have been granted (remanded for retrial on this issue)
        - Duponts had sold a parcel to the Whitesides; Whitesides expressed concern about access; Duponts said they were building a road out there, so Whitesides bought the prop and built a $240,000 home; after ~13 years Duponts said they couldn't use the road any more; Whitesides' own road would have cost $40k – $50k to build

- Easements implied from prior use – generally require only "reasonable necessity" *(861)*
    - Cts gen'ly more willing to imply easemts by grant than by reservation
- Necessity is measured at the time of severance (not at the time of suit)

- *Leo Sheep Co. v. U.S.* (U.S. 1979) *(864)*
    - Power of eminent domain → no easement by necessity

Easements by Prescription *(869)*

- *Scope* – generally limited to what it was at time of grant – cannot expand *(878)*
    - *exception* – "changes in the character of the dominant estate" – but no unreasonably increased burdens

- *MacDonald Properties, Inc. v. Bel-Air Country Club* (Cal. App. 1977)
    - Prescriptive easement requirements
        - open and notorious
            - *higher standard than adverse possession – would a "reasonable neighbor" be aware of the use?*
            - notorious - "so conspicuous as to impute notice to the true owner" *(Black's) – by inference from open and visible?*
            - *here: building restrictions on the subject property → open and continuous by inference*
        - visible
            - *golf balls fell on the subject property – "several balls per day frequently and regularly;" golfers entered to retrieve them*
        - hostile
            -
            - *here: deed + Weber's acquiescence in use as rough → adverse, under claim of right, accepted as such*
        - continuous for statutory period (here: 5 years)
            - *distinct from continuity of possession; generally interpreted to mean "consistent with a normal pattern of use" (877)*
            - *here: use of the subject area as rough for its sixth hole for >40 years*
        - *but not exclusive.*

- *Lyons v. Baptist School of Christian Training* (Me. 2002) *(872)*
    - *School had a piece of property with a road running through it, which was used by locals; when School became concerned about damage to the road, they barred the way. Lyons sued, praying the court would find a public prescriptive easement (which it did not).*

    - Presumption of permissive use in the public's recreational use of:
        - private land
        - "wild and uncultivated" land
        - *(presumption created by the type of use, not the type of land)*

- *Public* prescriptive easement requirements *(873)*
  - Continuous use
    - *supra*
  - By people who are not separable from the public generally
  - For at least twenty years
  - Adverse and under a claim of right
    - *Presumed when unmolested, open and continuous use for 20 years or more, with knowledge and acquiscence from owner* – but this exception does not apply re: recreational uses of "open fields or woodlands and the ways traversing them"
    - ***π**'s witnesses stated that they would have respected "No Trespassing" signs if they had been posted*
  - With the owner's knowledge and acquiescence
    - *Or* "a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed"

- Easements to pollute *(879)*
  - *Hoffman v. United Iron & Metal Co.* (Md. Spec. App. 1996) – Company gained prescriptive right to maintain a nuisance (noise & pollution), even though the pollution violated state laws

- *dedication* – property owners can bequeath to the city property for the public use (can be *implied* re: long-term public use of private beaches)
- *custom* – uses lasting so long "that the memory of man runneth not to the contrary"

Covenants and Servitudes *(881)*

- Generally
  - *real covenants* were encumbed with restrictions developed by early English courts; property owners who wished to avoid these restrictions turned to courts of equity to obtain *equitable servitudes*
- Running of the benefit and burden
  - benefit often ran with the land, while
  - burden often did not
    - courts' belief that it was more of a burden to impose burdens than benefits *(totally)*
    - requirement of notice for burden to run

Requirements	*Burdens of Real Covenants*	*Benefits of Real Covenants*	*Burdens of Equitable Servitudes*	*Benefits of Equitable Servitudes*
Intent	(yes)	(yes)	(yes)	(yes)
Notice to subsequent purchaser	(yes)		(yes)	
Horizontal privity	(yes)	(generally not)		
Vertical Privity	Succ. to estate of = duration	Succession to any part of estate		
Touch or Concern Land	(yes)	(yes)	(Laxer than for real covenants)	(Laxer than for real covenants)

- *Runyon v. Paley* (N.C. 1992) *(884)*
    - Real covenant → legal remedy → damages
    - Equitable servitude → injunction
    - *both need notice*

    - Requirements for a real covenant to run with the land
        - "Touches and concerns the land" *(886)*
            - "some economic impact" (+/– value in land) and
            - affects "legal rights of the landowners"
            - *not necessarily a physical effect*
            - *not if the b/b may "exist independently from the parties' ownership interests in the land)*
            - *(here: a restriction limiting the use of land)*
        - Privity of estate between party enforcing the covenant & party being forced against *(886–7)*
            - horizontal – between covenantor & covenantee @ time of creation
                - some "connection of interest" – e.g., when orig. parties make covenant in connection with a transfer from one of the parties to the other
                - *some courts do not require this*
            - vertical – between covenanting parties & their successors in interest
                - succession of interest btw. orig. parties and the current owners of dominant & servient estates
                - no adverse possession
        - Original intent for b/b to run with the land
            - Presumption disfavoring running
            - Ambiguity of deed language → surrounding circumstances
            - *(here: deed said "subject to certain restrictions as to the use thereof, running with said land by whomsoever owned . . ." – habendum clause said "subject always to the restrictions . . ."*

    - Requirements for enforcement of an equitable servitude
        - *Same as real covenant but without the privity requirement*

    - Notice
        - does not need to have express statement in deed of intention both to bind succeeding grantees and to permit enforcement by successors
        - restriction contained in chain of title → notice requirement met

- *Kinds of horizontal privity (895)*
    - tenurial privity – covenanting parties must be present & future interest holders (landlord/tenant, life tenant/reversioner)
    - substituted privity – easement substitutes for tenurial relationship
    - instantaneous privity (most common today) – transactional

- *Vertical privity*
    - buyer must have acquired same interest in the servient estate as the original promisor held

- *Touch or concern*
    - some courts use a "reasonableness" requirement instead *(Davidson)*

    - *Davidson Brothers, Inc. v. D. Katz & Sons, Inc.*
        - factors re: "reasonableness" *(899)*
            - Intent of the parties at the time
                - purpose must not have been one that interfered with commercial laws (e.g., antitrust laws) or public policy
            - Whether the covenant had an impact on the considerations exchanged @ covenant's execution
                - provides measure of covenant's value @ time of creation
            - Whether the covenant clearly and expressly sets forth the restrictions
            - Whether the covenant was in writing, recorded; whether the subsequent grantee had actual notice of the covenant
            - Whether the covenant is reasonable re: area, time, or duration
                - perpetual/beyond terms of a lease → unreasonable
            - Whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenantor
            - Whether the covenant interferes with the public interest
            - Whether "changed circumstances" make the covenant presently unreasonable

Covenants to make payments *(902)*

- *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savgs Bank* (N.Y. 1938)
    - promise by landowner to pay association for maintenance of roads, parths, parks, etc. "touched and concerned" the land

- *Eagle Enterprises v. Gross* (N.Y. 1976) *(903)*
    - Covenant to pay for well water 5/1 – 10/1 did not touch or concern **Δ**'s land → did not run
        - was not sole source of water; didn't affect others in the area; didn't "substantially affect ownership"

Covenants against competition *(904)*

- *Norcross v. James* (Ma. 1885) – *overruled* – anti-competition covenant found not to touch the land ("does not [] affect the use or occupation")

- *Whitinsville Plaza, Inc. v. Kotseas* (Ma. 1979)
    - upheld covenant – covenants "*may* be considered to run with the land when they serve a purpose of facilitating orderly and harmonious development for commercial use."

Covenants not to sue

- *El Paso Refinery v. TRMI Holdings* (5th Cir. 2002)
    - El Paso (buyer) promised not to sue TRMI (seller) for liability if the property turned out to be contaminated (covenant had said t'would bind all future owners) – a later purchaser of El Paso's land brought suit
    - Characterized as "a continuing and non-contingent contractual agreement" – "a personal contractual agreement" is not a covenant

Covenants in gross

- Generally banned
- Exceptions: where benefit is held by the government, a charity, or a homeowners' assoc with power to enforce covenants on behalf of its members

Chapter 11: Local Land Use Control

Zoning *(962)*

- *Village of Euclid v. Ambler Realty Co.* (U.S. 1926)
    - upheld the Village's zoning ordinance against a challenge that the zoning law violated the Due Process and Equal Protection clauses
    - *Facts: U-1 single family residences, U-2 added duplexes, U-3 added apartments, hotels, schools, churches, libraries, museums, and gov buildings, U-4 permitted retail establishments, U-5 allowed billboards, warehouses, U-6 allowed heavy industrial plants, U-7 listed prohibited uses*

    - Ambler Realty argued the Euclid zoning ordinance deprived them of their right to use their property as they desired;
    - legitimate state interests: promotes safety and security, reduces street accidents decreases noise, preserves an environment in which to raise children, aids in fire prevention

    - zoning as a use of police power

    - *Euclidean zoning* – zoning by districts
    - *cumulative zoning* – different zones/districts are ranked in a hierarchy
    - *noncumulative/exclusive* – permits only authorized activities in each district

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