**Property Outline**

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| **TRESPASS** | Vountary physical invasion of land without the owner’s permission.*Jacques v. Steenberg Homes*: awarded punitive damages despite only nominal damages because owner’s right to exclude was violated and nominal damages insufficient to enforce that right. |
| **AD COELUM** | Title Theory: owner literally owns to the heavens and the depths.Option Theory: exclusive option to occupy to the heavens or depths, but if no attempt to possess then intrusion by others not trespass.Can be viewed as an element of the principal of accession under the title theory (*Edwards v. Sims*–Great Onyx Cave)*Hinman v. Pacific Air Transport*: airplane overflights deemed okay because owner was not using or trying to use the airspace above his land |
| **NUISANCE** | Private nuisance requires a substantial and either intentional or unreasonable interference with the private use and enjoyment of land.Nuisance requires balancing the equities!*Hendricks v. Stalnaker*: Stalnaker’s water well preventing Hendricks’ septic tank from being built. Declared not nuisance because reciprocal nature balanced equities evenly. |
| **COASE THEOREM** | Absent transaction costs, private parties will contract as to maximize their overall wealth. Initial distribution affects final distribution. Since there are almost always transaction costs, the theorem shows government intervention can sometimes maximize overall wealth. |
| **INJUNCTION** | An order requiring a person to do or cease doing a specific action.Requires balancing the equities! Bad faith negates defendant’s disproportionate hardship.*Baker v. Howard County Hunt*: Court grants injunction because the trespasses are repeated and that only an injunction will protect Bakers’ property rights in the future. **Injunctions will not enjoin a mere trespass but will enjoin…**1. Repeated Trespasses
2. Trespasses by multiple individuals
3. Trespasses that create subjective harms not easily compensable by damages
	1. Not quantifiable
	2. Cannot compensate
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| **CLEAN HANDS** | Equity will not permit a party to profit by his own wrong. |
| **UNJUST ENRICHMENT** (cause of action) | Three elements: (1) ∆ is enriched (2) at the π’s expense and (3) the circumstances are unjust for ∆ to retain the benefit. The party accused of unjust enrichment must know of the benefit conferred.If 3 elements satisfied:* ∆ cannot use blind luck as defense
* π must have clean hands and acted in good faith.
* ∆ must have been enriched in good faith (cannot purposely fool π into enriching him)

*Olwell v. Nye & Nissen*: ∆ used π’s eggwashing machine; π sued for unjust enrichment (∆ didn’t have to hire eggwashers) and won.*SEC v. Elliott*: Fraud approximates unjust enrichment, victims had unclean hands |
| **RESTITUTION** (unjust enrichment remedy) | Refers to disgorging something taken and compensation for loss of injury. When tortfeasor has benefitted from his wrong, tort may be waived to bring assumpsit for restitution action.∆ consciously tortious + π deprived of profit then restitution.Damages focus on what was actually gained.  |
| **CONSTRUCTIVE TRUST** (unjust enrichment remedy) | Provides restitution where there would be unjust enrichment (also used in fraud, etc. where the question of legal remedy’s adequacy comes up). Three elements: (1) violation of a fiduciary duty, confidential relationship, or other wrongful act, (2) specific property acquired by wrongdoer that can be traced to the wrongful behavior, (3) violation of equity if the wrongdoer is allowed to keep the property.*SEC v. Elliott*: Victims sought securities back. Court denied because whose securities were lost was sheer luck and victims lacked clean hands. |
| **FIRST POSSESSION** | First person to possess an otherwise unowned object becomes the owner. This means that the first person who both intends to assert control over the object and who establishes a significant degree of power over the object is deemed to be the owner, provided no one has any claim of ownership to it.*Pierson v. Post*: foxes are *ferae naturae* and ownership of such animals requires actual possession. Pursuit not enough, possibility that mortally wounding suffices.*Ghen v. Rich*: Whale case; actual possession not reasonable because dead whale needs to float ashore, defer to custom for provenance, audience, and reasonableness.*Keeble v. Hickeringill*: Ducks being in a duck decoy insufficient to establish first possession. |
| **HOMERUN BASEBALLS** | Ball was up for first possession because abandoned. Popov caught it, but lost ball when he fell to ground and Hayashi picked it up. Both declared to have superior interests against the world, but equal to each other. *Popov v. Hayashi* |
| **DISCOVERY** | A collection of situations in which someone establishes ownership of an object by being the first to claim it. The relevant object is a *claim* of ownership (opposed to actual possession)* Intention and notice very important

*Johnson v. M’Intosh*: U.S. had superior title to Johnson because U.S. asserted first claim to North American lands. |
| **CREATION** | Property claim based on bringing to light new information or expressions. Creation often involves incremental informational discovery.Quasi-property: right to exclude only a small pre-defined class.*INS v. AP*: INS had a “quasi-property” right against its news competitors, aka could only exclude them.*Midler v. Ford Motor Co.*: Midler brought a new expression (her voice), therefore owned it and Ford could not appropriate it. |
| **PRINCIPLE OF ACCESSION** | Ownership of some unclaimed or contested resource is assigned to the owner of some *other* resource that has the most prominent relationship to the unclaimed or contested resource.* For example, the interest earned on a bank account belongs to you because you own the principal.
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| **DOCTRINE OF ACCESSION** | When someone mistakenly (good faith) takes up a physical object that belongs to someone else and transforms it through her labor into a fundamentally different object.* Tests for doctrine of accession: (1) degree of transformation (the more difficult identifying original object in final product is, more likely final product awarded to laborer), (2) comparison of relative value.
* Accession barred for bad faith improvers.
* If laborer wins, must pay owner for original object
* If original owner wins, labor has a difficult restitution claim.
* Never applies to land.

*Wetherbee v. Green*: Made barrel hoops from trees did not own, increased value 28x, improver kept hoops but paid owner for trees |
| **INCREASE** | Baby animals are owned by the baby’s mother, even if the father is a “prize-winning bull.” |
| **FIXTURES** | A thing which, although originally a movable chattel, is by reason of its annexation to, or association in use with land, regarded as part of the land.*Strain v. Green*: Three tests for fixtures: (1) custom: would some sort of item of this generic class be included in any house in the same general price level? (light fixtures) (2) Attachment: if a thing is firmly attached to the wall or ground it is a fixture. If it can be removed without damage, then personal property. (Mirrors in living room but not mirror in powder room) (3) Specially fitted: is the item custom built or otherwise an unusually strong complement for the surroundings? (Venetian blinds) |
| **RATIONE LOCI / RATIONE SOLI** | Captured wild animals awarded to owner of land on which animals were captured. |
| **ADVERSE POSSESSION** | When an owner does not bring an ejectment/quiet title action on a trespasser and the statute of limitations for trespass runs, then the adverse possessor acquires ownership of the land.Five requirements: (1) exclusive: two or more people cannot possess adversely to each other at the same time(2) open and notorious: either so apparent that it gave notice to the owner, or a reasonable person should have had notice(3) actual: must use land as an actual property owner would (seasonal use okay)(4) continuous: continuous for the entire statutory limitations period– Tack time together only if parties in privity of estate.(5) adverse under a claim of right. Three views: (i) objective view: used w/o true owner’s permission and inconsistent with their rights. (ii) bad faith view: used with subjective intent. (iii) good faith: adverse possessor mistakenly believes it is his land (*Carpenter v. Ruperto*).* Adverse possession relates back: clock starts ticking at entry.
* Cannot adversely possess government property.

Exceptions: clock doesn’t run if owner is disabled (minor, insane, incompetent) at time of entry.Policy reasons: (i) rewarding improver (ii) penalizing lazy owners (iii) cleaning title cheaply. |
| **TRESPASS TO CHATTELS and CONVERSION causes of actions** | (1) replevin (equitable remedy)–give my stuff back; have to put up bond. (2) Trover (remedy at law)–money damages. This is now called conversion.  |
| **ADVERSE POSSESSION OF CHATTELS** | Same 5 elements as adverse possession, but statute of limitations is shorter.Three tests for determining when SoL begins running: (1) at the time of conversion, (2) discovery rule (doesn’t run until party discovers or should have discovered through reasonable diligence and intelligence), (3) owner demands property back and the demand is refused. |
| **THE LAW OF FINDERS** | The overarching question: what system maximizes the likelihood that the true owner recovers the lost property?F1 > C2 (*Armory v. Delamirie*)F1 > F2 (*Clark v. Maloney*)C1 > C2 (*Anderson v. Gouldberg*)LO > FPIf abandoned, then original acquisition.If lost, then finder gets possession (even against LO).If mislaid, then LO gets possession. |
| **LOST v. MISLAID PROPERTY** | *Mislaid* property is property deliberately placed by the owner and then forgotten. If such a distinction is made, the LO > F1 for mislaid property. |
| **JUS TERTII** | Person A cannot take possession from Person B because Person C has superior title to Person B if the litigation is between Persons A and B. |
| **LARCENY** | Purpose to protect individual property rights.Taking of property in self-service store context established by evidence that customer exercised control over merchandise wholly inconsistent w/ store’s continued rights. (*People v. Olivo*)* Allows larceny conviction w/o actually leaving the store (e.g., putting snickers into briefcase)
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| **SELF-HELP** | * Reasonable force to eject trespassers
* Landlords can never use self-help to remove a tenant in possession (*Berg v. Wiley*)
	+ Could use forcible entry and detainer (expedited eviction (Summary) proceedings)
* In states that adopted the UCC, chattels may be repossessed through self-help if it can be done without breaching the peace. (*Williams v. Ford Motor Co.*)
* Most courts assume there are no due process requirements for self-help repossessions
* One can use self-help to abate a nuisance if:
	+ She gives notice of the nuisance;
	+ Requests action by the landowner; and
	+ There is some urgency to abate the nuisance
 |
| **PUBLIC POLICY as an exception to the right to exclude** | An owner’s right to exclude may be limited by public policy considerations. Balancing the costs and benefits of the owner’s exclusion may counsel against exclusion.Two approaches to balancing:1. Categorical Exception: Balance a general situation, and carve out from the exclusion right an exception for that situation.
	1. E.g., carve out an exception for “public accommodations” (*Uston*)
2. Ad hoc Exception: Balance case-by-case.
	1. E.g, prevent farm owner from excluding charity and aid workers from visiting migrant workers who live on owner’s farm.
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| **PUBLIC ACCOMODATIONS as an exception to the right to exclude** (cannot exclude people from public accommodations) | Title II of the Civil Rights Act of 1964: (1) inns, hotels, and motels, unless < 6 rooms and owner lives on premises (Mrs. O’Leary exception); (2) restaurant, cafeteria, or lunch counter; (3) “any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition of entertainment.” Exception: Can exclude restaurant goer from restaurant’s kitchen. a/k/a non-public places at public accommodations. |
| **ANTIDISCRIMINATION LAWS as an exception to the right to exclude** | *Shelley v. Kraemer*: Fourteenth Amendment precludes state courts from enforcing racially restrictive covenants.Fair Housing Act, 42 U.S.C. §§ 3601-19, 3631Aimed at discrimination in availability, terms and conditions, lying about availability, advertising, and blockbusting on the basis of race, color, religion, sex, familial statute, or national origin. There are some exceptions  |
| **NAVIGATION SERVITUDE** | 1. Navigable Waters: No state government or individual/corporation acting under state law has power to obstruct/interfere w/ public right of free use of waterways for transport.
2. Navigable airspace: Much the same as navigable waters; airspace is a public highway with the exception of a minimal flight altitude.
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| **PUBLIC TRUST** | A trust in which land is held by the State for the public use. * The trust’s holdings cannot be abdicated to private property, unless either of the following are true:
	+ To the extent that selling small parcels promotes the public interest therein (e.g., wharves and docks)
	+ The disposal does not substantially impair the public interest in the land or waters remaining

*Illinois Central R. Co. v. Illinois*: Chicago cannot sell the lakebed to the railroad because land under navigable waters is held in public trust.Scope of Public Trusts: 1. Navigability may be broader, public trust may extend to other streams
2. Public trust may extend to waters overlaying privately owned lands
3. Public trust uses include navigation, fishing, commerce, and now recreation
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| **CUSTOM** | Is it customary? If something done everyday or if specific to a certain field, this is a common sense inquiry.If long standing:Has seven (7) elements:1. Ancient/longstanding; “Time out of mind”
2. Uninterrupted; not necessarily continuous
3. Peaceable and free from dispute
4. Reasonable; court can review the custom for substance and ask how authorities have treated the custom
5. Certain; notice and background knowledge
6. Obligatory; treating as binding like a law.
7. Not repugnant to or inconsistent with law. Other more formal law trumps custom.
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| **DEMSETZ THEORY** | Property rights change when the benefit internalization exceeds the costs imposed by the externalities. |
| **INHERENTLY PUBLIC PROPERTY** (Carol Rose) | Property that must be maintained in an inherently public or open-access state. For example, navigable waterways and airspace. |
| **LICENSE** | A partial waiver to the right to exclude, A/K/A a limited right to use. For example, a dinner guest who rifles through the host’s bedroom likely exceeded their license.* Not a property right, but a waiver of a property right.
* Most are revocable.
* IP licenses presumed irrevocable.

*Wood v. Leadbitter*: Licenses are always revocable. License + grant is irrevocable, e.g. license to hunt deer on private land, because a grant is a property right.Some view the possibility of specific performance as making licenses irrevocable.Shrinkwrap, browse-wrap, and click-wrap licenses are binding.  |
| **BAILMENT** | When an owner (the bailor) temporarily transfers custody of property to another (the bailee) while retaining ownership. Among other rights, the right to exclude transfers to the bailee, and the bailor may reassume ownership at any time.* Usually created by contract, express or implied.

Examples: transfer of clothing to a dry cleaner, transfer of securities to a broker, transfer of automobile to valet parking. Conjunctive inquiry for determining whether there has been a bailment: (1) Has there been a transfer of possession?; and (2) What were the party’s expectations?*Allen v. Hyatt Regency*: Are parking garage owners bailees of the automobiles they house? Factors to consider: (1) garage owner’s degree of control; (2) expectations of security to be provided by the garage; (3) is the garage enclosed; (4) does owner keep the car keys; (5) any actors relevant to whether there has been a transfer of possession and party expectations. |
| **BAILEE’S DUTY OF CARE** | Standard of care varies according to who benefits from the bailment:1. For benefit of bailee: strict standard of care (e.g., neighbor borrowing lawnmower)
2. For benefit of bailor: standard of slight care (e.g., leaving laptop w/ friend while going to the bathroom)
3. Benefit of both parties: reasonable care (e.g., watch repair)
4. Injury, loss, or theft of chattel by third-party: reasonable care; HOWEVER
5. Misdelivery: strict liability UNLESS bailor had a ticket supposed to be matched to the item at retrieval and bailee delivered item to someone presenting the ticket.
* Good faith purchaser from bailee has greater property right than bailor, however bailor may sue bailee for unjust enrichment.
* Bailor must sue bailee to recover for damages.
* Bailee may sue the third-party who injured the chattel because possession serves as a surrogate for ownership. Bailee is owner against all but bailor.
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| **ABANDONMENT REAL PROPERTY** | Requires (1) intent and (2) an overt act (not mere words or nonuse).* Cannot abandon property to which one has perfect title (clear record title, reasonably free from challenge from others). (*Pocono Springs*)
* Can abandon property to which one has less than perfect title.
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| **ABANDONMENT PERSONAL PROPERTY** | Can be abandoned at any time. However, requires intent.* Example: is a chair on a porch abandoned? Is a chair on the curb abandoned? Is a chair in a snow-plowed parking spot in Chicago abandoned?
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| **DESTRUCTION** | Generally, unless a person can be found incompetent and a guardian appointed, a person is free to destroy his or her own property.* Right becomes restricted once someone dies. For example, in *Eyerman*, lady requested historic home she lived in destroyed in her will. Court enjoined the destruction. If she were alive, injunction never would have been granted.
* There are some U.S. historic preservation laws that prevent certain destructions.
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| **ESTATES IN LAND** | **Fee Simple Absolute** – Largest package of ownership rights from which all others are carved**Life Estate** – Ownership for life* Future interest:
	+ Reversion (in Original Owner “O”)
	+ Remainder (in a third party)
		- If granted in Fee Simple, no condition, Remainder; “Indefeasibly Vested”

**Defeasible Fees*** Fee Simple Determinable – Fee simple “as long as” limiting condition doesn’t occur, if it does, then AUTOMATIC reversion.
	+ Future Interest:
		- Possibility of Reverter (in O)
* Fee Simple Subject to Condition Subsequent – Fee simple “but if” limiting condition occurs then O has a the option to reenter and take back the property.
	+ Future Interest:
		- Right of entry/Power of termination (in O)
* Fee Simple Subject to Executory Limitation – Fee simple “as long as” limiting condition doesn’t occur OR “but if” limiting condition occurs then AUTOMATIC transfer to 3d Pty.
	+ Future Interest:
		- Executory Interest (in 3d Pty)
 |
| **CONSERVATION OF ESTATES** | The sum of the interests granted and retained must add to fee simple.  |
| **INTERPRETING WILLS** | Interpret based upon testator’s overall purpose. * Holographic Will: Will handwritten and signed by testator. Some states exempt wills from the requirement of attestation by witnesses.
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| **NUMERUS CLAUSUS** | Catalog of estates is finite and closed.* Cannot create new forms of ownership.
	+ Rationale: information cost to third-parties is high! Imagine Wednesday watches, a right to own the watch only on Wednesdays.

*Johnson v. Whiton*: “heirs on her father’s side” struck from will for violating numerus clausus |
| **WASTE** | **Affirmative Waste** – type of misfeasance that occurs when a life tenant undertakes some affirmative act on the property that is unreasonable and causes “excess” damage to the reversionary or remainder interest.**Permissive Waste** – a type of nonfeasance that occurs when the life tenant fails to take some action with regard to the property and the failure to act is unreasonable and causes excess damage to the reversion or remainder**Ameliorative Waste** – affirmative act by the life tenant that significantly changes the property, but results in an increase, rather than a diminution, in its market value. (*Brokaw v. Fairchild*: court enjoined razing Fifth Avenue mansion to build apartment building)Posner’s analysis: law of waste should permit holder of present possessory interest to do anything a fee owner would do and prevent that which goes beyondWaste is different from destruction because waste concerns shared or divided ownership. |
| **RESTRAINT ON ALIENATION** | Courts take a dim view on attempts to restrain the power of an owner to alienate.* *Morse v. Blood*: Husband left wife his land in will but conditioned it upon her not giving *any* money to husband’s family. Court held that provision void because it restrained the wife’s alienation.
	+ What is the problem here? If the wife sells the land and gives the proceeds to husband’s family, then the wife has violated the provision and the land she sold reverts back to the husband’s estate. This would harm the third-party and subject them to an overhanging condition to which the wife, and not the third-party, is subject.
* Use restrictions are not restraints on alienation. *Mountain Brow Lodge*
 |
| **TENANCY IN COMMON** | Each tenant in common has a separate but undivided interest. Each interest is *separate*, in the sense that it is independently descendible, conveyable, and devisable. **One unity**: possession.* Property held as tenancy in common can be attached by creditors of each individual tenant.
* Each tenant’s share passes in death to his or her estate.
* Each interest is *undivided*, meaning each tenant in common has the right to possess the whole of the property (although they need not exercise that right).
* Each tenant need not hold an equal share.
 |
| **JOINT TENANCY** | Exactly like a tenancy in common except for the treatment of survivorship. When a tenant dies, their share is split amongst the remaining tenants in common. Requires **four unities** at the time of creation:1. Time. Each interest must be acquired or vest at the same time.
2. Title. Each must acquire title by the same instrument or by joint adverse possession, never by intestate succession or other act of law.
3. Interest. Each must have the same legal interest in the property, such as fee simple, life estate, lease, etc., although not necessarily identical fractional shares.
4. Possession. Each must have the *right* to possess the whole.

How **survivorship** works: Since both joint tenants A and B own an undivided interest in the whole during life, A’s interest is extinguished and passes to B upon A’s death.* There is no inheritance or devise by will in the interest’s passing from A to B. Instead, A’s interest *just disappears*.
* B had a right to the whole thing while A was living, and B has a right to the whole thing after A dies.
	+ Therefore, B does not “gain” anything upon A’s death; rather, A loses his interest.
	+ This explains why a joint tenant’s death does not trigger feudal incidents, and why joint tenancies can be used to avoid probate.

Joint tenancies may be **severed**: Either joint tenant can unilaterally sever the joint tenancy, thereby destroying the right of survivorship and converting the tenancy into a tenancy in common. Severance is achieved by destroying one of the four unities (time, title, interest, or possession).* Usually achieved through conveyance to a third-party who would then reconvey to the grantor.

Mortgages under the lien theory do not sever joint tenancies! |
| **TENANCY BY THE ENTIRETY** | Retained by a minority of states, where it is available to married couples only. Neither spouse can unilaterally transfer or encumber their share of the property without the consent of the other. Think of it as five unities: the four from a joint tenancy + marriage.* No longer exists in many states.
* Also has **survivorship**
 |
| **PARTITION** | Available to tenants in common and joint tenants, not to tenants by the entirety. Two kinds: (1) in kind; and (2) by sale.* Problem with partition by sale: can destroy the other co-tenant(s)’ subjective value, especially if for some reason (legal rule, liquidity, etc.) that other co-tenant cannot buy the whole in the judicial sale.
* Partition test: Partition by sale only if: (1) the physical attributes of the land are such that a partition in kind is impracticable or inequitable; or (2) the interests of the owners would better be promoted by partition by sale.
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| **OUSTER** | An act that necessarily excludes another tenant.* Mere exclusive use is not an ouster.
	+ Physically pushing someone out is an ouster.
	+ In some cases, especially over buildings, letter writing is insufficient.
* *Gillmor v. Gillmor*: Frank ousted Florence when Frank refused Florence’s unequivocal demand to use that land that was in Frank’s exclusive possession.
	+ Court held that when a cotenant out of possession makes a clear, unequivocal demand to use land that is in the exclusive possession of another cotenant, and that cotenant refuses to accommodate the other tenant’s right to use the land, the tenant out of possession has established a claim for relief. (because they have been ousted).
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| **MARITAL PROPERTY** | Community property: everything except property acquired before marriage, or during marriage by gift, bequest, devise, or descent, and in some states the earnings on these.* Strong presumption of 50/50 split of community property.
* Spousal earnings are community property.
* Medical license obtained during marriage is community property (*O’Brien v. O’Brien*)

Court has broad discretion when dividing non-community property. |
| **TYPES OF LEASES** | * **Term of years**: Can be for any time period (some state limit) so long as maximum duration is finite. No notice required to terminate lease.
	+ **Key feature**: STATED DAY OF TERMINATION.
* **Periodic Tenancy**: Lease that automatically rolls over for a certain period of time, usually a year or month.
	+ **Key feature**: PERIODICITY.
	+ Can be express or implied. Landlord or tenant must provide notice (or else rolls over).
	+ At common law, 6 months notice required for year-to-year; lease period is notice period, not to exceed six months, for shorter leases.
* **Tenancy and Will**: Lasts so long as both parties wish for it to continue.
	+ Either party can terminate at any time for any reason.
	+ At common law, no notice required, however many jurisdictions now require notice equal to rent payment period (e.g., monthly rent requires month notice)
* **Tenancy at Sufferance**: When an individual, who was once rightfully in possession, holds over after the right has ended. Landlord may evict tenant w/ forcible entry and detainer statutes, or by bringing an ejectment action.

Landlord retains a reversion. |
| **CONSTRUCTIVE EVICTION** | **Defense to a claim for rent where:**The landlord’s act or failure to act breaches the covenant of quiet enjoyment. Subjective intent is not required, as the law presumes that the landlord intends the natural and probable consequences of their actions or inaction. **Tenant must abandon the premises within a reasonable amount of time**. Notice might also be an element. Did tenant give notice, constructive or otherwise? |
| **SURRENDER** | When the tenant abandons or stops paying rent for the premises, “offers” its right to relinquish quiet possession. The landlord has three options:1. Continue to hold the tenant liable for rent as it comes due;
2. Re-enter the premises in order to re-let for the tenant’s benefit; or
3. Accept the tenant’s repudiation as a surrender of the leasehold, and re-let for the landlord’s own account.
 |
| **DEPENDENT COVENANTS** | Residential leases are always dependent. A tenant who has suffered a substantial breach of the material covenant has three remedial options:1. Rescind the lease and be released of any further obligation to pay rent.
2. Remain in possession and sue for damages for loss in profits suffered by reason of the breach.
3. Rescind, by putting an end to the contract prospectively, and sue for damages for lost profits suffered up to the time of recission.

Commercial leases are not always dependent:1. Group one (Texas, Utah): implies warranty of fitness into commercial leases, analogous to IWH.
2. Group two (Mass.): Adopts position that all lease clauses are dependent.
3. Group three (Majority): Adopts rule that all material clauses are dependent, nonmaterial clause independent.
4. Group four (Minority): Adopts position that all clauses except quiet possession are independent, and tenant remedies are based on constructive eviction.
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| **IMPLIED WARRANTY OF HABITABILITY** | Implied warranty that the premises will be delivered free of defects vital to the use of the premises for residential purposes, and that this condition will be maintained. |
| **DUTY TO MITIGATE** | Landlord has a duty to mitigate damages when a tenant breaches a lease. Landlord must (1) treat premises as one of his vacant stock; and (2) make reasonable efforts to re-let the premises.* When a landlord rejects a tenant’s surrender, this doctrine applies.
* If a landlord accepts a tenant’s surrender, then the doctrine does not apply.
 |
| **RUN WITH THE LAND** | For a covenant to run with the land when the original owner assigns her interest to a new owner:1. The original landlord and tenant must **intend** the covenant to run with the land; and
2. The covenant must “**touch and concern**” the land.
	1. Only those terms that affect the scope of the property rights or the condition of the land are binding on successors in interest.
	2. “[S]o related to the land as to enhance its value and confer a benefit upon it.” With reference to promises to pay money, the funds must be restricted “to the benefit of the property.”
 |
| **SUBLEASE** | A *sublease* occurs when the tenant does NOT transfer the entire remaining interest in the lease to a third-party, but retains some interest for himself.* Prime tenant (T1) retains a reversion.
* Prime tenant remains obligated to the LL under of contract and hence must perform all the original lease’s provisions (pay rent, walk the dog).
* Subtenant regarded as holding of the prime tenant, not of the LL, therefore NOT in privity of estate with LL. Therefore LL cannot enforce any obligations of the original lease against the subtenant.
 |
| **ASSIGNMENT** | An *assignment* occurs when the tenant transfers the entire remaining interest in the lease to a third party, such that the new tenant steps into the shoes of the original tenant.* Original tenant still liable to the landlord under privity of contract for obligations set forth in the original lease.
* New tenant in privity of estate with the landlord, and therefore must perform all obligations that “touch and concern” the land. Thus, new tenant probably has to pay rent, but not walk the dog.
* In assignment, all covenants between the landlord and prime lessee that run with the land are inherited by the assignee.
* If assignee misses a rent payment, then the prime lessee must pay because the prime lessee is in privity of contract with the landlord.
 |
| **PRIVITY OF CONTRACT** | Is there a contract (lease) between the parties? |
| **PRIVITY OF ESTATE** | A and B are in privity of estate if:1. B’s interest is carved from A’s;
2. B is in possession; or A holds a reversion.

Assignors not in privity of estate with prime lessee because their interest is not carved out. |
| **NOVATION** | Parties agree to erase any privity of contract liability on the part of the prime tenant. Obviously, landlord must agree to this. |
| **ASSUMPTION** | Assignee expressly agrees as part of the assignment agreement to be bound by the terms of the original lease. |
| **CONDOMINIUMS** | Fee ownership of unit and tenancy in common of outside walls, common areas etc.; usually includes a condominium association. Very flexible: can be used for buildings, townhouses, etc.* There are statutes limiting the right to partition (e.g., an owner cannot sell their share of the walls etc.)

Declaration: basic constitution for the project, which is publicly recorded and contains a number of covenants, conditions, and restrictions (CC&Rs)Enforcement of CC&Rs entrusted to the condominium association. Challengers to CC&Rs must show the court that the CC&R is unreasonable. Three ways to show unreasonableness:1. Cannot be shown by focusing on an application to one homeowner but rather by showing that the covenant (a) is arbitrary; (b) the burden it imposes on effective properties so substantially outweigh the benefits of the restriction that it should not be enforced against any owner; or (c) violates a fundamental public policy.
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| **COOPERATIVES** | Each owner owns a share of a corporation that owns the building and has an indefinitely long “proprietary lease” to unit. Traditionally more sharing of financial risk (so one reason for more nosiness in admitting new members), but less so now that coop owners can mortgage their shares.**Business Judgment Rule**: Shareholder-tenant must show that the board acted1. outside the scope of its authority;
2. in a way that did not legitimately further the corporate purpose; or
3. in bad faith.

Otherwise, the court defers to the board’s judgments. |
| **SUBDIVISIONS** | Planned unit developments especially in the suburbs, often with a homeowners association.* Owners always have a right to rent unless the Declaration says otherwise (i.e., bylaws cannot proscribe renting) *Kiekel v. Four Colonies Homes Association*
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| **TRUSTS** | Separates management from *benefit*. Trustee holds legal title whereas beneficiary holds equitable title. Involves three parties:1. the settlor;
	1. Conveys property to trustee.
2. the trustee; and
	1. Manages the conveyance as a fiduciary for the benefit of the beneficiary.
3. the beneficiary.

Trust assets are alienable: third-parties take subject to beneficial interest only if they are GFPV. Third-party has *little* duty to inquire**Spendthrift Trust**: A trust where the beneficiaries’ creditors cannot reach the trust assets, nor can the beneficiaries use the trust assets as collateral / means of acquiring more credit. Upholding such a trust relies on respecting to donor’s (settlor’s) intent. |
| **FIDUCIARY DUTIES** | Duty to act solely in another party’s interest.**Duty of Loyalty**: Precludes trustees from self-dealing or engaging in transactions that create a conflict of interest with their obligations to the settlors (while settlors are alive) and the beneficiaries (when settlors are dead).**Duty of Impartiality**: Require that trustees act fairly toward all beneficiaries, not favoring one class of beneficiaries at the expense of others.**Duty of Prudence**: Require that the trustee invest and manage the trust assets in a fashion that entails an appropriate degree of risk given the circumstances of the beneficiaries and the nature of the trust property. |
| ***CY PRES*** | Doctrine permitting courts to alter trusts because of changed circumstances.Two-part test:1. Court must determine that the trust’s settlor has a *general* charitable intent; and
2. Court must find that the *specific* charitable intent specified by the settlor is impossible to fulfill, would violate public policy, or has been rendered problematic by changed circumstances.

If (1) and (2) satisfied, then court may modify the interests created so long as they still fall within the general charitable intent.  |
| **MORTGAGES** | **Title Theory**: Mortgagee holds title to the mortgagor’s property UNTIL mortgagor pays off the mortgage.**Lien Theory**: Mortgagee holds a lien on the mortgagor’s property UNTIL mortgagor pays off the mortgage. (Under this theory, mortgages do not sever joint tenancies)Mortgagee owes a fiduciary duty to mortgagor when conducting a foreclosure sale. Sellers in a foreclosure sale must satisfy (1) the statutory requirements for a foreclosure sale; and (2) a duty of good faith and due diligence in protecting the interest of the mortgagor.* Note! Violation of the duty of due diligence is also measured against a fair price, NOT fair market value.
* Violation of the duty of good faith, however, may well be the difference between fair market value and the sale price.
* A fair price is what would have been obtained had the property been sold in a reasonable fashion.
* However, equity abhors forfeiture and damages typically must be in reasonable proportion to the loss actually suffered. **Look at how much has been paid on the contract!**

When assigning a mortgage, there must be written documentation establishing a clear chain of title **BEFORE** a foreclosure takes place! *U.S. Bank Nat’l Assn. v. Ibanez***Equity of Redemption:** Statutory period during which the mortgagor has the right to redeem the property even after the foreclosure sale. |
| **LAND SALE CONTRACT** | Must be in writing (per Statute of Frauds), express an intent to convey the land, and state the price.* Enforceable via specific performance.
* Viewed in equity as an installment contract, meaning you forfeit when you do not make a payment.
* However, equity abhors forfeiture and damages typically must be in reasonable proportion to the loss actually suffered. **Look at how much has been paid on the contract!**
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| **GIFTS** | **Gifts** require: (1) an intent to give (by exercising the power to shift ownership to another); and (2) delivery (may be satisfied by writing!).**Gifts *causa mortis***: Typically, wills must be either be written, witnessed by one or two disinterests witnesses, and sometimes signatures must be notarized. However, gifts *causa mortis* are an exception. A gift *causa mortis* requires (1) the belief that death is imminent; and (2) actual or symbolic delivery of the property if they are to be enforced as valid transfers.* If the person recovers, then gifts *causa mortis* are revoked!
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| ***NEMO DAT*, DAWG!** | One cannot give that which one does not have.**Exceptions**:1. Good Faith Purchaser for Value (GFPV): People who have *voidable* title can give good title to a good faith purchaser for value. HOWEVER, impossible for seller had *void* title.
	1. Good Faith means had no notice, actual or constructive, of a prior inconsistent interest.
		1. Paying little money for something expensive counts as constructive notice. *Kotis*
	2. Value means consideration.
	3. **Four ways to acquire voidable title**: (1) transferor was deceived as to the purchaser’s identity; (2) delivery was in exchange for a check which is later dishonored; (3) it was agreed that the transaction was to be a “cash sale”; or (4) the delivery was produced through fraud punishable as larcenous under the criminal law.
	4. *Hauck v. Crawford* (South Dakota): Fraud leads to void title unless it is clear to GFPV and there is no owner negligence.
2. Adverse Possession: Adverse possessors do not have to record and GFPV do not get that land back simply because they didn’t know it had been adversely possessed.
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| **TITLE RECORDS** | Three types of recording acts:1. **Race** – the first person to record gets title.
	1. If no one records, then the first person to whom property is conveyed wins by *nemo dat*, dawg.
2. **Notice** – Last GFPV in time gets title.
3. **Race-Notice** – Subsequent GFPV wins only if (1) such person has no notice; and (2) records before the prior instrument is recorded.

**Shelter Rule**: Transferee who has received a property interest from the winner under a recording act will also be protected as a winner under the recording act, even if the transferee would not legally qualify for such a status.* Exception: O conveys to A. O then conveys to B who doesn’t know about A. A records. Then B records and sells to O. Since the transferee is the original owner, we say A wins to prevent collusion/fraud.

**Wild Deed**: A deed that is recorded, but is NOT connected to the chain of title of the property, and therefore does NOT provides constructive notice to later purchases of the property. |
| **NUISANCE** | A substantial non-trespassory interference with use and enjoyment of land that is caused either by negligence, reckless, ultrahazardous activities, OR intentional and unreasonable activities.* Note! Here, intentional is either (i) acting for the purpose of causing the invasion; (ii) knowing (or reasonably being supposed to know) that the invasion is the result; OR (iii) knowing (or reasonably being supposed to know) that it is substantially certain to result.

Trespass v. Nuisance: four tests:1. Trespass may apply where there is a personal entry by the ∆ (the oldest test);
2. Trespass is reserved for “direct” injuries to land as opposed to more indirect ones (from the old distinction between trespass and trespass on the case);
3. Trespass is based on whether invading objects are visible to the naked eye, such as shotgun pellets–as opposed to smoke, odors, or (possibly) aesthetic blight, which would be nuisance.
4. Trespass is reserved for situations of substantial harm that constructively deny possession to the π (the “modern” approach).
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| **PROPERTY RULES AND LIABILITY RULES** | **Property Rule**: An entitled is protected by a *property rule* when the entitlement cannot be taken without the owner’s consent.**Liability Rule**: An entitled is protected by a *liability rule* when it can be taken as long as officially determined damages are paid (e.g., private eminent domain).**Inalienability Rule**: Transfer (or some kinds of transfer forbidden). |
| **EASEMENTS** | **Servient Estate**: the property out of which the easement is carved.**Dominant Estate**: Property whose owner has the right to engage in or prohibit the use that is singled out.**Affirmative** easement: Easement permitting the owner of the dominant estate to perform some act in certain activities or uses on the servient property.**Negative** easement: Easement requiring servient property owner to desist from engaging in certain activities or uses on the servient property.**Appurtenant Easement**: The benefit of the easement is attached to a particular land parcel, and runs with the ownership of the dominant estate.Easement **in gross**: Benefit of the easement not linked to any particular land.**How to create an easement between private parties**: 1. A written grant including all the elements required to make a valid transfer of real property by deed from one person to another.
2. The writing should include the identity of the servient and dominant lands (or of the benefitted owner in the case of an easement in gross);
3. Should include a description of the easement;
4. Should include whatever formalities are required by state law for a valid transfer of land, such as attestation of signatures.
5. To assure that the easement is not wiped out by a future GFPV without notice, it should be recorded.
6. To ensure that the easement appears in the chain of title of the properties that are benefitted and burdened, it should not be created by reservation in a grant to some other party.

**How to create an easement as a matter of law**:1. **Easement by implication**: (1) former unity of ownership; (2) an existing use, which was visible and continuous at the time of severance; and (3) reasonably necessity for continuation of the use after severance.
2. **Easement by Necessity**: (1) former unity of ownership; (2) strict necessity; and (3) the strict necessity existed at the time of the severance.
3. **Easement by Estoppel**: (1) True owner (TO) gave explicit or implicit permission; (2) the user relied to their detriment on this permission by a material change in position; and (3) it would be inequitable to revoke permission.
4. **Easement by Prescription**: If the user engages in a particular use (opposed to acting like an owner), and that use is (a) open; (b) notorious; (c) exclusive; (d) continuous; (e) under a claim of right; and (f) for the period of statute of limitations, then easement by prescription.
	1. If act like an owner, then you’re adversely possessing rather than adversely using (the latter of which establishes a prescriptive easement).

In the U.S., there are no negative easements for light (ancient lights). *See Fountainblue*In the U.S., no negative easements by as a matter of law (prescription, estoppel, implication, and necessity).**How to end an easement**:(1) Merger/unification; (2) By contract; (3) Estoppel; (4) Prescription; (5) Necessity (when necessity ends); (6) condemnation; (7) destruction of servient estate; and (8) abandonment (requires an affirmative act). |
| **COVENANTS** | Must be in writing (Statute of Frauds applies). May violate public policy or laws and may be struck down upon those grounds. When does a covenant bind successors? Depends on whether you seek an equitable or legal remedy when suing the successors.**Real Covenants Test**: 1. *Burden*: (a) intend the promise to be binding on successors (intent); (b) original promise must have been between grantor and grantee (horizontal privity); (c) successor must have acquired the entire interest of the original promisor (vertical privity); and (d) the promise must touch and concern the land.
2. *Benefit*: (a) intend the promise to be binding on successors (intent); (b) successor must have acquired part of the interest of the original promisor (partial vertical privity); and (c) the promise must touch and concern the land.

**Equitable Servitudes Test**: 1. *Burden*: (a) parties must intend the promise to bind successors; (b) successor must have actual notice OR constructive notice (the latter of which is established by recordation of the original deed) of the promise to be bound by the burden; and (c) promise must touch and concern the land.
2. *Benefit*: (a) parties must intend the promise to bind successors; and (b) promise must touch and concern the land.

Courts might not enforce a covenant if the *circumstances have changed*. Test: There must be no benefit to property owners who desire to keep it in place. Other grounds for seeking abrogation are laches, abandonment, and violation of public policy. |
| **ZONING** | **Euclidean Zoning**: On the map, neighborhoods are marked off in zones having different land uses. Individual parcels of property are restricted to the uses permitted in their zone. Two types of Euclidean Zoning:1. *Cumulative zoning*: Uses are ranked in a hierarchy for most to least intensive, in accordance with their presumed incompatibility with single-family residences. Within any zone, one can devote one’s land to the designated use plus any less intensive use.
2. *Noncumulative zoning*: Only the designated use is permitted.

Euclidean zoning works best when adopted on a clean slate before a community is developed. *Nonconforming Uses*:Some courts hold that municipalities CANNOT downzone properties that had already been developed and devoted to a use incompatible with the zoning scheme.Zoning exists to prevent nuisance-like interferences.**Planned Unit Development (PUD)**: Contractual zoning between a developer and local political authorities.* More suspect because it’s essentially spot zoning.
* Typically incorporates a mixture of different uses into one area.

Trend is toward greater use of PUD. |
| **TAKING** | “[N]or shall private property be *taken* for public use, without just compensation.* “*[P]ublic use . . .* ”: actually means public purpose. *See Kelo v. City of New London*
	+ Kennedy concurrence: public purpose + is this just a pretext for a private taking?
	+ O’Connor dissent: Can only eminent domain not for public use if property is an affirmative harm to society.
	+ Thomas dissent: Can only eminent domain for public use (state retains it, or for public use). This will hurt minorities and vulnerable classes.
* “*[W]ithout just compensation*.”: Must compensate owner with fair market value, a/k/a opportunity cost. *See United States v. Miller*

**Eminent Domain**: a taking by the government that falls under the Fifth Amendment’s Takings Clause. Requires (1) public use; and (2) just compensation.* Eminent domain is cumbersome; we do not use it for personal property (chattels).
* Eminent domain is used against holdouts.

**Regulatory Taking**: When a government regulation effectuates a taking under the Fifth Amendment’s Takings Clause. Ad Hoc Test – balance the following factors:1. the extent of diminution in value caused by the regulation;
2. whether the regulation interferes with reasonable investment-backed expectations;
3. nature of the government action; in particular, whether it causes a physical invasion of the property or merely adjusts “the benefits and burdens of economic life to promote the public good”

UNLESS…Per Se Taking (two types):1. Permanent physical occupations, no matter how slight (*Loretto* – internet cable on roof and side of building); or
2. Denials of all economically beneficial or productive use of land (“total takings”; “total wipeout”), and nuisance exceptions (*Lucas* – beachfront property);
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