

PROPERTY OUTLINE 2020

Property rights concern relations among people regarding control of valued resources
Property law gives owners the power to control things & it does this by placing duties on non-owners.

Property

Bundle/set of rights with respect to valued resources

Property is also a system, made up of the sum of the parts of these individual rights

To achieve a just and efficient system, private property must be:

Widely dispersed, widely available, easily alienable

Real Property: land & those things permanently attached to land

Personal Property: everything else – including intellectual property

Trespass

Trespass defines & protects an owners right to exclude

Trespass: Unprivileged intentional intrusion of property possessed by another.

- Could be by an individual or object, at, above or below the surface
- Intent requirement is met if the trespasser engaged in a voluntary act
- Intrusion occurs the moment the non-owner enters the property

Privileged Trespass: Not wrongful. Done with the consent of the owner, entry is justified by the necessity to prevent a more serious harm to persons or property or the entry is otherwise encouraged by public policy

Public Policy Limits On the Right to Exclude

State v. Shack: D's went on owner's land to help migrant farmers who were housed on his property. Owner allowed them on but insisted that they give legal advice in his office, D's refused. So owner called police & D's were arrested for trespass.

Rule: Landowner doesn't have the absolute right to bar all individuals from his property. Right to exclude doesn't bar access to government services to employees who live on the property. Also noted that migrant workers are a disadvantaged class. Property rights must balance individual and social interests.

Supremacy Clause: This Constitution, & the laws of the U.S which shall be made in Pursuance thereof;... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

First Amendment: Congress (and states) shall make no law.. abridging the freedom of speech

Necessity Defense:

- 1) Clear & imminent danger
- 2) Reasonable expectation that the trespass will be effective as the direct cause of abating the danger
- 3) No legal alternative which will be effective in abating danger
- 4) Legislature has not acted to preclude the defense by a clear & deliberate choice regarding the values at issue

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Commonwealth v. Magadini: Homeless D lived outside for years, wasn't allowed in several buildings which had filed no trespass orders or the homeless shelter. He was arrested for trespass.

Holding: D had a viable defense under necessity, since D's conduct is viewed at the time of danger and the timing of the incidents was in the early morning or night hours when D could suffer in a fixed position from the cold weather.

Limits on Right to Exclude from Property Open to the Public

Public Accommodations Common Law

- Majority Rule - Grants members of the public right of reasonable access only to: innkeepers & common carriers (planes/trains/buses)
- Minority Rule – All places open to the public have duty to grant reasonable access

Public Accommodation Statutes – applied to suspect classes such as race/religion/ethnicity

- Federal Civil Rights Statutes
- State human rights/civil rights/anti-discrimination statutes

Free Speech Protections

- Federal – First Amendment (*Marsh*)

State Constitutional Provisions

Uston v. Resorts International Hotel (minority rule public accommodation)

Facts: P was banned from D casino b/c of counting cards at the blackjack tables, P sued claiming D had no right to exclude him

Holding: Absent a rule change by Casino Commission, D had no right to exclude.

- (minority rule) Right of reasonable access to members of the public.
- All property open to the public, no right to exclude people unreasonably

Remedies for Trespass

Equitable Remedies:

- Declaratory Judgement
- Injunction-court orders trespasser off the property

“Legal” remedy/monetary damages:

- Nominal damages *Jacques*
- Compensatory damages *Glavin*
- Punitive damages *Jacques*

Criminal punishment:

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- For violation of criminal trespass statute *Shack, Magadini*

Glavin: D's wanted better ocean view so they hired a landscaper to remove 10 trees from the P's property w/o permission. P had planned to use those trees as shade for his pond P sued. Court sided with P awarding \$30k in restoration damages.

D appealed, arguing that measuring restoration damages was incorrect & court should have measured by value of trees cut or diminution of market value of P's property.

Holding: Restoration damages are allowed when other measures do not preserve the imposition of justice. Other methods of assessing damages would not sufficiently deter other would-be trespassers from cutting down trees. Other methods are not correct here because P did not want the trees for any monetary reason.

Possible ways of measuring the damages: value of timber wrongly cut, diminution in market value of P's property, restoration damages, subjective valuations

Stenberg

Facts: P's own large swath of land that D needed to cross to transport a mobile home. P refused, D crossed the land anyways to deliver the home.

Holding: Court held that private landowners should be confident that trespassers will be appropriately punished, and the \$100k of punitive damages will encourage other parties to follow the law. A punitive damage award does not require compensatory damages.

Civil Rights Act of 1964

- D committed discrimination
- On the grounds of race, color, national origin or religion
- Public accommodation (not private clubs or establishments that aren't open to the public)

Dale v. Boy Scouts of America: P was well known boy scout, came out of the closet on t.v and D kicked him out for being a homosexual. Based on N.J public accommodation law, N.J ruled in favor of P. D appealed to SCOTUS.

Holding: Supreme Court held that forcing D to retain P violated D's first amendment rights, infringes 1st amendment rights if the presence of the person affects D's 1st amendment rights in a significant way. D is a private, non-profit organization.

Free Speech Rights of Access to Public/Private Property

***Marsh v. Alabama* (Fed/1st Amendment)**

Facts: D was arrested for trespass after attempting to give out Jehovah Witness pamphlets in a town that was entirely owned by a private corporation.

Holding: Supreme Court held that the town doesn't function any differently than a normal town, and the D's first amendment right to free speech occupies a preferred position over the companies right to exclude.

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Corp acts as a “business district” & therefore its right to exclude is limited

Lloyd v. Tanner (Fed/1st Amendment)

Facts: Mall sometimes hosts civic groups & presidential candidates, Vietnam war protestors attempted to hand out pamphlets and were told to leave. P protestors sued for declaratory judgement on 1st amendment grounds.

Holding: Court held that 1st & 14th amendment safeguards free speech through limitations on state action not private property.

Limits *Marsh*, which involved the assumption of a state created municipality by a corporation, no comparable assumption of municipal functions here.

Property doesn't lose its private character simply b/c the public is invited to use it

N.J Coalition v. J.M.B Realty (State-free speech provisions)

Facts: P sued D to permit members to distribute leaflets & pamphlets under New Jersey free speech law.

Holding: N.J has an expanded right to free speech concerning public use. Free Speech is protected against the government & private property for public use. Leafletting on private property open to the public is protected, however the ruling is limited to leafletting. Perhaps, Court would rule different if Ps were using bullhorns, picketing & parading? This would cause distractions and harm the economic activity of the business. Court analogizes malls as the modern day downtown business districts

Schmid Factors for determining public use:

- 1) Nature, purpose & primary use of property
- 2) Extent & nature of the public's invitation to use D's property
- 3) Purpose of P's expressive activity in relation to both the private use & public use of D's property

Trespass Maturing to Ownership/Use Rights

Adverse Possession

- 1) Actual possession that is (usual possession given the particular circumstances *Nome 2000*)
- 2) Open & notorious (constructive notice)
- 3) Exclusive (of record owner)
- 4) Continuous
- 5) Hostile (no express permission of record owner)
- 6) For the statutory period

Transforms trespassers into owners, claimant must prove by “clear & convincing evidence” – higher burden than “preponderance of the evidence”

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Tacking Doctrine: Adverse possessor may tack on previous adverse possession if the parties are in privity or purported to transfer title to successor. Privity is satisfied based on a non-hostile nexus, contractual, familial relationship.

**Not allowed when there has been an ouster.

Hostile Objective Test: (Majority) Looks at whether the possessor lacked permission, regardless of state of mind.

Subjective Test: (minority) “claim of right” test

- Intentional dispossession: must intend to oust true owner/bad faith trespasser
- Good faith/mistaken trespasser: must mistakenly occupy property of another

Color of Title: Written conveyance appears to pass title but doesn't do so, either from want of title in the person making it or the defective mode of conveyance

Number of years required for adverse possession varies state to state

Brown v. Gobble:

Facts: D alleged adverse possession of 2 foot tract of land, which had a fence two feet into P's property for many years.

Holding: Court held that the “doctrine of tacking” allows D to tack on the years of adverse ownership prior to D's purchase of the land. D had maintained the fence for years, it had been there for several decades, reputation was that the 2 foot tract belonged to the D.

Nome 2000 v. Fagerstrom

Facts: D and family had been using disputed land for more than 40 years. D used mobile home in the northern section of the land and built reindeer shelter, fish rack and planted trees.

Holding: Quantity & quality of acts required varies based on the character of the land, property was suitable for the activities that D used it for. Fact that others were allowed to use the property/cross the property doesn't undermine D's adverse possession, he was just serving as a hospitable owner. Hostility Requirement: Doesn't matter what the D believed/intended, the test is objective. D adversely possesses the northern section, but not the southern section since the activity in the southern part was insufficient. Activity in southern portion included: picking up trash/using the trails.

Nuisance

Nuisance: activity/condition that substantially and unreasonably interferes with use & enjoyment of one's land/Non-trespassory invasion

- Nuisance law is the primary way by which the common law of property addresses land use conflicts
- Focuses on the result of the conduct rather than the conduct itself
- D may be liable for nuisance even w/o any negligence

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Nuisance per se – some activities may be held to constitute nuisance no matter what location they are in or what consequence they generate

Anticipatory Nuisance Doctrine – Bars lawsuits prior to the nuisance taking place

Common Defenses – 1) D got there first, 2) the plaintiff is too sensitive

Factors

the extent of the harm, character of the harm, social & economic value of the conflicting activities, the suitability of the activities to the location, ability of either party to avoid the conflict & the practicability & fairness of making the party do so.

Page County Appliance v. Honeywell (hyper-sensitive)

Facts: P has owned an appliance store in a mall for decades, D placed a computer in the store beside P's store, which caused P's TVs to lose reception. D fixed 70% of the problem, P unsatisfied & sued for nuisance.

Holding: Court finds that the fair test for nuisance is whether conducting the operation of a business is reasonable in the manner, at the place & under the circumstances shown by the evidence. Court overturns summary judgement for D's.

Hypersensitive Defense: D argues that the P's need for TVs to be free from radiation interference is hypersensitive & therefore nuisance claim is invalid.

Outdoor Theatre Case: Outdoor theatre argued lights were messing up the screen so it sued for nuisance. Court ruled that requiring complete darkness in an urban area was a hyper-sensitive use.

Pendoley v. Ferreira

D founded piggery a decade ago, however the area surrounding the piggery has become more and more residential & the piggery has grown in size. Smell from the piggery nauseated residents and resulted in lawsuit for nuisance against piggery.

Court held that the D's can't remedy the situation with reasonable care & the piggery is likely damaging the potential growth of the area, therefore the D piggery must move its business. P has successfully shown it has the right to an injunction against D.

Jost v. Dairyland Power Cooperative

Facts: D is a coal powered plant which generates pollution that travels to neighboring farms. Farms sued for damages due to nuisance, arguing that D's pollution had diminished the property value of the farms & had killed numerous vegetation.

Holding: Court held that testimony that D wasn't negligent is irrelevant to a finding of nuisance. Even if benefit of activity is great and damages to plaintiff is slight it may still be found to be a nuisance. Injuries caused by air pollution must be compensated irrespective of the utility of the offending conduct.

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Nuisance Remedies

Boomer v. Atlantic Cement

Facts: D operates a cement plant, P is a residential neighbor that's suffered dirt, smoke, vibration & air pollution due to D's plant.

Old doctrine is if there is a nuisance & substantial damage than an injunction will be granted

Court modifies this doctrine & rejects an injunction conditioned on payment of permanent damages to P's which compensate for total losses to property, this requirement pushes owners in the direction to research improved techniques. Relief granted disallows future owners of P's property to sue for this specific nuisance.

Spur Industries v. Del Webb (Public Nuisance)

Facts: D operates a cattle feedlot in rural Arizona, but P developer has developed a town over the years that is encroaching on D's feedlot. As the development got closer and closer the smells from D's feedlot grew worse to the point that it created difficulty to sell the residences so P sued.

Court held that the D's feedlot constituted a public nuisance b/c the flies & odor frequently drifted over to P's properties.

Court held that the P developer came to the nuisance and therefore D was entitled to a purchased injunction. P developer has taken advantage of the cheaper land values in moving to a rural area to the foreseeable detriment of the D, and therefore must indemnify the D.

Public Nuisance

- Unreasonable interference with a right common to the general public
- With public health, safety, morals, peace, comfort, convenience
- Formerly only public officials could bring a public nuisance action
- Nowadays, any member of the public affected by the activity can bring suit

Nuisance Liability & Remedies

P wins \$ damages only – when D's conduct is societally reasonable (causes more societal good than harm & thus should be allowed to continue) but harm to P is substantial (& unfair to burden P with the costs of D's socially useful conduct)

P wins injunction (& doesn't have to pay for injunction) when D's conduct is societally unreasonable (causes more societal harm than good) and harm to P is substantial.

P win purchased injunction – when D's conduct causes more societal harm than good and causes substantial harm to P, but its fair to impose cost of shutting down D's activity on P (ex: when P comes to the nuisance)

P loses if harm to P is not substantial; or D's conduct causes more societal good than harm & its fair to impose costs of D's activity on P; or imposition of damages would unfairly put D out of business

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Interferences With Light & Air

Fontainebleau v. Eden Roc

Facts: D built a 14 story building on it's north property line, during part of the year the shadow of the building would extend over the cabana, swimming pool & sunbathing area of P hotel.

Court held that D's building did not constitute a nuisance b/c a landowner does not have a legal right to the free flow of air & light across the adjoining land of his neighbor.

Court held that the building was not analogous to a "spite fence" which is a type of nuisance

Prah v. Maretti

Facts: P had solar panels on roof of home for heating system. D neighbor plans to build home that would block light to the panels.

Court held that nuisance law has the flexibility to protect both landowners right of access & another's right to develop. Landowners compliance with zoning laws does not automatically bar a nuisance claim, and sunlight is no longer valued only for aesthetic enjoyment, it now serves a practical purpose.

Zoning

Top down, comprehensive, long-range land use planning

To avoid conflicting land uses that may result in nuisance

State governments enjoy the power to enact regulations promoting public health, welfare, safety & delegates power to local government/municipalities

Use Zoning: divides up areas into different permissible uses; residential, agricultural, commercial, industrial

Area Zoning: height, lot size, setback requirements; height restrictions, minimum lot sizes, setback requirements

10th Amendment: powers not delegated to the U.S by the Constitution.. are reserved to the States respectively, or to the people

- states retain/enjoy broad general police power
- To regulate property to promote general public health, welfare, safety. Power to Zone + Otherwise regulate land

Village of Euclid v. Ambler Realty

Facts: Municipality zoned a large portion of owners land as a restricted residential area. Owner argued the zoning violates the 14th Amendment & deprives him of liberty & property w/o due process of law & denies him equal protection b/c the zoning reduced the value of his land 75%.

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Court held that apartment complexes destroy the residential character of a neighborhood, the ordinance is not unconstitutional b/c it is not unreasonable & it has a relation to public health, safety, morals & general welfare.

Doctrines that protect property owners against newly enacted zoning ordinances

- Prior non-conforming use- use of land, building, or premise that lawfully existed prior to the enactment of a zoning ordinance & is maintained after the effective date of such ordinance even though it doesn't comply with the use restrictions applicable to the area in which its situated
- Vested rights- already put significant work into the project
- Variances- permission to use/develop a parcel in a way that otherwise violates zoning ordinance, to alleviate a special hardship

Town of Belleville v. Parillo's

Facts: Restaurant was in an area that was later zoned as residential. Qualified as a pre-existing non-conforming use, however it later re-opened as a nightclub. Applied for a license, denied, continued anyways and was fined.

Court held that the restaurant can no longer benefit from the non-conforming use b/c the nature of the business has changed. It holds many more people, the hours are late into the night and there have been noise complaints from neighbors.

Vested Rights Defense to Rezoning

Standard for vested rights in rezoning: depends on type of project, location, cost & the amount accomplished under conformity.

Majority – owners have vested rights to existing zoning if they've invested substantially in good faith reliance on that law, most courts require a building permit or other approval.

Minority – no requirement for building permit

- Some courts measure the substantiality of investment by comparing the ratio of expenses to the total cost of the project
- Others take a factored approach

Minority – Developers have vested rights upon filing of a valid & complete building permit w/o need to demonstrate substantial expenses

Stone v. Wilton *vested rights*

Facts: P purchased 6 acres of land with intent of building low-income subsidized housing. At the time $\frac{1}{4}$ was zoned single family, $\frac{3}{4}$ was zoned multi-family, P paid architecture fees, engineering fees in preparation for plans, and received an FHA loan. City rezoned the entire plot to single family and P sued.

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Court held that the rezoning does not amount to a “taking”, no construction was begun and P’s efforts/expenses were unsubstantial. P failed to prove he had a vested right to complete the project, city council could reasonably have believed that general welfare interests outweighed P’s investment interest.

Takings Law

When do regulations constitute Taking of property?

5th Amendment “takings Clause” – private property shall not be taken for public use w/o just compensation

14th amendment incorporates takings clause and applies them to the states

Penn Coal v. Mahon (1922)

Facts: D coal company has deed to P’s underground land rights which reserves the right to remove all the coal underneath & waives damages. P has deed to surface land & P argues that D’s rights were taken away by the Kohler Act.

Holding: Supreme Court for the first time found that if the state police power goes too far than a taking occurs. Damage to a single home is not a public nuisance, extent of public interest is limited.

Safety is not a concern as notice can be provided in advance, and b/c P purchased the land knowing the risks concerning the coal.

Brandeis Dissent: Right of an owner to use his land as he sees fit is not absolute. The restriction was imposed to protect public health, safety, morals and dangers, therefore it is not a taking. Owner may not use land to create a nuisance.

Bright Line Rules/categorical taking:

- Government mandated permanent physical invasions of property
- Regulations that completely deprive an owner of all economically viable use of his property (*Lucas, Penn Coal*)

If not a categorical taking

- Apply multi-factor test to determine whether justice & fairness require compensation (*Penn Central*)
- Economic impact of the regulation on the particular property owner/character of the government action

Penn Central v. NYC

Facts: N.Y designed P Penn Central as a historic landmark, P entered lease to construct 50 story office building above Penn Central. D rejected the permit request, and P sued.

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Holding: Court ruled that the landmark designation does not constitute a “taking”. Court held the law is not arbitrary, it applies to many structures, doesn’t interfere with present use of terminal, permits P to operate & obtain a reasonable return on investment. Additionally, the D didn’t say P couldn’t build anything on top of Penn Central, just not a 50 story tower. Restrictions imposed are substantially related to the general welfare.

New Test: Court should consider economic impact of the regulation on the current owner, extent to which the regulation has interfered with the owner’s rxable investment-backed expectations, and the character of the government action involved.

Dissent: No reciprocity of shared mitigated value exists when a few buildings are singled out & treated differently. D’s are not prohibiting a nuisance, and the P is required to preserve the property at its own expense.

Per Se Takings

Prune Yard Shopping v. Robbins

Facts: Ps went to Ds mall to protest for Zionism, D told them to leave, and Ps sued. CA has an enlarged free speech right (*see N.J Coalition*) and allows it on commercial private property. (Contrast with *Tanner*, which was a U.S Const. case). D argued that forcing it to allow protestors constituted a taking under the 5th amendment w/o just compensation.

Holding: Court held that that the proper test for a “taking” is whether restrictions on private property forces some people alone to bear public burdens which should be beared by the public as a whole. Nothing here shows that the activity will unreasonably impair the value or use of the property as a shopping center.

Loretto v. Teleprompter Manhattan

Facts: P apartment complex is required by state law to install cable wires on the property for T.V. P sued claiming that the requirement constituted a taking

Holding: Court held that a permanent even if minor physical presence constitutes a taking. Constitutional protection can’t be made to depend on the size of the area seized. The government has broad power to regulate housing conditions, but not to impose permanent occupation.

Deprivation of Economically Viable Use

Lucas v. S.C Coastal Council (1992 U.S) (*all economically beneficial use*)

Facts: P paid \$975k for 2 residential lots in 1986 for which he intended to build a residential home on. In 88, S.C enacted a statute which barred any permanent structures on the land P had purchased. P sued claiming that the statute constituted a “taking”

Holding: Property may be regulated to a certain extent, however if the regulation goes too far it constitutes a “taking”. This regulation denies all economically beneficial/productive use of the land. It constitutes a taking unless South Carolina can show that the prohibited use wasn’t part of P’s rightful use in the first place.

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Concurrence: The property still may have some use, test should be whether the deprivation is contrary to P's reasonable investment backed expectations.

Dissent: There are other benefits that the P could enjoy, like camping. (this judge is an idiot)

Palazzolo v. R.I (2001)

Facts: D designated a property as wetland & therefore made it nearly impossible to build on. P purchased the land, and was denied permits to fill in his marshland & build homes. P lost at trial court appealed to Supreme Court.

Holding: Supreme Court held that the fact that the P took title to the property after the regulation restricting development on the marshland was set in place does not absolve the state from facing a suit based on taking's law. The Court also found that the State had already denied his plans several times & thus he could bring the suit. Reserved judgement on whether P had been denied all economic benefit.

On Remand: Court sided with D that there was no taking. Development of much of the land would constitute a public nuisance b/c much of it was below the mean high water line which defines the land as public.

Tahoe Sierra Preservation v. Tahoe Regional Planning (2002)

Facts: D placed a temporary moratorium on development on the lake for 32 months & then extended it to 6 years in order to prevent the loss of the lake's "clarity". P sued claiming that the moratorium took all economically viable use of the property and amounted to a taking.

Holding: Court held that the moratorium did not amount to a per se taking. Owners of property can sometimes obtain damages for temporary takings if they are prevented from using their property for a period of time, however this situation is not covered by that rule. A temporary physical intrusion may also constitute a taking, however that is not present in this case.

*Not like *Lucas* because the diminution of use is only temporary.

Public Use (Eminent Domain)

Kelo v. City of New London (2005)

Facts: D made a development plan that would create jobs, increase taxes & revitalize the area. City had been designated a "distressed city". D purchased property from willing sellers, & wants to use eminent domain on the unwilling. Ps properties are not in a poor condition. Ps sued arguing that the taking of their property would violate the "public use" requirement.

Holding: The taking meets the public use requirement, this isn't a transfer from a private property to another private property. However, the city doesn't intend to open the use entirely to the public. "Use of the public" test is invalid, current test is "public purpose", which is defined more broadly. Challenges are resolved in light of the entire plan, not on a piecemeal basis. Promoting economic development is a valid exercise of the governments taking power, even though it will often benefit private parties.

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Concurrence (Kennedy): Court should apply a rational-basis review and should strike down a taking that by a clear showing is intended to favor a particular private party with only incidental or pretextual public benefits.

Dissent (Thomas): Under the guise of “economic development”, any private property could be taken & transferred to another private owner so long as it may be upgraded. This obliterates the previous rule where properties taken were considered harmful akin to a nuisance.

Just Compensation

S.C holds that this requires payment of “fair market value”

Some states have legislated that the government must pay more than fair market value

S.C has held that the government doesn't have to pay relocation expenses. Fair Market Value doesn't include any special value of the property to the particular owner arising from its adaptability to a particular use.

Severance Damages: If government takes a portion of a property, it must compensate not only for the property it took, but also for any reduction in value to the remaining property.

Special Benefit: Sometimes the taking will increase the value of the remaining property. Courts will sometimes reduce severance damages by the amount of the special benefit. Most states do not follow this.

Servitudes

Servitude: Right or obligation that “runs with the land”, automatically passes to subsequent owners or possessors of land (non-possessory)

Easements

Affirmative Easement: (Easement) Right to use another's land for a limited purpose

- Right of Way: Most common easement, right to use another's land for ingress or egress.
- Profit: allows non-owners to collect resources from the land such as coal, water or timber

Negative Easement: Entitles holders to compel the servient owner to refrain from doing something.

- Very restricted, typically limited to light, air, structure, water(?). Some states scenic view
- Example: Negative Easement to prevent someone from building to tall of a building and blocking sunlight

Appurtenant Easement: Benefit of easement attached to land ownership & owned by whomever owns the dominant estate. Benefit follows the land, passes automatically with the dominant estate. Involves **two properties**, need a dominant and a servient estate!

- When the dominant estate is subdivided it is presumed that the benefit of the easement will be shared

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- May apportion (let others use it) appurtenant easements (*Green v. Lupo*)

In gross Easement: Confers upon the easement holder a personal or financial gain, but it's not linked to the easement holders use & enjoyment of the land. Held by a particular individual or entity rather than running with the benefited estate.

- Easement passes automatically with the burdened estate, but there is no benefitted land
- Sometimes you may apportion *Henley*, usually not
- Example: Right to place a billboard on another's land, right to swim in someone's pond, right to lay utility lines
- ****Not transferable unless it's for commercial purposes!**

Personal Easements in Gross vs. Commercial Easements in Gross.

- Personal: Right to swim in neighbor's pond, can't transfer
- Commercial: Fishing Corp has right to fish in lake, can transfer

?s to ask for in gross or appurtenant?

(1) whether the easement would be useful separate from ownership of neighboring land (if so, more likely to be in gross) or (2) whether the easement has little utility separate from ownership of neighboring land (like the right to use a right of way across neighboring property) (if so, more likely to be appurtenant) and (3) constructional/policy preference for appurtenant easements.

****Statute of Frauds requires that Easements be in writing**

- Exceptions: 1) Easement is less than a year, 2) prescriptive easements

Easements created by express agreements run with the land only when;

- 1) Easement is in writing
- 2) Subsequent owner of the servient estate had adequate notice of the easement at the time of purchase of the estate
- 3) Drafters of the easement intended that it run with the land

Appurtenant or In Gross?

Green v. Lupo (1982)

Facts: P sold part of his land to D, P performed a deed release for portion of land in exchange D gave P an easement to part of the land. D didn't like that P's mobile home park tenants used the easement for racing motorcycles so D blocked it off. P sued requesting that the D be enjoined from interfering. D argued that the easement was in gross & therefore the P's tenants may not use the easement.

Holding: Easement was ambiguous as to whether it was appurtenant or in gross, however the court finds it was appurtenant since there is a strong presumption in favor of appurtenants. However, reasonable restraints are allowed to avoid a greater burden on the D's estate than

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originally contemplated in the easement. Can't ban motorcycles b/c they are a common means of transportation.

**Easement that designates a specific person as the dominant owner is more likely to be considered in gross.

**easement subject to rxable restraints so that use does not become a nuisance

Cox v. Glenbrook (Nev. 1962)

Facts: D granted an easement to use D's road. Original grantee died, and P came into possession. P wants to break up benefited estate into 40-60 parcels & continue to use the easement. The easement is the only existing way to and from the land. P sued for a declaratory judgement that the easement is valid.

Holding: If the easement did not contain restrictions, the court may not impose them. P may improve & maintain the road, however P can't extend the width of the road as this would be outside the compilation of the original easement. Intentions of the P to build residential properties does not in & of itself constitute an unreasonable burden upon D's estate.

***Holder of an appurtenant easement may not place an unrxable burden on the burdened estate that wasn't contemplated by the grantor, but subdivision in & of itself is not unrxable

Henley v. Continental Cablevision (1985 C.O.A Missouri) (*easement in gross, commercial*)

Facts: P's predecessors conveyed an easement in gross to telephone companies to construct, repair & operate telephone lines & electrical lighting. D acquired licenses from the telephone corp to use the easement to erect cables, wires & conduits for T.V. P sued to compel the removal of D's wires & cables & sought \$300k in damages.

Holding: Grantor of an easement for a particular purpose who does not retain an interest in using the land for that purpose may not prevent the easement holder from sharing the easement with others. Adding a single cable to the existing electrical poles doesn't increase the burden on the P. Owners of the Easement may authorize (apportion) 3rd persons to use its right of way for purposes consistent with the principal use granted.

Factors Whether the Owner of an Easement is Misusing it:

- 1) Whether the use is of a kind contemplated by the grantor
- 2) Whether the use is so burdensome that it constitutes an unreasonable burden on the servient estate not contemplated by the grantor
- 3) Whether the easement can be subdivided

Easements By Implication

**Four Easement Exceptions to the Writing Requirement:

- 1) Easement by Estoppel
- 2) Easement by Prescription
- 3) Easement Implied by Prior Use

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4) Easement by Necessity

Easement by Estoppel Elements

- 1) Permission from owner to use the land
- 2) Foreseeable & reasonable reliance on continuation of permission
- 3) Changed position by claimant (usually through significant expenses) in reliance on continuation
- 4) Finding an easement is necessary to prevent injustice.

***Holbrook v. Taylor* (1976) Easement by Estoppel**

Facts: D gave permission in 44 for a road to be created for a mine. In 57, D built a home & the road was used by the tenant. In 64, P bought neighboring land, built a home & used the road to access the home. Prior to 65 P used the road with D's permission, afterwards D rescinded permission. P sued to establish an easement by estoppel.

Holding: If the P was given permission to use the road & construct something at considerable expense than the P may have gained a right to use. Doesn't necessarily require express permission, only the owner's knowledge. P widened the roadway, put in a culvert & graveled it. P used the roadway to build the home. Right to use the road is established by estoppel, D has no right to revoke permission.

Easement by Prescription

- 1) Actual Use that is
- 2) Open & notorious (doesn't need to be exclusive of record owner)
- 3) Continuous for the statutory period
- 4) Adverse/hostile – w/o permission of the owner

Community Feed Store v. Northeastern Culvert Corp

Facts: P owned a business adjacent to the D's property, gravel parcel of land owned by D which was partially used for loading & unloading trucks. P used the land for nearly 60 years until D found out that it owned part of the land and built a barrier.

Holding: Extent of an easement is fixed by the use through which it was created, doesn't have to be proved with absolute certainty. Area in use by trucks had been used for 70 years, P is allowed to tack on previous owners affirmative easement for unloading & loading purposes.

Easement Implied by Prior Use Elements

- 1) Common ownership – two parcels previously owned by common grantor
- 2) Prior use – one parcel was previously used for the benefit of the other parcel in a manner that was apparent & continuous
- 3) Reasonable necessity/convenience – the use is reasonably necessary or convenient for the enjoyment of the dominant estate

Restatement Factors for Prior Use

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- 1) Whether claimant is the conveyor or conveyee
- 2) Terms of the conveyance
- 3) Consideration given for it
- 4) Whether the claim is made against a simultaneous conveyee
- 5) Extent of the necessity of the easement to the claimant
- 6) Whether reciprocal benefits result to the conveyor & conveyee
- 7) Manner in which land was used prior to conveyance
- 8) Extent to which the manner of prior use was or might have been known to the parties

Granite Properties v. Manns (1987) Easement Implied by Prior Use

Facts: P owned the entire property from 63-82 when Parcel B was sold to the D. To access P's Parcel A, P must use a driveway that is on D's property. P had been doing this since 67. D had survey done which indicated that P's driveway encroached on his land, told P to discontinue use.

Holding: P had used the driveway since the 60s, they were permanent & D was aware of them. P does not need to show that the driveway was absolutely necessary, test is reasonable necessity. P meets the standard for prior use easement.

Easement by Necessity Elements

- 1) Dominant & Servient estates were formerly one parcel (common prior ownership)
- 2) At the time of severance the dominant estate becomes landlocked

Finn v. Williams (1941) Easement by Necessity

Facts: Williams owned 140 acres, sold 40, P later purchased the 40 acres. D inherited the remaining 100 acres. P's land is entirely surrounded by D's land & strangers land. Previous roads through strangers land have been closed. D refuses to allow access to the road through his land.

Holding: P has successfully argued for an easement by necessity. P's are unable to take their livestock & farm products to the market. The only way to a public road is through D's private road.

Modifying & Terminating Easements

Easements last forever unless they are terminated by:

- 1) An agreement in writing
- 2) By the easements own terms
- 3) By merger, when the owner of the servient estate becomes owner of the dominant estate
- 4) Abandonment
- 5) Adverse possession or prescription
- 6) Frustration of purpose

Covenants

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Covenants: Restrictions on the use of land/obligations regarding the land held by one who doesn't own the land. Vast majority are negative, but they can be affirmative.

- Burdens & Benefits run with the land – enforceable by/against succeeding owners of the benefitted/burdened land
- Covenants can last forever, but in order to burden land forever there must be a countervailing benefit to other land
- Created b/c negative easements are so limited

How is promise to be enforced?

“Real Covenant” – money damages

“Equitable Servitude” –injunctive relief

Different requirements for each

For burden/benefit of covenant to be binding upon successors in interest to land:

- 1) Writing – Promise must be in signed writing in the originating documents (lease, deed of sale, etc.)
- 2) Notice – Party to be bound must have notice of the covenant (actual/inquiry/constructive)
- 3) Intent to Run – Original covenanting parties must intend for the covenant to be binding upon successors
- 4) Touch & Concern the Land- subject matter of the covenant must touch & concern the land... relevant to/pertaining to parties as landowners
- 5) Privity of Estate – necessary to enforce \$ damages (real covenant) not required for enforcement of injunctive relief (equitable servitude)
 - Vertical privity – between each of those parties & its successors in interest
 - Horizontal privity – between the original covenanting parties

Touch & Concern

- Promises that affect the use or value of the land itself, increasing the value of the benefitted land or enjoyment of the land

Types of Promises that may not Touch & Concern the Land

- Historically, promises to just pay \$ do not touch & concern the land
- If its just about \$, then it doesn't necessarily touch & concern the land

Horizontal Privity: Looks to relationship between original covenanting parties. Most Courts allow “instantaneous privity”, finding horizontal privity when the covenant was created at the moment the owner of one parcel sells/transfers rights in the other parcel.

Elements:

- 1) Original covenanting parties must be in a relationship evidencing their mutual interest in the land

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- Seller/purchaser relationship
- Lessor/Lessee relationship

2) The covenant is contained in the documents establishing that relationship

Vertical Privity: Refers to relationship btwn original covenanting party & the subsequent owner of the parcel

- For strict vertical privity to exist, original covenanting party must transfer all of its interest in the burdened parcel to the successor
- Not satisfied when original covenanting party transfers less than all of its interest (lease, life estate)
- Not satisfied under adverse possession

Neponsit v. Emigrant Bank (1938)

Facts: P developed a parcel for use as a residential community in 1911, in 1917 it sold a portion to the Deyer's. D bought the Deyer's property in 1935. Deed to property contains a covenant that mandates a fee to be paid by owner to P to contribute to the maintenance of the community. D refused, P sued to enforce the covenant.

Holding: P intended for the covenant to run with the land, & to be enforced by P. Issue is whether or not it "touches the land"? It does, because the burden of paying the cost is inseparably attached to the land enjoying the benefit (the community). Is the property owner's association in privity with the benefited estate? P has not succeeded to ownership of property from the grantor, doesn't have title to the community. There is vertical privity btwn the original developer & the community management corp in substance if not in form b/c it is for the benefit of the claimant.

Whitinsville Plaza v. Kotseas (1979)

Facts: In 68 D sold Parcel A to Plaza Trust. The deed had a covenant which promised that D would not use his retained land in competition with the Trust's contemplated discount store. In 75 the Trust sold land to P, & the deed gave it the benefit of the covenant. D leased his land to CVS to establish a discount store. P sued D seeking injunctive relief, arguing that the operation of CVS would violate the covenant.

Holding: Court held that reasonable anticompetitive covenants are enforceable by & against successors to the original parties. The covenant affects the value of the burdened estate because it increases the value of the benefited estate and decreases the value of the burdened estate. Anticompetitive Covenants remain unenforceable if they are unrxable in time, space or if they obstruct the public interest.

Substantive Limitations On Creation & Enforcement of Covenants

Grounds for Challenging Covenants;

- 1) Reasonableness/Public Policy Considerations
- 2) Equal Protection Clause (Constitutional Violations)
- 3) Discrimination under Fair Housing Act

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- 4) Restrictions on alienability
- 5) Unreasonable restraint of trade

Davidson Bros v. D. Katz & Sons (1990) (*reasonableness/public policy concerns*)

Facts: P opened a supermarket in 1952 & in 78 it opened a 2nd one two miles from the 52 store. P closed the 1st market in 79, sold in 80 to Katz. Deed contained a covenant preventing use as a supermarket. Katz sold to D & D leased it as a supermarket. P sued seeking money damages for the violation of the covenant.

Holding: Court held that the covenant was for an unreasonably lengthy period of time given the circumstances, unreasonable restraint of trade & contrary to public policy. Many residents don't have cars and there are no other options for a supermarket. Removal of supermarkets causes inner-city decay, and D had attempted to find another location for a supermarket but none were available.

**Unique Case b/c N.J replaces the 5 Element Covenant Test for an 8 Factor Reasonableness Test

Nahrstedt v. Lakeside Village (1994) (*reasonableness/public policy concerns*)

Facts: D Condo Association had a covenant on all of the condos that cats & dogs were banned. P moved in & sued arguing that the covenant was unreasonable.

Holding: In Cali, P must meet a higher standard when attempting to invalidate a condominium covenant that was created in the original declaration. There is a presumption of validity with condominium covenants in the original declaration, b/c this rule promotes stability & predictability and b/c condo owners are aware of covenants in place when they purchase. The restriction is not arbitrary but is rationally related to health, sanitation & noise concerns.

14th Amendment: No State shall deny to any person within its jurisdiction the equal protection of the laws.

Shelley v. Kraemer (1948) (*equal protection clause*)

Facts: In 1911, 30 out of 39 home owners signed a restrictive covenant to prevent blacks from living there. D is a family of blacks that purchased one of the properties in 1945. P sued arguing that the D should be prevented from taking possession & title should be divested to the grantor.

Holding: 14th Amendment protects property rights with reference to race. Problem is this case is between private individuals and not the government. The covenant on its face is constitutional b/c its between private citizens, however they are enforced by the judiciary. 14th Amendment implicates actions by the state courts & judicial officials. Since there has been state action in enforcing these covenants, they are unconstitutional under the 14th Amendment.

Restraints on Alienation

Northwest Real Estate v. Serio (1929) Restraints on Alienation

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Facts: D sold a property to another party with a covenant stating that the party couldn't sell the property for 5 yrs without D's consent. The party contracted to sell the party to P (Serio). D didn't consent, so P brought a suit seeking specific performance of the property against D.

Holding: The covenant is invalid b/c it is an invalid restraint against alienation. It improperly restricts the transferability of the property.

Dividing Up Ownership Over Time

Future Interests: Used to control what is done with &/or who will own property in the future by defining ways to divide up property interests over time

- If restriction is imposed, remedy for violation is forfeiture of ownership of the property
- Fee Simple Absolute: Right to possess land which extends indefinitely into the future
- Other future interests describe features of time segments into which the right to possess can be split

Estates in Land are distinguished from each other primarily by the different times at which they end

Future Interests are distinguished from each other primarily by the different times/ways which they begin.

May be created in grantor or in 3rd party:

O grants blackacre to A for life [default: blackacre reverts back to O when A dies]

- Present life estate in A
- Future interest in O

O grants blackacre to A for life, and then to B

- Present life estate in A
- Future interest (remainder) in B

Policy Concerns

- Avoid creating system of hierarchal/concentrated land ownership through inheritance

Devising: Act of leaving land in a will to someone (the devisee)

Intestate: If the person dies without creating a will, property is divided up among person identified in the state intestacy statute.

Heirs: Those who inherit under the state intestacy statute

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Types of Current/Future Land Rights:

<i>Estates System: Freehold Interests</i>			
<i>Present Interest</i>	<i>Words Used to Create</i>	<i>Future Interest</i>	
		<i>In grantor</i>	<i>In third party</i>
Fee simple absolute	"to A" "to A and her heirs"		
Fee simple determinable	"as long as" "during" "until" "while"	possibility of reverter	
Fee simple subject to condition subsequent	"provided that" "on condition" "but if"	right of entry (also called right of reentry or power of termination)	
Fee simple subject to executory limitation	"until (or unless) . . . , then to . . ." "but if . . . , then to . . ."		executory interest
Life estate	"for life"	reversion	remainder (vested or contingent)

Defeasible Fee: interests that terminate at the happening of an event (other than the death of the current owner), may never occur. Must have clear language for a defeasible fee.

O: To A while the property is used for residential purposes, then...

- Fee Simple Determinable: future interest in grantor, forfeiture is automatic. "so long as", "during", "until", "unless". (reverter is the only future interest available/automatic)
 - Exp: O to A so long as A is an attorney
- Fee Simple Subject to Condition Subsequent: future interest in grantor/grantor must assert right
 - O to A, but if coffee is ever consumed on the property than grantor reserves the right to revert. Language – "but if", "provided that", "on condition"
- Fee Simple Subject to an Executory Limitation: future interest in third party, automatic forfeiture.

Fee Simple Absolute: Property ownership without an associated interest, estate that extends into the indefinite future. (Default ownership).

Life Estate: Interest held for life by designated individual, grantor gets to decide what happens to the interest upon his/her death

- Future Interest: In Grantor (reversion), In third party (remainder)

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Contingent Remainder: Remainder will take effect upon happening of an event or remainder will go to person who cannot be ascertained at the time of conveyance

- To A for life, then to Michelle Obama if she is ever elected president
- To Malia Obama for life, and then to the children of Malia Obama

Vested Remainder: Remainders are vested if they are identifiable at the time of the conveyance & no conditions/contingencies upon taking possession

- To A for life, then to Michelle Obama

Wood v. Board of County Commissioners of Fremont County

Facts: P conveyed a parcel of land for the “purpose of constructing & maintaining a County Hospital”. D built & operated a public hospital for 35 years but then sold the property to a private corp. P sued claiming the grant was for a fee simple determinable or a fee simple subject to condition subsequent.

Issue was whether the language in the conveyance was sufficient for a defeasible fee.

Holding: No, an estate conveyed for the purpose of an activity is not sufficient to create a defeasible fee. Deed must clearly state the grantor’s continued interest in the land. Fee Simple Determinable: Language must say “so long as”, “during” or “until”. Fee Simple Subject to a Condition Subsequent: Language must say “upon condition that”, “provided that” or “if”. P retains no interest in the property.

***Interpreted the language as explaining the purpose or the use of the conveyance. This only amounts to Precatory Language and has no legal effect.

Edwards v. Bradley

Facts: Decedent died in 69 with a will giving the property to daughter, unless she tried to sell it. At which point it would be conveyed to daughter’s six children. Daughter attempted to sell however P declined to support the sale. Daughter died, and the will directed that the property be sold & proceeds go to the children except for P. P sues claiming an interest in the property.

Holding: In the absence of language clearly creating a specific type of ownership, a will placing restraints on an interest in land creates a life estate. Such restraints are void in a fee simple, therefore a life estate is created to preserve the conditions. Daughter had no interest in the property at the time of her death, therefore her will giving the property to only 5 children was invalid. Property passes to all children equally.

Hierarchy of Interpretational Preferences

Fee Simple Absolute (FSA) with non-binding language (*Woods*) **Most Preferred**

- Courts abhor forfeiture, language expressing “purpose” & “use” is only Precatory Language & has no *legal effect*

Fee Simple Absolute with Enforceable Covenant

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Defeasible fee (may last forever, may cut short)

- Fee simple subject to condition subsequent (forfeiture is not automatic)
- Fee simple determinable (forfeiture is automatic)

Life Estate **Least Preferred**

- *But see Edwards v. Bradley* – life estate preferred if necessary to give effect to testator's overriding intent to impose enforceable restraint on alienation

McIntyre v. Scarbrough (1996) (Forfeiture of Life Estate due to Voluntary Waste)

Facts: P purchased 17 acre estate from D with a life estate for D mother on 1.2 acres of the purchased land which included several buildings. "Life estate is for Ms. McIntyre's life & during her occupancy it will serve as her personal residence". Mother stopped living there for several years, purportedly in a nursing home. During that time D didn't pay the property tax and the property became dilapidated. P sued to establish title & terminate the life estate.

Holding: P hadn't seen the mother for years on the property. Property had no water/gas or mailbox. P was forced to pay the property tax. D argued due to health issues she had been away but she intended to come back. Court held that the D had committed voluntary waste and therefore the life estate was subject to forfeiture.

Dividing Up Ownership of Property Concurrently

Varieties of Common Ownership

Concurrent Ownership: More than 1 person may have the right to control the same thing at the same time.

Entity Property: Beneficial use of the property is significantly divided from rights to govern the property. Exp: Publicly Owned Corporation

Types of Concurrent Tenancies

Each co-owner has a right to possess the entire parcel without compensating the absent co-owners. (absent an agreement otherwise or an ouster)

Right of Survivorship: When one tenant dies, his interest is automatically transferred to the remaining tenant.

Tenancy in Common: Favored (except for married couples in some states), unless express writing to the contrary.

- More than 1/2 of Americans die w/o a Will, when an individual dies intestate, than the heirs receive the property based on a tenancy in common. This has caused property issues with estates being divided up to significantly.
- Can transfer property interest via will or intestate (no right of survivorship)
- Can own unequal shares

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Joint Tenancy:

- Right of Survivorship (no right to transfer interest), but severable. *Unless* an indestructible right of survivorship is created
- Must explicitly specify a joint tenancy b/c it's not the default
- Joint Tenant can destroy the Joint Tenancy, & afterwards it becomes a Tenancy in Common.
- Divided up equally, cant own unequal shares
- Joint Tenant can destroy by selling his property interest during life. This will destroy the Joint Tenancy interest, but with respect to that tenant only.
- Requires the 4 unities: time, title, interest & possession
 - Interest: Each joint tenant must have equal shares
 - Title: Must come from the same conveyance
 - Possession: Each tenant must have equal right to occupy property
 - Time: Interest of joint possessors must arise at the same time

Tenancy By the Entirety: Has a right of survivorship, but inseparable. Only destructible by disillusion of a marriage or death.

- Generally available to only married couples, available in 1/2 of the States

Actual Ouster: Affirmative act by which one co-owner wrongfully excludes other co-owner from property

Constructive Ouster: when the realities of the property/situation prevent a co-owner from sharing property. (exp: 21 co-owners own a 500 square foot cabin)

Olivas v. Olivas (Constructive Ouster)

(N.M Ct. App 1989)

Facts: Pre-divorce, this couple held their property as communal property. The couple separated in 1983 and the wife filed for divorce 2 months later. After which, the two held the family home as tenants in common & husband lived elsewhere.

Husband argues he was constructively ousted and is entitled to half of the rental value of the home from the time of the initial separation.

Holding: Husband has burden of proving constructive ouster, and he failed to meet it. Husband's purpose in leaving was to live with G.F and his departure was the reason his wife filed for divorce. The delay of several years until husband demanded rent also supports an inference of abandonment.

Carr v. Deking (Tenancy in Common)

Facts: P & father (deceased) held an estate as tenants in common. 74-86 P leased land to D, rent was 1/3 of the annual crop. P told D he wanted cash rent. D met with P's father & agreed to a 10

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year crop-share lease w/o P's acceptance. P's father died, and in 04/87 P told D to vacate the property.

Holding: A lessee with a tenant in common becomes a tenant in common for the duration of the lease. P isn't entitled to eject D, proper remedy is partition.

Tenhet v. Boswell (Joint Tenancy)

Facts: P & deceased owned a parcel as joint tenants. Deceased leased the property to D for 10 years for \$150 yearly w/o consent of P, with a provision granting lessee an option to purchase. Deceased died, P demanded that D vacate, P sued to declare the lease invalid.

Holding: Joint Tenancy requires 4 unities (unity of interest, unity of time, unity of title, unity of possession). If unity is destroyed, the tenancy is severed & a tenancy in common results. Here, a lease does not destroy the unity of interest. A lease doesn't create a temporary nor a permanent severance. Since P has the right of survivorship, he adopts deceased share and deceased's interest has been destroyed. The lease is expired.

Sawada v. Endo (Haw. 1977, tenancy by the entirety)

Facts: P was injured in a car accident by D. P sued for damages against D. D was a tenant by the entirety with his wife. D conveyed the property to their sons, & wife later died. P sued to set aside the conveyance.

Holding: Interest of both tenant's is not subject to the claims against individual tenant's during the joint lives of the spouses. The estate may not be divided except by joint action of the spouses.

If the tenant had conveyed by fraud, than the court may set aside the conveyance however there is no evidence of this here.

Arkland v. Harper (W.VA 04) (Partition in kind vs. or Partition by Sale)

Facts: Family owned 75 acre parcel as tenants in common. P purchased 67.5% undivided interest in the property, remaining D's refused to sell. P sued to have the land sold.

Holding: P argued that it would cost millions more to mine the coal if the land were partitioned, D argued that the land could be partitioned. Court finds that partition is the preferred result, if possible.

Factors affecting partition or sale include; economic value of property, length of ownership, sentimental or emotional interest in the property may be considered.

The property should be partitioned, other factors support this & its still possible that the coal company could mine. Additionally, P took the risk that the entire family may not sell their share.

Involuntary Partition Through Sale:

- 1) Property can't be conveniently partitioned in kind
- 2) Interests of one or more of the parties will be promoted by the sale
- 3) Interests of other parties wont be prejudiced by the sale

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**Co-tenants may terminate co-tenancy & divide the property or its proceeds.

*Strong presumption in favor of partition in kind over partition in sale

Rights & Duties of Landlords & Tenants

Lease: A conveyance of a property interest as well as a contract between landlord & tenant.

Traditional: Common Law treated Lease/Tenant relationships as conveyances of property for the lease term

Modern Day: Contractual approach, treats lease/tenant as ongoing contractual relationship for the length of the tenancy

Types of Tenancies

- Term of years
- Periodic tenancy
- Tenancy at will
- Tenancy at sufferance

Term of years: Lasts for a specified time period determined by the parties. Ends automatically at the agreed time, may be terminated before by some event or condition in the lease.

Reversion: future interest held by the landlord.

Lease may have a Remainder: Owner provides in the lease that the property will shift to a 3rd person.

Periodic Tenancy: Renew automatically at specified periods unless a party chooses to terminate. (notice is required for termination).

Tenancy at will: Similar to periodic tenancy except it can be terminated with no notice. Many states have abolished.

Tenancy at sufferance: A tenant rightfully in possession who wrongfully stays after the leasehold has terminated.

*Most states require that a tenancy 1 year or longer be in writing.

Landlord Rights: Right to receive agreed upon rent, receive the premise returned intact, regain possession at the end of the lease

- Remedies:
 - Sue for possession: However this is long & drawn out
 - “Summary Process”, supposed to be fast
 - May not self-evict

Tenant Rights:

Quiet Enjoyment of Premises: live free from noise and harassment of Landlord

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- Protected via doctrine of actual/constructive eviction
- May be express or implied
- Constructive Eviction: Where landlord's actions are the functional equivalent of physically barring tenant from the premises. Occurs when landlord (or L tenant? *Minjak*) substantially interferes with use and enjoyment of all or a portion of the property.

Right to Habitable Premises: Premises safe & suitable for habitation (*Javins*)

- refers to physical condition of the property as opposed to *quiet enjoyment*

Tenant has duty: Make ordinary repairs (clogged drains), must not commit waste

- Remedies:
 - Rescind/repudiate lease agreement: move out before end of lease term
 - Rent withholding (of entire rent amount)
 - Rent abatement – withhold part of rent
 - Repair & deduct rent
 - Sue landlord for specific performance to bring apartment into compliance
 - Sue for damages, compensatory, punitive,

Right to Quiet Enjoyment

Minjak v. Randolph partial constructive eviction (mixed residential & commercial)

N.Y App. Div. 1988

Facts: Tenant began residency pursuant to a commercial lease in a primarily residential apartment complex in 1976. In 77, tenant above began using the apartment to operate a health spa. D suffered 40 water leaks between 11/77-02/82, P ignored complaints. 01/78 apartment above was sandblasted causing sand to fall into the apartment. 09/81 P performed construction work & dust poured into D's apartment.

P sued for D refusing to pay rent, D counterclaimed under the breach of warranty of quiet enjoyment.

Holding: Tenant may assert doctrine of constructive eviction even if he has only evicted a portion of the apartment. Must only evict the portion of the apartment that has been made uninhabitable, which D did in this case. P's actions were intentional & malicious, therefore punitive damages are valid here.

3000 B.C v. Bowman tenant action results in quiet enjoyment claim

Facts: P is a professional spa had leased a property from D for 12 years. D leased the space above P to a hair cutting place. The noise was very loud & caused P to sue based on a breach of the covenant of quiet enjoyment.

Holding: This covenant is implied into every lease in P.A. P can show breach through showing the utility of the premises has been substantially or functionally impaired, which amounts to a

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constructive eviction. Tenant may collect damages for all losses he sustained, or losses he will necessarily sustain resulting from the eviction.

Lease was to expire on 08/01/06, P can't collect damages past the lease expiration. Applicable period is from 02/05 (beginning of noise) to 12/05 when P left. Court may examine attorney fees, moving expenses, & additional rent that P had to pay. Court may also award "spa credits" for customers poor service as a result of the upstairs tenancy, as well as loss of business reputation.

Right to Habitable Premises

Javins v. First National Realty (D.C Circ 1970)

Facts: Landlord sued seeking possession on grounds that D hadn't paid rent. D raised defenses for violation of Housing Regulation. D didn't pay rent for the numerous violations of the Housing Code.

Holding: D's obligation to pay rent is extinguished due to the housing code violations. Warranty of Habitability is implied into every lease & it requires that landlords maintain the premises in livable condition.

Historically, courts did not hold landlords liable for repairs, however the nature of leases has changed dramatically. Value of a lease to an apartment dweller is that it gives him a place to live. Ordinary tenants are no longer able to make repairs. Lease should be interpreted like any other contract. Tenants sign leases for a certain amount of time & they should be able to expect that the premises will be habitable the entire time. The fact that the uninhabitable conditions arose after the tenant moved in doesn't matter.

***Refused to allow waivers of warranties of habitability or quiet enjoyment, many courts follow this as well

Intellectual Property

Trademark

Word, symbol or phrase used to identify a particular manufacturer/seller's product & distinguish them from other's products. Sometimes trademark protection can extend to include other aspects of a product, such as color or packaging. Trademarks are governed by state & federal law.

Prerequisites for Trademarks: Mark must be distinctive, courts group into 4 categories based on the relationship between mark & underlying product.

1) Arbitrary or fanciful 2) suggestive 3) descriptive 4) generic

Arbitrary or Fanciful

Bears no relationship to the underlying product. Highly distinctive, given a high degree of protection.

Suggestive

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Evokes or suggest a characteristic of the underlying good. Inherently distinctive, high degree of protection. “Coppertone”

Descriptive

Directly describes, rather than suggests a characteristic or quality of the underlying product. Protected only if they have acquired “secondary meaning” – Holiday Inn, All Bran, Vision Center

- Secondary Meaning: When the public primarily associates the mark with a particular producer.
 - Factors:
 - 1) Amount & manner of advertising
 - 2) Volume of sales
 - 3) Length & manner of the term’s use
 - 4) Result of consumer surveys

Generic Mark: Describes the general category to which the product belongs. Entitled to no protection.

Trademarks may be acquired in two ways:

- 1) Being the 1st to use the mark in commerce or
- 2) Being the 1st to register the mark with the U.S Patent Office

Trademark rights can be lost through abandonment, improper licensing or assignment, or genericity.

Genericity: Terms that weren’t generic become so overtime. i.e. aspirin, Velcro

Trademark Infringement

Lanham Act §1125(a) Trademark Infringement

Trademark Infringement Elements: (Correct Test)

- 1) P possesses a mark
- 2) D used the mark
- 3) D’s use of the mark occurred within commerce
 - Pretty much always met on the internet
- 4) D used the mark in connection with the sale, offering for sale, distribution or advertising of goods or services
 - D need not have actually sold goods/services, only prevented users from obtaining or using P’s goods or services
- 5) D used the mark in a manner likely to confuse consumers

****Likelihood of Confusion:** Likely to cause consumer confusion as to the source of those goods or the sponsorship or approval of such goods.

Likelihood of Confusion Factors:

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1) strength of the mark, 2) proximity of the goods, 3) similarity of the marks, 4) evidence of actual confusion, 5) similarity of marketing channels, 6) degree of caution exercised by the typical purchaser 7) D's intent in selecting the mark 8) likelihood of expansion of the product lines

Initial interest confusion: Consumer confusion that creates initial interest in a competitor's product.

Trademark Dilution

§1125(c) Can be brought only if the mark is "famous"

Once prerequisite of "famous" is shown, party must show that the use dilutes the distinctive quality of the mark through "blurring" or "tarnishment"

- Blurring: use of P's mark by D to identify non-competing goods
- Tarnishment: P's mark weakened through negative or unsavory association with D's mark

Dilution: Lessening of capacity of mark to identify and distinguish goods/services, regardless of likelihood of confusion.

Famous Factors:

- 1) Degree of inherent or acquired distinctiveness
- 2) Duration & extent of use
- 3) Amount of advertising/publicity
- 4) Geographic extent of the market
- 5) Channels of trade
- 6) Degree of recognition in trading areas
- 7) Any use of similar marks by 3rd parties
- 8) Whether mark is registered

State Law: Doesn't have to be "famous". Elements: 1) the "mark" has selling power. 2) the two marks are substantially similar

- Some Courts balance 1st Amendment right with degree of likely confusion. Generally more sympathetic to non-commercial use

Defenses §1125(c)(4)

Fair Use Defense: Descriptive mark is used in good faith for its primary, rather than its secondary meaning & no consumer confusion is likely to result.

Nominative Use Defense: Use of a term is necessary for purposes of identifying another the mark holder's product. Elements: Product isn't readily identifiable w/o using the mark, user used only so much of the mark as rxably necessary to identify it, & there was no suggestion of endorsement by the mark holder.

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Parody: May be permissible if not too closely tied to commercial use. Many courts balance first amendment interests against the likelihood of confusion. Courts are generally less sympathetic to parodies that involve commercial use of a trademark.

Remedies: injunctive relief, monetary relief

Playboy v. Netscape (Trademark infringement, Nominative Use Defense)

(2011 C.O.A)

Facts: D's use search engines to appear on the front page of certain keywords. D uses terms such as "playboy" & "playmate" which are trademarked by P. P sued D for trademark infringement & dilution.

Holding: The ads that the D uses are confusingly labeled or not labeled at all. The banner ad of D is the first thing that a consumer sees after typing P's trademarked words. Consumers are likely to be consumed by an unlabeled advert.

Nominative Use fails b/c the D could have used other words besides the P's trademarked terms. Additionally, the ads suggest sponsorship or endorsement by the TM holder b/c they do not state that the website is not owned or sponsored by PlayBoy.

Peta v. Doughney

(01 C.O.A)

Facts: D registered the domain name "PETA", & made false statements in order to obtain the domain name. Created a website titled "People Eating Tasty Animals". PETA is a registered trademark of PETA, and P asked the D to give it the domain name since they owned the trademark, however D refused. P sued D for trademark infringement.

Holding: No parody defense here because it must simultaneously convey that it's not actually PETA. Here, the domain name does not signal to a consumer that it's not actually the organization PETA.

Element 4: Likely to prevent consumers from going to the actual PETA website b/c it can cause confusion or frustration with consumers & therefore they may conclude that there is no actual PETA website.

Lamparello v. Falwell

(C.O.A 05)

Facts: D is a nationally known minister, holds trademark "Jerry Falwell" & "Falwell". P registered domain name www.falwell.com in 99 attacking D's sermons on the website. P sued D seeking a declaratory judgement of noninfringement. D counter claimed, arguing that P's use of fallwell.com was trademark infringement.

Holding: Court held that there was no likelihood of confusion. Additionally, noncommercial use of a trademark is not actionable. D's trademark is distinctive & P's domain closely resembles the

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trademark, however P's website looks nothing like D's. The site criticizes the D, so no one looking for D's website would believe that this is his.

The Court distinguishes *PETA*, and limits the "initial interest confusion" to proof of financial profit, which is absent in P's case.

Copyright

§102(a): original works of authorship fixed in any tangible medium of expression.

Form of protection for authors of "original works of authorship" including literary, dramatic, musical, artistic, & certain other intellectual works.

§102(b): Protection does not extend to ideas or facts embodied in works.

- Notice & Registration is not required to obtain a copyright however it does provide benefits such as statutory damages
- Publication is important to copyright but no longer required

Copyright Holder's Exclusive Rights §106 – Subject to Limitations of §107 (fair use)

- 1) To reproduce
- 2) To adapt/modify/prepare derivative works based upon the copyrighted work
- 3) To distribute copies to the public
- 4) To perform the copyrighted work publicly
- 5) To display the copyrighted work publicly

Length of Copyright

- Generally given for the author's life + 70 years after
- Joint Work: 70 years after the last inventor died
- Works for hire, anonymous, & pseudonymous works will be 95 years from publication or 120 years from creation, whichever is shorter

Transfer: Any rights to a copyright may be transferred, but it must be in writing & signed by the conferrer

Copyright Infringement

To win a claim of copyright infringement P must show:

- P owns a valid copyright & D actually copied protectable elements of P's work (or violated another §106 exclusive right)
- Copying may be inferred by the substantial similarity between D's work & P's protected expression

Fair Use Defense (§ 107): The fair use of a copyrighted work for purposes such as criticism, comment, news reporting, teaching, scholarship or research is not an infringement. 4 factors:

- Purpose & character of the use - commercial use (less fair) v. nonprofit/educational/transformational/commentary (more fair)

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- Nature of the original copyrighted work – fictional/expressive (less fair) v. factual (more fair)
- Amount & substantiality of the portion used in relation to the copyrighted work as a whole – more taken/heart of work (less fair) v. less taken (more fair)
- Effect of the use upon the potential market or value of the copyrighted work – harmful to market/potential market for the original/derivative work (less fair) v. not harmful (more fair)

Contributory Copyright Infringement

Sony: Court looks to patent law for contributory infringement because there's nothing in the copyright statute about it

- Could make the argument that this means that contributory infringement is precluded in copyright, but Court finds that nearly all areas of law have vicarious liability

Test

- Was it used within commerce?
- Did the unauthorized use impair the commercial value of the copyright or may in the future?
- Are there commercially significant non-infringing uses?
- Did the seller have constructive knowledge that users would infringe?
- Does plaintiff represent all of the copyright owners?

Luther v. Acuff-Rose (fair use - parody)

(1994 SCOTUS)

Facts: D (2 live crew) was sued for making a parody of P's song "Pretty Woman". In 89 D's manager notified P that they had created a parody & they would give credit for ownership & they were willing to pay a fee. P refused, D released it anyway. P sued D for copyright infringement, D raised a fair use/parody defense.

Holding: Rejects copyright infringement based on fair use defense.

Factor 1: The lower court unfairly gave too much weight to the commercial nature of the parody. The fact that the parody was intended for commercial use tends to weigh against a finding of fair use, but it isn't dispositive.

When considering a parody, context is everything & the court must engage in a factual analysis.

Factor 3: Here, a substantial portion of the parody is not a verbatim copying of the original. D produced distinctive sounds & altered the drumbeat. D departed from P's lyrics after the first line.

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Factor 4: When the Parody is Transformative, market substitution is less certain & harm may not be inferred. The parody & the original likely serve different market function, different genres of music. No evidence that a potential hip hop market for P was harmed by D's use of parody.

Sony v. Universal City Studios (*copyright vicarious liability*)

(1984 SCOTUS)

Facts: D manufactures & sells home video tape recorders. P owns copyrights on some t.v programs. Some ppl use D's recorders to record P's broadcasts. P sued claiming copyright infringement, P argued that D was liable b/c D had marketed the VTR's.

Holding: P fails to show the D is liable for contributory copyright infringement.

To hold D vicariously liable for copyright infringement:

P must show that the use impaired the commercial value of the copyright or that it is likely to in the future.

Must show that D sold the equipment with constructive knowledge that consumers may make unauthorized copyright material.

A sale of an article that is adapted to infringing use & lawful use is insufficient to prove the D liable for contributory infringement. Critical ? is whether the VTR is capable of commercially significant noninfringing use.

No evidence that viewers decreased their t.v watch time or that they ever will because of VCRs.

Primary use of VCRs is "time shifting" (recording a broadcast to watch later), which is a valid use.

D showed that the VTR is capable of commercially significant noninfringing use. Not all broadcasters object to recordings of their shows. (Mr. Rodgers, Sports, Public Broadcasting).