If u left and had been over paying - can get back pay
If u stay and withhold money - court might actually require tenant to ultimately pay if they were under paying

3. Tenancy by The Entirety (TBE)

A tenancy by the entirety (TBE) is a marital estate in which each spouse holds the entire property, with a right of survivorship. When one spouse dies, his interest instantly passes to the surviving spouse. The TBE requires the four unities of a joint tenancy, *supra*, plus the ***fifth unity*** of a legal marriage. The TBE is not recognized in most states.

C. Rights and Obligations

Johnson v. Mcintosh is on the exam but not wills v. pierce

1. Restraints on alienation NOT on the exam? Adverse, property in persons and body, and rights to transfer property
2. What will be on the exam other than AP, co ownership, ???
3. **Easements implied by existing use** do not need absolute necessity and easement by necessity (majority classic view is you do need absolute necessity)
4. On exam she would have tell us where in a state in a jrx that doesnt have a statute
5. Look at dissents and add to your answer.

1. Adverse Possession - allows a person to acquire title to property without the owners consent by using or occupying the property in a sufficient manner for sufficient time.
    a. ACHOSE + color of title
2. must be in Actual possession of the property in order to make a claim effective
    a. Continuous - means more than merely sporadic or occasional. There can be substantial intervals in possession, but “continuous” will be met if, in light of the nature and customary uses of the type of property at issue, possession is regular and consistent, in a manner congruent with what the true owner would do.
    b. Hostile - **means that the trespasser’s actions to the property must manifest to a reasonable observer a belief that the property is his. Possession cant be hostile if there is consent with the true owner**
        i. Divided: objective - some courts require that the trespassers subject beliefs are irrelevant. but must reasonably objectively appear to treat the property as his own. Reasonable perception of onlookers controls
        ii. Subjective test - objective test must be met but the trespasser must

honestly and in good faith belief the property belongs to him

c. Open and notorious - generally be met where either the true owner actually knows about the possession, or where the trespasser publicly and openly treats the property as his own, so that an uninformed observer reasonably assumes that the trespasser is the owner. SECRET POSSESSION WILL NOT SATISFY ADVERSE POSSESSION
d. Statutory period
    i. Disability exception
    ii. Tacking - formal conveyance sufficient but not necessary
e. Exclusive - means that the trespasser must behave as if the property is his as against everyone including the true owner. The trespasser must exclude anyone else (including the true owner) who tries to enter without his permission.
    i. Competing adverse possessors cannot hold land adversely to one another at the same time.. However, two or more persons who, cooperatively with one another, adversely possess as against everyone else except one another may acquire title as tenants in common through adverse possession.
f. Under the general rule, an adverse possessor does not necessarily acquire title to the entirety of the property; rather, he or she only acquires title to so much of the property as he actually possesses in a sufficient manner for the statutory period.
g. COLOR OF TITLE - means that the adverse possessor assumes possession in reliance on a document that purports on its face to convey title, but for some reason is legally insufficient to convey title. - u can get the whole property w color of title.

3. Types of ownership - only joint tenancy if explicitly stated.
4. Tenancy in common is preferred

1. Rights and Duties of Co-owners
    a. Martin v. Martin -
        i. Tenants in common each have a right to possess the entire property, even if they have different fractional shares of ownership.
        ii. *A cotenant who occupies a property must divide rent from outside parties with other cotenants, but receives credit for costs of maintaining the property.*
        iii. Cotenants occupying a property do not owe other cotenants rent, unless there is ouster or an agreement to pay rent.
        iv. Each cotenant is obligated to pay his proportionate share of the taxes, and a cotenant who pays more in taxes can recover from the excess from his fellow cotenants at anytime
        v. Repairs - if its voluntary repair you can only get that added value through partition or deducting from rent
        vi. Improvements- improving co-owner can not deduct but can recover the value added through partition
            1. Ouster occurs only when one cotenant exclusively

possesses the entire property, and denies that the other cotenants have any right to the property. - ""must amount to exclusive possession of the entire jointly held property"

- **a. And "(b) he must give notice to this effect to the ousted tenant, or his acts must be so open and notorious, positive and assertive, as to place it beyond a doubt that he is claiming the entire interest in the property."**
- **b. Ouster is used in two situations:**
  - **i. Beginning of the running of the SOL for AP**
  - **ii. Liability of an occupying co-owner for rent to other co-owners**
    1. **U can technically the rule of ouster to get rent from a koskhol tenant**

- **vii. Each co-owner has the right to alienate her interest in the property**
- **viii. Each co-owner has the right to force a partition of the property**

- **b.** Spiller v. Mackereth - Mackereth (plaintiff) and Spiller (defendant) owned a building as tenants in common. After their tenant vacated the property, Spiller took the property and used it as a warehouse. Mackereth sent Spiller a letter demanding that Spiller either vacate half of the building, or pay Mackereth rent for half of the rental value. Spiller refused to do either, and Mackereth sued him. The trial court found in favor of Mackereth and awarded him $2,100 in rent from Spiller. Spiller appealed.
  - **i.** Does refusing a cotenant's demand for rent or to vacate half of a property constitute an ouster?
  - **ii.** No. there needs to be an ouster which means that theres a refusal to allow the other cotenants equal use of the land and right to enjoyment of the land - the letter **didnt demand equal use and enjoyment of the land**
  - **iii.** Simply requesting the occupying tenant to vacate isnt sufficient bc the occupying tenant holds title and may rightfully occupy the whole property
  - **iv. There was no evidence that Mackereth had demanded and been denied a copy of the keys or that he was otherwise prevented from entering the premises due to the locks. Without evidence of Mackereth's efforts to enter and use the property, no ouster was effected.**

2. Partition
   - **a.** Concept of a partition - it ends a property relationship between cotenants.
   - **b.** Partition in Kind v. Partition in Sale
     - **i.** Partition in kind divides the land amongst cotenants
     - **ii.** Partition in sale occurs when the court **auctions** the land and divides the money proportionally

c. Delfino v. Vealencis - The Delfinos owned an undivided 99/144 interest and Vealencis owned an undivided 45/144 interest. The Delfinos did not have actual possession of the property. Vealencis lived on a portion of the land and from there operated a trash removal business, although no trash was actually stored on the premises. The Delfinos brought an action asking the court to order a partition by sale, with the proceeds being distributed to the parties according to each party's interest in the land. Vealencis moved for a partition in kind.
    i. A partition by sale should be ordered **only where a partition in kind is impracticable or inequitable, and when the interests of the parties would be better suited by sale.**
    ii. Conditions for partition by sale (ONE VIEW):
        1. Physical charac. Of the land must make partition in kind impractical
        2. Partition by sale must better promote the owners interest than partition in kind
d. Chuck v. Gomez- (ANOTHER VIEW) The court shall have power to divide and allot portions of the premises to some or all of the parties and order a sale of the remainder, or to sell the whole, where for any reason partition in kind would be impracticable in whole **or** in part or be greatly prejudicial to the parties interested.
e. the statutes were different in these two cases. Very similar.
f. Uniform Partition of Heirs Property Act: Unexpected Reform
    i. Buyout Provision
        1. Eagles heirs property owners who did not request a court to order partition by sale to buy out the interests of any of their fellow co tenants who did request partition by sale
            a. Could help them maintain their ownership if they want to
    ii. Totality of Circumstances Test
        1. If buyout remedy does not resolve partition action, can employ this test which requires courts to make dindings on a range of economic and non-economic factors like:
            a. Property can practically be divided
            b. Whether the property sold would yield a sale price significantly greater than the aggregate market value of the parcels that would result from division in kind
            c. Longstanding ownership of any individual co-tenant
            d. A co-tenants sentimental attachment to the property
            e. A co-tenants lawful use of the property (commercial or residential)
            f. Extent to which co-tenants paid costs of maintaining property
            g. Any other relevant factors
    iii. Open Market Sale
        1. In the case partition in sale is most equitable remedy use

this procedure
2. Designed to mirror traditional procedures real estate brokers use
3. Court appoints real estate broker who must list prop for determined fair market value
4. This is better than sale upon execution procedures because it allows for more time for prospective buyers to inspect the prop which will yield higher sales prices

3. Real Property Leases
   - **a.** Intro:
     - **i.** The Term of Years. The term of years is a leasehold measured by any fixed period of time. The most familiar term of years lease is the residential one-year lease.
     - **ii.** The Periodic Tenancy. The periodic tenancy is a lease for some fixed duration that automatically renews for succeeding periods until either the landlord or tenant gives notice of termination.
       1. For any periodic tenancy of less than a year, **notice of termination** must be given equal to the length of the period, but not to exceed 6 months. The notice must terminate the tenancy on the final day of the period, not in the middle of the tenancy. What if its over a year
     - **iii.** The Tenancy at Will. The tenancy at will has no fixed duration and endures so long as both of the parties desire.
       1. If the lease provides that it can be terminated by one party, it is necessarily at the will of the other as well if a tenancy at will case been created.
   - **b.** Effel v. Rosberg
     - **i.** Lease that is not for a **certain period of time creates a tenancy at will.** This includes a lease for the period of the lessee's life. A lessee's lifespan is not a period certain. **A lease for a lessee's lifetime is thus a tenancy at will and terminable at any time by either party**.
     - **ii.** **Modern statutes ordinarily require a period of notice in order for one party or the other to terminate the tenancy at will.**
     - **iii.** However there is another approach that views that views a tenants right to move out when she desires as a life tenancy and the LL has no right to terminate it (Garner case notes)
   - **c.** Hannan v. Dusch (MINORITY VIEW)
     - **i.** An implied covenant to deliver actual possession of a premises does not exist in real estate leases. (MINORITY)
       1. In such case the tenant must protect himself from trespassers, and there is no obligation on the landlord to assure his quiet enjoyment of his term as against wrongdoers or intruders
     - **ii.** **Under the English rule (Majority), a landlord is under an implied covenant to deliver actual possession of property to a**

new tenant, whether there is an express covenant in the lease or not. HOWEVER IT IS WAIVABLE. IF NOT MENTIONED THEN IMPLIED.

iii. **If prior holdover is still in possession, landlord has breached and the new tenant gets damages**

iv. **You can refuse to pay rent to anytime attributable to the time the old tenant is still there. - you can also sue to break the lease.**

1. The reasoning behind this is that the landlord is in a better position to know whether a previous tenant is likely to holdover and protect against it, and because of this, the landlord is the one who would be required to testify on such matters in legal proceedings.
2. What about the landlord's options in dealing with an old tenant who holds over? Typically, the law allows the landlord to make a onetime election. The landlord has the option to treat the holdover as a trespasser, bring an eviction proceeding, and sue for damages. (Some states require a holdover to pay double or triple rent for the holdover period.) Alternatively, the landlord may renew the holdover's lease for another term. This second option is typically referred to as a tenancy at sufferance.

4. Transferring or Exiting a Lease

a. General Transfer Rules

i. Landlords may sell their properties to third parties at any time.

ii. The law categorizes a landlord's interest in rented property as a reversion and, like most other property interests, the landlord's reversion is fully alienable.

iii. DEFAULT RULE - when a landlord sells his interest, the purchaser takes subject to any leases.

iv. If there are tenants with unexpired term-of-years leases, for example, the new landlord cannot evict them

v. The default rule is that a tenant's interest in a term of years lease or periodic tenancy is also freely transferable. **(Note, however, that a tenant cannot transfer a tenancy at will to another party.)**

b. Two types of transfer: the assignment and the sublease.

i. In an assignment, the original tenant transfers all of the remaining interest under the lease to a new tenant.

ii. In a sublease, on the other hand, the original tenant transfers less than all of her remaining rights in the unexpired period – **the original tenant either gets the unit back at the end of the sublease or reserves a right to cut the sublease short.**

iii. A minority of jurisdictions takes a less formalistic approach to the assignment/sublease division. In these states, the subjective intent of the parties, rather than the structure of the transaction, controls. Arkansas, for example, allows parties to designate their leases as

subleases or assignment, regardless of whether the new tenant takes the unit for the entire remaining term.

c. What you need to enforce a promise
   i. To enforce any promise, the law requires a certain type of legal relationship between the parties, known as privity: either privity of contract or privity of estate.
   ii. Parties are in privity of contract if they have entered into a valid contract with each other.
   iii. Privity of estate arises when two parties have successive ownership claims in the same property.
   iv. Have any tenants made an assignment of their rights? If a tenant has assigned their rights, they have no chance of possessing the property again and, thus, cannot stand in **privity of estate with anyone (although they may still be in privity of contract with various parties).** For all the remaining tenants ask, "Who receives the property when this tenant's possessory rights finally end?" **Remember, parties with successive interests have privity of estate.**

d. Silent Consent Clause - A clause in a lease that prohibits assignments or subleases without the consent of the landlord but the reason is silent
   i. (modern rule minority) Julian v. Christopher - The lease contained a silent consent clause, stating that the lease could not be assigned or sublet without the landlord's approval. Leasee tried subleasing the place. Christopher told them he would consent only if they would pay an additional $150 per month in rent.
      1. If a lease requires a landlord's consent for assignments or subleases, the landlord **may not unreasonably** withhold consent unless the lease clearly spells out that the landlord has absolute discretion to withhold consent.
      2. THIS IS A MINORITY VIEW FOR COMMERCIAL PROPERTY only - DISCUSS BOTH
      3. SILENT CONSENT OK FOR RESIDENTIAL
      4. Reasonable standards: (1) the sublessee's credit history, (2) the sublessee's capital on hand, (3) whether the subleesee's business is compatible with landlord's other properties, (4) whether the sublessee's business will compete with those of the leassor or any other lessee, and, (5) the subleesee's expertise and business plan.

e. a tenant can always ask her landlord to terminate the lease before the term ends. The tenant generally agrees to turn over the property and pay a small fee and, in return, the landlord releases the tenant from all further obligations. This is called **a surrender**.
f. If a tenant can not work out a surrender they may **abandon**.
g. Sommer v. Kridel

i. A landlord has a duty to mitigate damages when he seeks to recover rents due from a defaulting tenant.
ii. THIS IS THE MAJORITY VIEW IN BOTH RESIDENTIAL AND COMMERCIAL
iii. BRING UP THE MINORITY ON THE EXAM FOR EXTRA POINTS
iv. Importantly, the duty to mitigate does not relieve an abandoning tenant of all liability. **Even if a new tenant rents the unit, the landlord can still recover damages for all of the costs of finding the replacement tenant and for any time that the unit remained empty.**
v. **The landlord can also recoup any unpaid rent that accrued before the abandonment.**
vi. Finally, if the rental market in the area has softened and landlord is forced to rent the unit at lower price, the tenant is responsible for the difference between the new rent and the original rent.

h. Tenant eviction
   i. If a tenant fails to pay rent or otherwise commits a material breach of the lease, the landlord can elect to terminate the leasehold and evict the tenant from the property.
   ii. Berg v. Wiley - restaurant business altered the property too much
      1. When a lessor feels that the tenant in possession is violating the terms of the lease, the lessor must exercise judicial remedies to retake the property.
      2. Under the common law, self-help was ok. (ALMOST ALL STATES NOW BAR SELF HELP)
         a. Traditional common law: landlord could use self-help to repossess if:
            i. (1) landlord is legally entitled to possession; and
            ii. (2) landlord's means of reentry are peaceable
   iii. In all jurisdictions, for example, a landlord who wishes to evict a tenant must first send the tenant proper written notice. The notice requirement generally obliges the landlord to accurately state the tenant's name and address, and reveal the nature of the alleged breach.
   iv. Most states also require the landlord to give the tenant an opportunity (often 3 days, but sometimes as long as 14) to either cure the default or move out. - cure or quit
   v. If the tenant corrects the problem, they must be allowed to stay. However, if the tenant stays in the unit and does not cure the default, the landlord can file a petition for eviction with the local housing court.
   vi. The most commonly raised defenses are (1) notice was faulty, (2) the tenant cured the default, (3) the landlord illegally retaliated against the tenant, and, (4) the tenant had a right to withhold rent because the unit failed to meet certain minimum standards required

by law.

vii. Think about policy for and against self-help (bullshit it)

5. Condition of the Premises
   a. Every lease, whether **residential or commercial, contains a <u>implied covenant of quiet enjoyment</u>. WAIVABLE UNLIKE WARRANTY OF HABITABILITY.**
   b. **BARBRI -SING acronym**
      i. Often this promise is explicitly stated in the lease contract. Where it's not specifically mentioned, all courts will imply it into the agreement.
      ii. **The basic idea is that the landlord cannot interfere with the tenant's use of the property.**
      iii. Most courts state the legal test this way: A breach of the covenant of quiet enjoyment occurs when the landlord **substantially interferes with the tenant's use or enjoyment of the premises.**
      iv. Certain violations of the covenant of quiet enjoyment allow the tenant to **consider the lease terminated, leave, and stop paying rent.**
      v. Any eviction where the tenant is physically denied access to the unit ends the tenant's obligation to pay rent and allows the tenant to sue for damages incurred from being removed from possession
      vi. Fidelity Mutual Life Insurance Co. v. Kaminsky - a landlords failure to stop 3rd parties from interfering with a tenants quiet enjoyment of the premises ca constitute constructive eviction. **HAS TO BE SOMETHING REQUIRED IN LEASe.**
      vii. **To make a claim of constructive eviction, a tenant must show that some act or omission by the landlord substantially interferes with the tenant's use and enjoyment of the property. The tenant also needs to notify the landlord about the problem, give the landlord an opportunity to cure the defect, and then vacate the premise within a reasonable amount of time.**
   c. The **<u>implied warranty of habitability</u>** imposes a duty on landlords to provide **residential** tenants with a **clean, safe, and habitable living space.**
      i. **Hidler - There were many problems with the apartment, including a broken kitchen window, no functioning lock on the front door, a non-functioning toilet, inoperative light fixtures, water leakage, falling plaster and leaking sewage. Hilder complained to St. Peter about each of these problems as she discovered them. St. Peter almost always promised he would fix the problem but never did.**
         1. All residential rentals include an implied warranty of habitability, which cannot be waived or disclaimed. Landlord must meet obligations to be entitled to rent payments.
         2. Tenant has several options. She may, for example, withhold

future rent payments until the problems are resolved. In the case of needed repairs, she may make the repairs herself (or contract with another to perform the repairs), and deduct the cost from future rent. On top of these remedies emphasizing repair of the facilities, a tenant may recover compensatory damages reflecting her discomfort and annoyance arising from the defects.

3. In addition, the tenant may recover punitive damages under certain situations.

ii. **Major violation of the housing ordinances or code or defects that adversely impact health or safety can constitute breaches.**

iii. Court does not give tons of guidance - some courts use whether a reasonable person would think its fit for human inhabitation

iv. Premises must be safe clean, and fit for human inhabitation

v. **To recover for the breach, Landlord must be notified of the breach and had a reasonable time to fix it.**

vi. Damages for a breach of the warranty can include all rent due, all out of pocket expenses paid to repair defects, and in extreme circumstances punitive damages.

vii. "In determining whether there has been a breach of the implied warranty of habitability, the courts may first look to any relevant local or municipal housing code; they may also make reference to the minimum housing code standards enunciated in 24 V.S.A. § 5003(c)(1)–5003(c)(5). **A substantial violation of an applicable housing code shall constitute prima facie evidence that there has been a breach of the warranty of habitability**. "[O]ne or two minor violations standing alone which do not affect" the health or safety of the tenant, shall be considered de minimus and not a breach of the warranty. Javins v. First National Realty Corp., supra, 428 F.2d at 1082 n. 63. . . . **In addition, the landlord will not be liable for defects caused by the tenant.** Javins v. First National Realty Corp., supra, 428 F.2d at 1082 n. 62."

viii. **Notify first then if they dont fix the breach within reasonable time then there are Remedies: tenant can stay and stop paying rent or pay less rent, tenant can repair and then deduct, tenant can terminate the lease and move out, and stay pay rent and sue for damages**

ix. **Damages:**

1. **Hilder damages = [rental value of property in proper condition] - [actual rental value of property]**
2. **Majority damages = [rental value according to lease agreement] - [actual rental value of property]**
3. **Also punitive damages- willful wanton and fraudulent**
4. **Damages begin when the landlord fails to cure when receiving notice and last until defects are cured or T terminates the lease**

6. Selection of Tenants
    a. Background
        i. The Civil Rights Act of 1866 - prohibits all discrimination **based on race** in the purchase or rental of real or personal property.
        ii. The Fair Housing Act of 1968. **- prohibits discrimination in the renting, selling, advertising, or financing real estate on the basis of race, color, national origin, religion, sex, familofial status, and disability.**
            1. Exceptions:
                a. Section 3607(b), for example, allows housing designated for older persons to bar families with young children.\
                b. Similarly, § 3607(a) allows religious organizations and private clubs to give preferences to their own members
                c. The most controversial exemption, reproduced below, is the so-called Mrs. Murphy exemption:
                    i. If the dwelling has four or less units and the owner lives in one of the units, it is exempt from the Fair Housing Act in most states
                    ii. The plain text of the Mrs. Murphy exemption states that it does not apply to 3604(c) – the subsection that prohibits discriminatory advertising.
        iii. Some state legislatures have passed laws that afford far more protection from discrimination than the federal statutes provide. Minnesota, for example, protects against housing discrimination on the basis of sexual orientation, gender identity, marital status, and source of income.
        iv. in most states nothing prevents a landlord from denying an apartment to an engaged heterosexual couple, based on the belief that cohabitation before marriage is sinful.
        v. Reasonable accommodations FHA - All reasonable accommodations- (a) Asking a landlord with a first-come/first-served parking policy to create a reserved parking space for a tenant who has difficulty walking; (b) Requesting that a landlord waive parking fees for a disabled tenant's home health care aide; (c) Asking the landlord to make an exception to the building's "no pets" rule for a tenant with a service animal; (d) Requesting landlord to pay for a sign language interpreter for a deaf individual during the application process; (e) Asking the landlord to provide oral reminders to pay the rent for a tenant with documented short-term memory loss.
        vi. Two broad categories of cases may be brought under the FHA: disparate treatment claims and disparate impact claims.
            1. Disparate treatment claims target intentional forms of

discrimination

2. Disparate impact claims allege that some seemingly neutral policy has a disproportionately harmful effect on members of a group protected by the FHA.

7. Roommate selection
    1. fair Housing Council of San Fernando Valley v. Roommate.com, LLC
        a. The anti-discrimination provisions of the Fair Housing Act do not apply to the selection of roommates.
        b. Although the definition of "dwelling" in the FHA could be interpreted to either include or exclude shared living units, the correct interpretation of the statute is that the FHA excludes shared living units.
        c. In enacting the FHA, Congress intended to address discriminatory practices by landlords, and not arrangements between people who share a living space.

8. Licenses vs Leaseholds
    a. Cook v. University Plaza- plaintiffs were residents at University Plaza (defendant), a privately owned dormitory. The students each signed a residence-hall contract agreement. This agreement held, in part, that University Plaza **reserved the right to make assignments of rooms, authorize or deny room and roommate changes, and require the residents to move from one room to another.**
        i. An agreement must transfer a **possessory interest in a specific property to be considered a lease**. The language of an agreement does not control whether a contract is a lease or a license. Rather, the legal effect of the contract's provisions determines whether a contract is a lease or a license.
        ii. "a leasehold requires that the lessee's possession be more than merely coextensive with the lessor; it **must be exclusive against the world and the lessor.**" However, "there may be a reservation of a right to possession by the landlord for purposes not inconsistent with the privileges granted to the tenant."
    b. Robbins v. Reagan-
        i. Because the government never sought nor received any rent for the use of the shelter, the shelter is not a rental unit. Thus plaintiffs, occupants of the shelter, are not tenants.

ii. Reasoning: rent-paying "roomer" . . . was not a "tenant" for other purposes under the Code, nd, therefore, was not entitled to notice to quit.

1. In Smith v. Town Center Management, 329 A.2d 779, 780 (D.C.1974), the D.C. Court of Appeals held that a person allowed to live in an apartment rent-free was not entitled to any notice to quit.
2. **the court's conclusion was based on the fact that D.C. had a statute that defined a tenant as a person entitled to occupy a unit that is rented or offered for rent. So, in a jurisdiction without a similar statute, the fact that someone is not obligated to pay rent may not be determinative.**

c. State v. DeCoster-

i. Employees who lived at work case. Decoster was barring people from seeing his workers who lived at work. If they are tenants they have the right to have visitors. They say since decoster benefited they wer seen as tenants. Most cases come out and **say they are not tenants**.

9. Real Property Transactions
   a. the Statute of Frauds almost always requires a written conveyance – now called a "deed" – to transfer an interest in real property.
      i. Transfers by operation of law (primarily through adverse possession and intestacy) are very much the exception
   b. **executory period**: the time between when a contract to transfer property becomes legally binding and the time when the transferor actually provides a deed transferring the property.
10. Disclosure
   a. Traditional common law rule (probably small ass minority) is Caveat Emptor- buyer beware. The seller has no duty to disclose known latent defects, at least if the transaction is at arms length and both parties have the same opportunity to discover defects
   b. Modern rule requires a residential seller to disclose any known material defects, if they are not reasonably discoverable by the buyer. A defect is material if it has a significant effect on the value of desirability of the property. Many states require disclosure by statute.
      i. Stambovsky v. Ackley - ghost case (NY COURT TRYING TO MOVE IN THE MODERN JRX MAKING AN EXCEPTION TO THE CAVEAT EMPTOR RULE). - If a seller creates a condition that materially impairs the value of a contract and is within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care, nondisclosure of the condition constitutes a basis for rescission of the contract.
         1. (**exception** to the no duty to disclose standard Caveat emptor where buyer only protected if seller affirmatively

misrepresents the facts actively conceals defects owes a fiduciary duty to the buyer)

2. "As is" clause takes u back to the traditional common law approach (caveat emperor)

c. Engelhart v. Kramer -
   i. The seller of residential real property shall furnish to a buyer a completed copy of the disclosure statement before the buyer makes a written offer. If after delivering the disclosure statement to the buyer or the buyer's agent and prior to the date of closing for the property or the date of possession of the property, whichever comes first, the seller becomes aware of any change of material fact which would affect the disclosure statement, the seller shall furnish a written amendment disclosing the change of material fact.
   ii. SDCL 43-4-41 requires that "The seller shall perform each act and make each disclosure in good faith."
   iii. SDCL 43-4-40 absolves sellers of liability for defects in certain circumstances by providing:
      1. Except as provided in § 43-4-42, a seller is not liable for a defect or other condition in the residential real property being transferred if the seller truthfully completes the disclosure statement.
   iv. The disclosure form mandated by SDCL 43-4-44 establishes that beyond the above obligations, there is no warranty passing from the seller to the buyer
   v. A transfer that is subject to §§ 43-4-37 to 43-4-44, inclusive, is not invalidated solely because a person fails to comply with §§ 43-4-37 to 43- 4-44, inclusive. However, a person who intentionally or who negligently violates §§ 43-4-37 to 43-4-44, inclusive, is liable to the buyer for the amount of the actual damages and repairs suffered by the buyer as a result of the violation or failure. A court may also award the buyer costs and attorney fees. Nothing in this section shall preclude or restrict any other rights or remedies of the buyer.

11. Deeds - a deed is an instrument that conveys an interest in a land
   a. Walters v. Tucker - ADD CASE INFO
      i. Under Missouri law, the court may not rely on extrinsic evidence to reform a deed that is unambiguous on its face. - **is this majority or minority???**
      ii. **Insufficient- if we can introduce ambiguities from external evidence (going out and interviewing people) so we try to rely on language in deed and not bring in external evidence if none in the deed and how it is applied to the land**
   b. **A general warranty deed is one in which the grantor covenants against title defects created both by himself and by all prior titleholders.**
   c. **In a special warranty deed, however, the grantor covenants only that he himself did not create title defects; he represents nothing about**

what prior owners might have done

i. **It does not warrant against defects in the title that existed before the grantor was deeded the property**

d. **Quitclaim Deeds - A quitclaim deed is basically a release of whatever interest, if any, the grantor has in the property. Hence, the use of covenants warranting the grantor's title is basically inconsistent with this type of deed; i.e., if the deed contains warranties, it is not a quitclaim deed**

e. Seymore v. Evans - ADD CASE INFO

1. A conveyance of property by a **warranty deed** without restrictive words includes the five covenants known to common law: seisin, power to sell, freedom from encumbrance, quiet enjoyment, and warranty of title.
2. Seisin and power to sell are separate covenants only for historical reasons and are practically identical. Both covenants mean that the grantor has the right to convey title to the property.
3. The covenant against encumbrances is not violated by the property being subject to ordinances that limit its use, **unless the property is in violation of the ordinances at the time it is sold.** Violations of ordinances that arise from the conveyance itself are not encumbrances in violation of the covenant.
4. This means that the property is not subject to any liens, mortgages, taxes, leases, easements and other restrictions that might affect the buyer's ability to use the property or which might reduce its value.
5. The covenant of **quiet enjoyment** is breached by actions that are the equivalent of eviction. **A breach thus requires either interference with the grantee's title or with the grantee's ability to possess the property.**
6. The covenant of quiet enjoyment is very similar to the warranty of title, which is **simply a covenant that the grantor will provide the grantee with title to the property.-** guarantees that no one claiming superior title will **disturb the grantees possession of the property and the grantor will defend the grantee against any such claims.**
7. **What are the remedies????**

Pg. 255 glannon - 3 covenants are considered to be present: any breach of a present covenant occurs at the time of the delivery of the deed. This is when the SOL begins to run. grantee may only sue grantor for this: present covenants do not run with the land.
Covenant of seisin, covenant of right to convey, and covenant against

encumbrances

3 future covenants: may be breached at any time after the delivery of a deed- they are said to run with the land
Quiet enjoyment, warranty, and further assurances

Covenant	
covenant of seisin	owner of estate in deed
covenant of power to sell	legal right to transfer
covenant against encumbrances	no undisclosed encumbrances
covenant of quiet enjoyment	won't be disturbed by someone with better title
warranty of title	promise to defend against claims
covenant of further assurances	will take actions reasonably necessary to perfect title

f. Brown v. Lober - mineral case.
  i. Rule - **The mere existence, without more, of a superior title does not constitute a breach of quiet enjoyment**. a conveyor's failure to disclose the existence of **paramount** title does not amount to a constructive eviction. A property owner is entitled to quiet enjoyment of the property, and a constructive eviction occurs when the owner's **quiet enjoyment is substantially affected.**
  ii. Being forced to negotiate the deal with the coal company was not constructive eviction - no one claiming superior title had attempted to remove coal from Brown's land

iii. Because no one with superior title (i.e. the original owners who retained the two-thirds interest in the mineral rights) had undertaken to begin excavation of the land, **the Browns at all times had the right to enjoy and use the land, including the minerals.**

12. Mortgages
    a. A mortgage is an interest in land.
    b. A secured loan is backed, or secured, by a specific asset such as a house or a car, which the lender can seize in case of default.
        i. An unsecured loan is not secured by any specific asset – for example, credit card debt and student loans are unsecured.
    c. Mortgage - a written instrument that grants the lender an interest in their newly purchased land.
    d. the model residential mortgage in the U.S. is for no more than 80% of the value of the house at time of purchase;
    e. A transferee can either take "subject to the mortgage," which means that the original mortgagors still owe the debt and the transferee is at risk if they don't pay, or "assuming the mortgage," which means that the new owner agrees to pay the mortgage directly.
        i. When the purchaser assumes the mortgage, the seller still has a duty to pay the mortgage if the buyer doesn't, but the seller can pursue the buyer for reimbursement if that happens.
        ii. **; to avoid problems associated with transfers, many mortgages have "due on sale" clauses, which means that the full amount of the mortgage comes due ("accelerates") when the mortgagor sells the property.**
        iii. If the mortgagors default on the mortgage by failing to pay the appropriate amounts at the appropriate times, the mortgagee can foreclose. Either by a private sale (nonjudicial foreclosure) or under judicial supervision (judicial foreclosure), the mortgagee can have the property sold and apply the proceeds of the sale to the amount due on the note.

13. Redlining
    a. "redlining" refers to the practice of lenders, insurers, and government agencies of drawing literal red lines on city maps around neighborhoods that were collectively deemed an unacceptable credit risk.
        i. This "location-based" discrimination is distinct from discrimination against particular individuals on the basis of race, though the two forms of discrimination often go hand in hand.
    b. During the redlining era, neighborhoods where substantial numbers of nonwhite people lived were often deemed categorically ineligible for FHA-insured loans.

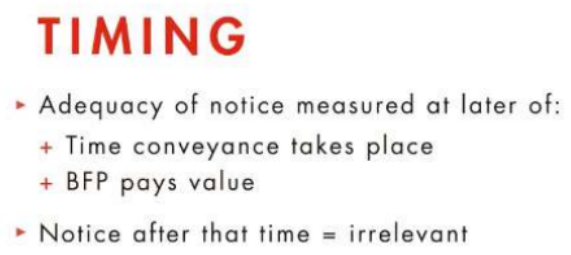
14. The recording system
    a. Common law had a system where whoever got the deed first had the right to the property.
    b. Recording systems try to prevent some of these messes by making

available better information about who owns what.

i. They create the trust and certainty needed to make land transactions common and reliable.

c. National Packaging Corp. v. Belmont **(MINORITY VIEW)**
   i. The doctrine of idem sonans does not apply to names that are misspelled in judgment-lien name indexes.
   ii. The doctrine, which forgives name misspellings if the misspelled name sounds similar to the correct name, was established when the country was in its infancy and should not be strictly applied in modern society.
   iii. Applying the doctrine to misspellings in name indexes would unjustly burden land abstractors by forcing them to attempt to search for every possible spelling, known or unknown, of a name.

d. **Race Recording Statute** -
   i. Under a race recording statute, a subsequent mortgagee of real property will prevail against a prior mortgagee of the said real property **if the subsequent mortgage is recorded before the prior mortgage**
   ii. **Types of recording indexes:**
      1. **Grantor-grantee (confusing but majority mispelled a little ok): The recorder's office maintains two indexes. One is an alphabetic list of all sellers (grantors), the other is an alphabetic list of all purchasers (grantees).**
      2. **Tract index: Records are organized by sections, with a section relating to one square a mile (a tract). (may give constructive notice more easily in some situations)**
   iii. **Requirements to be a Bonafide Purchaser**
      1. **Must purchase**
      2. **For value, and**
         a. **"Value" is normally considered more than a nominal amount, but how much constitutes value may be subject to debate.**
      3. **Be without notice of any adverse claims.**



e.

f. **Notice Recording Statute -**
   i. Under a notice recording statute, a subsequent mortgagee of real

property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee.

ii. Hartig- To determine the chain of title, the prospective purchaser must go to the recorder's office and search through the grantor index, beginning with the person who received the grant of land from the United States and continuing until the conveyance of the tract in question. The particular grantor's name is not searched thereafter.

iii.

g. **Race Notice Statute-**
   i. Under a race-notice recording statute, a subsequent mortgagee of real property for value and without notice (actual and constructive) of a prior mortgage of the said real property will prevail against the prior mortgagee if the subsequent mortgage is recorded before the prior mortgage.
   ii. Board of Education of Minneapolis v. Hughes - Doesnt give priority to a deed recorded first which shows no conveyance from a record owner.

h. **Under either a notice or a race-notice recording statute**, the subsequent mortgagee cannot be without constructive notice if the prior mortgage has been recorded as of the time of execution of the subsequent mortgage.

i. Types of notice meanings
   i. Actual notice. A purchaser who has actual knowledge of a conflicting prior interest in the property is said to have actual notice. This is a state-of-mind test
   ii. Constructive notice - A purchaser is charged with notice of all conflicting prior interests that are shown on properly recorded instruments. This notice is based on the idea that the purchaser should search the public records before buying and that the search will reveal relevant information about prior interests. Sometimes authorities call this type of notice "record notice.
   iii. Add inquiry notice - a purchaser who knows facts suggesting that someone might have an unrecorded interest has a duty to inquire further. The purchaser is charged with whatever information that inquiry would have revealed.

15. Easements
   a. Creating Easements
      i. Easements are interests in land that entitles its holder some limited use or enjoyment of another's land called the servient tenement.
         1. Example: right to lay utility lines, the easement give its holder the right of way across a tract of right.
      ii. Unlike fee simple ownership, they are nonpossessory.
      iii. They allow the easement holder to use or control someone else's

land.

1. Example: Suppose Anna owns Blackacre, and Brad owns Whiteacre, which borders Blackacre. Anna would like to cross Whiteacre to reach Blackacre. She could ask Brad for permission to cross, but even if he says yes, permission can be revoked. Brad might also convey Whiteacre to a less welcoming owner. Anna may therefore wish to acquire a property interest that gives her an irrevocable right to cross over Whiteacre. If Brad conveys her this interest (by sale or grant), Anna now owns an easement of access, which is a right to enter and cross through someone's land on the way to someplace else.

iv. Affirmative and negative easements.

1. Easements come in multiple flavors. The first distinction is between affirmative and negative easements.
    a. **MOST EASEMENTS ARE AFFIRMATIVE** = An **affirmative easement** lets the owner do something on (or affecting) the land of another, known as the servient estate.
        i. The right is the benefit of the easement, and the obligation on the servient estate is its burden.
    b. A **negative easement** prohibits the owner of the servient estate from engaging in some action on the land.
        i. BUT FOR THE EASEMENT IT WOULD BE PERMISSIBLE
        ii. For example, if Anna has a solar panel on her property, she might acquire a solar easement from Brad that would prohibit the construction of any structures on Whiteacre that might block the sun from Anna's panel on Blackacre.
        iii. BARBRI - THEY ARE VERY RARE -LASS -LIGHT AIR SUPPORT STREAM WATER–
        iv. CAN ONLY BE CREATED BY AN EXPRESS GRANT

v. EandE - easement notes:

1. Any words showing an intention to create an easement will suffice

vi. Easements appurtenant and easements in gross

1. Another distinction is between easements appurtenant and easements in gross.
    a. An **easement appurtenant** benefits another piece of land, the dominant estate. (dominant estate is benefiting for the easement land).
        i. **Two parcels must be involved.**

b. The owner of the dominant estate exercises the rights of the easement. If ownership of the dominant estate changes, the new owner exercises the powers of the easement; the prior owner retains no interest.
c. Example:
    i. So if Anna's easement to cross Whiteacre to reach Blackacre is an easement appurtenant, Blackacre is the dominant estate. If she conveys Blackacre to Charlie, Charlie becomes the owner of the easement.
d. Easement appurtenant passes automatically along with the dominant tenement.

2. In an **easement in gross**, the easement benefits a specific person a personal or commercial benefit, who exercises the rights of the easement rights regardless of land ownership.
    i. Not linked to the easement holders own land
    ii. Example: right to place a billboard on anothers lot, right to swim on anothers pond - no dominant tenement.
b. If Anna's easement to cross Whiteacre to reach Blackacre is an easement in gross, she keeps her easement even if she conveys Blackacre.

3. In general, when the intent of the parties is unclear, the presumption is in favor of an **easement appurtenant over an easement in gross.**

vii. Third parties
1. Express easements can be created when a landowner metaphorically carves out an easement from her fee simple and conveys it to another party
2. an easement can also be created when a landowner conveys a fee simple to another party while carving out and keeping, or "reserving," an easement for herself.
    a. Traditionally, such a reservation could only operate in favor of the original landowner herself, not for a third party. This rule led to extra transactions. Where the traditional rule applied, if A wanted to convey to B while creating an easement for C, A could convey to C who would then convey to B, while reserving an easement**. The modern trend discards this restriction, but some states still adhere to it.**

viii. **"Easements by estoppel" or "irrevocable licenses."**
1. An easement is distinct from a license.
2. A license is permission from the owner to enter the land. Because it is permissive, it is revocable.
3. Many difficulties with distinguishing easements from licenses arise when parties fail to clearly bargain over the right to use

land.

4. Sometimes, however, a license can become irrevocable. Irrevocable licenses are treated as easements, sometimes called “easements by estoppel.”

ix. Richardson v. Franc - (lexis) - was a case where a party had an easement for “access and public utility purposes.” however, the parties and their predecessors for over 20 years maintained landscaping, irrigation, and lighting appurtenant to both sides of the road within the easement area without any objection. although the servient estate stated that the dominant estates rights in the easement area were expressly limited to access and utility purposes, the court found this to be an irrevocable license

1. A license gives authority to a licensee to perform an act or acts on the property of another pursuant to the express or implied permission of the owner.
2. A licensor generally can revoke a license at any time without excuse or without consideration to the licensee.
3. **In addition, a conveyance of the property burdened with a license revokes the license.**
4. a license may become irrevocable **when a landowner knowingly permits another to repeatedly perform acts on his or her land, and the licensee, in reasonable reliance on the continuation of the license, has expended time and a substantial amount of money on improvements with the licensor's knowledge.** Under such circumstances, it would be inequitable to terminate the license. In that case, the licensor is said to be estopped from revoking the license, and the license becomes the equivalent of an easement, commensurate in its extent and duration with the right to be enjoyed.

x. **Easements implied by existing use (prior use)**

1. An easement implied by existing use may arise when a parcel of land is divided and amenities once enjoyed by the whole parcel are now split up, such that in order to enjoy the amenity (a utility line, or a driveway, for example), one of the divided lots requires access to the other.
2. **An implied easement from a preexisting use is established by proof of three elements: (1) common ownership of the claimed dominant and servient parcels and a subsequent conveyance or transfer separating that ownership; (2) before severance, the common owner used part of the united parcel for the benefit of another part, and this use was apparent and obvious, continuous, and permanent; and (3) the claimed easement is necessary and beneficial to the enjoyment of the parcel conveyed or retained by the grantor or**

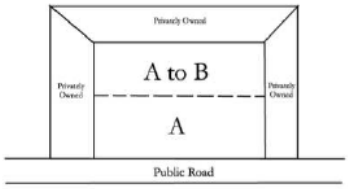
transferrer.

a. The third element is satisfied by something less than absolute necessity.

xi. Easements by necessity

1. An easement by necessity arises when land becomes landlocked or incapable of reasonable use absent an easement.

2. boundary, B will acquire an easement by necessity across the southern portion of the parcel retained by A:



xii. Thomas v. Primus (minority approach can be later. And also this is a minority bc here it doesnt have to be absolute landlock). Majority requires it at the time of division) - case where court found easement by necessity.

1. The plaintiffs own property. The defendant owns one and one- quarter acres of undeveloped land abutting the eastern boundary of the plaintiffs' property. Dispute at issue here concerns the northernmost portion of the plaintiffs' property, a twenty-five feet wide by three hundred feet long strip of land known as the "passway," which stretches from the public road on the western boundary of the plaintiffs' property to the defendant's property to the east.

a. The party seeking an easement by necessity has the burden of showing that the easement is reasonably necessary for the use and enjoyment of the party's property.

b. The plaintiffs claim that an easement by necessity does not exist because the defendant's predecessor in title had the right to buy reasonable alternative access to the street - court disagreed

i. "the law may be satisfied with less than the absolute need of the party claiming the right of way. **The necessity need only be a reasonable one"**

ii. nothing in our case law that suggests that a party is required to purchase additional property in order to create alternative access, even at a reasonable price

c. Easements by necessity need not be created at the time of conveyance.

d. the plaintiffs argue that an easement by necessity does not exist because Martha Thomas and Arthur

Primus did not intend for the easement to exist. The court disagreed

i. The law, under such circumstances, will give effect to the grant according to the presumed intent of the parties

ii. **Absent an explicit agreement by the grantor and grantee that an easement does not exist, a court need not consider intent in establishing an easement by necessity.**

xiii. Two traditional rationales for easements by necessity

1. *The first considers it an implied term of a conveyance, assuming that the parties would not intend for land to be conveyed without a means for access. (NOT SURE WHAT THIS MEANS)*
2. The second simply treats the issue as one of public policy favoring land use

xiv. Traditional view

1. traditional view is that the necessity giving rise to an easement by necessity must exist at the time the property is severed.
2. **"[I]n order for the owner of a dominant tenement to be entitled to a way of necessity over the servient tenement both properties must at one time have been owned by the same party**
3. In addition, the common source of title must have created the situation causing the dominant tenement to become landlocked.
4. A further requirement is that at the time the common source of title created the problem the servient tenement must have had access to a public road

xv. Access for utilities

1. Access for utilities may also give rise to an easement by necessity, creating litigation over which utilities are "necessary":
2. Courts often describe the degree of necessity required to find an easement by necessity as being "strict."
3. It is certainly higher than that needed for an easement implied by existing use. That said, considerable precedent indicates that the necessity need not be absolute.

xvi. Prescriptive easements

1. Easements may also arise from "prescription."
2. A prescriptive easement is acquired in a manner similar to adverse possession: it is a non-permissive use that ultimately ripens into a property interest.
    a. Felgenhauer v. Soni - prescriptive easement case. plaintiffs bought property with a restaurant on it. The

Felgenhauers never asked permission of the bank to have deliveries made over its parking lot. **Those elements are open and notorious use that is hostile and adverse, continuous and uninterrupted for the five-year statutory period under a claim of right.** Unfortunately, the language used to state the elements of a prescriptive easement or adverse possession invites misinterpretation.

3. **Claim of right does not require a belief or claim that the use is legally justified. It simply means that the property was used without permission of the owner of the land.**
    a. **If u meet hostile and adverse u meet the claim of right element.**
4. Once the easement is created, the use continues as a matter of legal right, and it is irrelevant whether the owner of the servient estate purports to grant permission for its continuance
5. Different than regular adverse possession because it does not need to be **exclusive**

xvii. Easements acquired by the public -

1. There is a split of authority as to whether a public highway may be created by prescription.
2. The majority view now is that a public easement may be acquired by prescription
3. What then should the owner of a publicly accessible location do? The owners of
    a. Rockefeller Center reportedly block off its streets one day per year in order to prevent the loss of any rights to exclude.
    b. Another option is to post a sign granting permission to enter (not hostile or adverse). Some states approve this approach by statute
        i. Possible that if u grant permission someone can try to get an easement by estoppel.
        ii. Cal. Civ. Code § 1008 ("No use by any person or persons, no matter how long continued, of any land, shall ever ripen into an easement by prescription, if the owner of such property posts at each entrance to the property or at intervals of not more than 200 feet along the boundary a sign reading substantially as follows: 'Right to pass by permission, and subject to control, of owner: Section 1008, Civil Code.'").

16. Scope and Alteration of Easements
    a. Marcus Cable Associates v. Krohn- (plaintiffs) granted an express

easement to Hill County Electric Cooperative (Hill County Electric). The easement allowed Hill County Electric to use the property to construct and maintain "an electric transmission or distribution line or system." Hill County Electric entered into a joint-use agreement with a cable-television provider. The cable-television provider later assigned its rights under the agreement to Marcus Cable Associates, L.P. (Marcus Cable) (defendant). Under the agreement, Marcus Cable could attach its cable lines to Hill County Electric's poles.

i. The common meaning of electric transmission or electric distribution when the easement was granted meant the delivery of electricity by power companies. It did not encompass cable-television services.
ii. **Rule - An express easement may only be used for the purposes specified in the easement's terms according to their common meaning.**
iii. When construing the scope of an express easement, the relevant question is not what is most convenient to the public or profitable for the grantee. **Rather, the relevant question is what purpose the contracting parties intended the easement to serve, which is answered by examining the easement's language**
    1. This is because grantors of easements and purchasers of properties burdened by easements must be able to rely on the granting language, without worrying that they are conveying more than is intended in the grant.
iv. Accordingly, the easement only includes uses for the purpose of the delivery of electricity by power companies, which is what "electric transmission or distribution" meant at the time of the grant.
v. POLICY FOR THIS RULE: CONVEYORS OF EASEMENTS SHOULDNT HAVE TO WORRY THAT THEIR CONVEYANCE WOULD BE CONSTRUED TO TAKE MORE THAN WHAT WAS INTENDED IN THE GRANT
    1. Easement should respect the parties intentions

b. Brown v. Voss - the predecessors in title of parcel A granted to the predecessor owners of parcel B a private road easement across parcel A for "ingress to and egress from" parcel B.
    i. The common law rule strictly forbids the use of an easement to benefit another property other than the dominant estate.
    ii. **Rule from case (which is the more modern approach)- the owner of an estate can use an easement to access after-acquired property if no additional burden is placed on the servient estate. (Court ruled for Brown who had property B and C)**
        1. Although brown legally misused the easement by using it to access parcel C. however Voss (A) **suffered no injury and the balance of hardships favored Brown.**
        2. Denied Voss (As) injunction

3. **Dissent**- Any misuse of an existing easement is a trespass. Permitting Brown to use the easement to get to Parcel C (where his home would be partially situated), which was not contemplated by the original easement, means authorizing a continuing trespass.

c. M.P.M. Builders, LLC v. Dwyer (modern rule 3rd restatement) -
   i. Rule - **In the absence of an express prohibition, a servient landowner may unilaterally change or relocate an easement at his or her own expense as long as the change does not significantly reduce the utility of the easement, make it more difficult to use and enjoy the easement, or frustrate the purpose of the easement.** Without consent
   ii. Traditional rule that requires.
      1. Reasoning: Allows the servient landowner to make the fullest use of the property, subject only to the requirement not to damage easement holder rights - also encourages easements.
         a. Rule allowing easement to veto any reasonable changes would make an easement a possessory interest rather than what it is which is a right of way
         b. There can still be consent requirements in agreements.
   iii. Traditional rule is that the servient mover can't move it w/o consent.

17. Transferring Easements
   a. (One view) - O'Donovan v. McIntosh -The deed states that the easement was for "the benefit of the Grantor and his heirs and assigns."
   b. Rule - An easement in gross (tied to person) is transferrable **if the parties clearly intended** to make it transferrable in the **deed** (basically default that its not transferable)
      i. Traditionally, easements in gross were deemed to be personal, nontransferable interests
      ii. . The vast majority of modern authority, however, has rejected this restrictive rule to further the policy of making property freely alienable.
   c. however, the transferee must limit his use to that which the original parties intended.
   d. Case notes from book state:
      i. Restatement view (Another view which is the majority) - **the modern view is that easements in gross are transferable, assuming no contrary intent in their creation (e.g., that the benefit was intended to be personal to the recipient).**
      ii. (basically default is its transferable)
      iii. Restatement (First) of Property § 489 (1944) (commercial easements in gross, as distinct from easements for personal satisfaction, are transferable); § 491 (noncommercial easements in gross "determined by the manner or the terms of their creation").

iv. Commercial easement in gross can be an easement for an entity. What does it matter if its transferred ?

18. Covenants
    a. Intro
        i. Covenants are contracts regarding land. Can be restrictive or affirmative. Most are restrictive. Picks up the slack left by negative easements narrow categories.
            1. Restrictive - Promises to refrain from doing something related to land.
                a. Ex: I promise not to build for commercial purposes on my property, i promise not to paint my shutters brown, i promise not to post a for sale sing on my front lawn.
                b. Restrictive covenant-promise or K regarding land, obliging its mater to refrain from doing something related to land.
            2. Covenants can also be affirmative. Ex: I promise to maintain my fence. Obligates someone to do something
                a. Another example can be paying into
                b. Under traditional rule - affirmative covenant can never run with the land.
        ii. LOOK FOR THE RELIEF THE PL IS SEEKING
        iii. DAMAGES->REAL COVENANT
        iv. INJUNCTION ->EQUITABLE SERVITUDE.

A and B make a promise
A sells to A1. B sells to B1.

Only talking ab affirmative easements and covenants we affirmative/ restrictive but mostly restrictive

    b. Covenant is said to run with the land at law when it is capable of binding successors to the original promising parties.
        i. WITHN
            1. Writing, Intent, Touch and Concern, horizontal and vertical privity, notice
            2. Horizontal and vertical privity needed for the burden to succeed in running from A to A1.
            3. **Horizontal privity refers to the nexus between A and B,** the original covenanting parties. Requires they be in success of estate. Means that at the time A made the promise to not build for commercial purposes to B, A and B were in a grantor/grantee relationship. Also satisfied if A and B share a landlord tenant relationship. Also satisfied if there is a debtor creditor relationship. DIFFICULT TO ESTABLISH. LIKELY ABSENT. IMPEDIMENT TO BURDEN IN SUCCEEDING WITH THE LAND. RARE THAT COVENANTING

NEIGHBORS WERE GRANTORS/GRANTEES.

4. YOU THEN NEED VERTICAL PRIVITY. A AND A1 MUST HAVE VERTICAL PRIVITY. NON HOSTILE NEXUS BETWEEN A AND A1-COMES FROM A CONTRACT OR DEED. WON'T WORK IF ITS POSSESSED ACQUIRED THROUGH AP
5. A1 must have had notice of that promise when she took. **(Actual or constructive)**
6. If all of those elements are met and As promise to B succeeds in binding A1, for B1 to recover, you must ask, does the benefit of As promise to B run from B to B1. YOU NEED **WITV**
7. Writing, intent that it would, touch and concern, vertical privity non hostile nexus between B and B1. **horizontal privity not needed for benefit to run.**

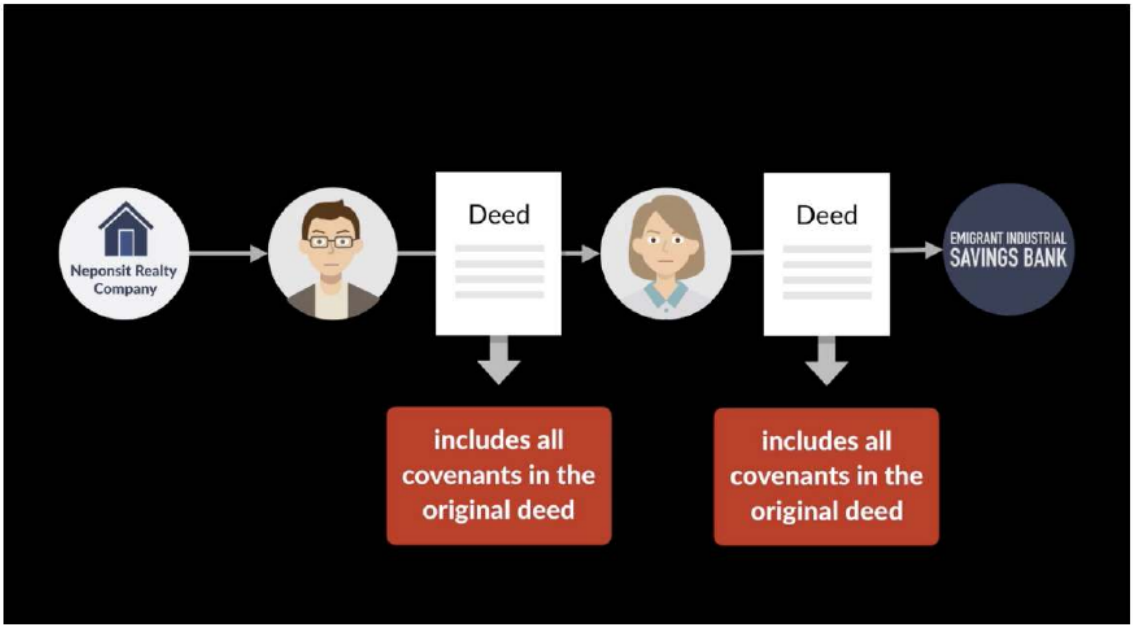
c. Equitable servitude
   i. **A restrictive covenant binds remote grantees as an equitable servitude if the covenant touches and concerns the land, the original parties intended that the covenant run with the land, and the remote grantee had notice of the covenant, and writing requirement(not from case tho).**
   ii. **(W)INT on Burden**
   iii. **(W)IT for benefitor.**
   iv. If all 3 elements are satisfied can still be enforced

	(damages)		(injunctions)	
	Benefit	Burden	Benefit	Burden
Horizontal Privity between original promisor & promisee		✓		
Strict Vertical Privity between original promisor and successor		✓		
Relaxed or Strict Vertical Privity between original promisee and successor	✓			
original promise in Writing	✓	✓	✓	✓
Intent for benefit/burden to run	✓	✓	✓	✓
benefitted/burdened party on Notice		✓		✓
benefit/burden Touch & Concern benefitted/burdened land	✓	✓	✓	✓

Relaxed privity-lease and easement type stuff

- Person thats benefiting doesnt have to know - ES

19. Touch and Concern: Neponsit v. Emigrant
    a. Neponsit v. Emigrant - deed for each lot contained a covenant requiring annual payment to the association. "Each covenant shall run w the land" (affirmative covenant)



b. **Goes against against the traditional rule that affirmative covenant can never run with the land.**
    i. A covenant requiring payment of money is enforceable against successors in interest
        1. 3 part test to see if covenant runs w land
            a. Original grantor and grantee must have intended that the covenant would run with the land
                i. They did in this case clearly
            b. The covenant must touch and concern the land
            c. **The majority of states say that for the burden to run, the promise needs to touch and concern both the benefited land and the burdened land, while a minority say that the promise needs to touch and concern only the burdened land**
                i. **Although the covenant didn't directly concern the owners use of the property - substantially affected their rights in the land bc it increased the lands usefulness**

and value

d. Privity of estate must exist between the party asserting the right to enforce the covenant and the party w the burden under the covenant

c. A property owners association has privity of estate with the property owners whose deeds contain covenants requiring payment of fees to the association

20. Restatement rejects the common law requirement that a restrictive covenant "touch or concern" land.
    a. Rule -

A servitude . . . is valid unless it is illegal or unconstitutional or violates public policy. Servitudes that are invalid because they violate public policy include, but are not limited to:

(1) a servitude that is arbitrary, spiteful, or capricious;

(2) a servitude that unreasonably burdens a fundamental constitutional right;

(3) a servitude that imposes an unreasonable restraint on alienation ...;

(4) a servitude that imposes an unreasonable restraint on trade or competition . . . ; and

(5) a servitude that is unconscionable. . . . .

21. Discriminatory Covenants
    a. Shelley v. Kraemer-
        i. Rule - **The enforcement of racially restrictive covenants by a state institution violates the Equal Protection Clause.**
        ii. **Court reasoned that the 14th amendment applies only to state action**
            1. It can not be violated by a private covenant.
            2. Judicial enforcement of a private agreement constitutes state action for purposes of the 14th amendment.
            3. Enforcing the racially restrictive covenant constituted state action
        iii. Without judicial assistance, the covenant could have willingly been observed by the parties.
        iv. But the state couldn't use the coercive power of the judiciary to enforce racial restrictions imposed by private agreements.
            1. This is a state action.
        v. Enforcing racist agreements would contravene the 14th amendments fundamental purpose.
        vi. Bc enforcement of covenant violated equal protection clause court didnt get into due process and privileges and immunities.

vii. They did have actual notice. Was there record notice? It was recorded.
viii. Touches and concerns the land - affects property value

22. Modification & Termination
    a. One basis for modification or termination is that conditions of the land have changed to such an extent that continued enforcement is inappropriate.
    b. El Di v. Town of Bethany Beach-
        i. Rule - **a restrictive covenant can become unenforceable for injunction purposes if changes in the neighborhood nullify the covenants intended purpose.**
        ii. **U can still enforce for real covenants when circumstances change tho.**
            1. Restrictive covenant can become unenforceable if a fundamental change occurs in the character of the neighborhood that renders it impossible to achieve the benefits intended by imposition of the restriction.
                a. Purpose of the covenant restricting the sale of alc. In this case was to attain a quiet residential atmosphere in the town
                b. Towns creators envisioned the beach to be a church community
                c. Beach ended up becoming a summer resort
                d. The changed conditions in the neighborhood made it so that the restriction no longer provided a benefit to the dominant estate, there is no use in restricting the free use of the servient estate.
    c. Several types of events may constitute “changed conditions” sufficient to at least trigger an inquiry whether a covenant ought still to be enforceable.
        i. Typical examples include condemnation of the burdened parcel through the power of eminent domain (typically bringing with it dedication to some purpose outside the scope of the covenant); zoning or rezoning (which may make the land incapable of legal use within the scope of the covenant); and nearby redevelopment that otherwise frustrates the purpose of the covenant.
    d. Third restatement view:
        i. Rule - The test for finding changed conditions sufficient to warrant termination of reciprocal-subdivision servitudes is often said to be whether there has been such a radical change in conditions since creation of the servitudes that perpetuation of the servitude w**ould be of no substantial benefit to the dominant estate.** However, the test is not whether the servitude retains value, but whether it can continue to serve the purposes for which it was created.

23. Eminent Domain & Regulatory Takings
    a. Eminent Domain
        i. **Eminent domain is the inherent power of the state to transfer**

title of private property into state hands

1. when the government "takes" land in this manner, it must pay the owner "just compensation
2. 5th amendment limits that inherent power- constitutional requirement, as the Fifth Amendment provides, **(1) has there been a "taking" of private property? (2) Is the taking for "public use"; and (3) has "just compensation" been provided?**

ii. Precedent under the Takings Clause regulates the manner in which the state directly exercises its eminent domain power.
   1. the clause also limits the ability of the state to regulate.
      a. Property owners sometimes challenge property regulations as being so onerous that it is as if the state has appropriated property and compensation is therefore due.
      b. Much of the Supreme Court's takings caselaw concerns these so-called "regulatory takings."

iii. Public Use
   1. SC treats "for public use" as a substantive limitation to the takings power, albeit not a strong one.

iv. **Kelo v. City of New London, Conn.** - The city council authorized the NLDC to purchase property or to acquire property by exercising eminent domain in the City's name -

v. In berman - there was nothing wrong w the department store - it was the area that needed to be fixed. They said they would fix the blight in the area and develop it.
   1. Rule - **A Citys taking of private property for economic development by another private entity satisfies the public use requirement if the plan serves a public purpose.**
      i. Gov does not need to own the land at all they can move it straight to a 3rd party.
      b. Takings conferring solely private benefits for private parties are unconstitutional
      c. **In two other cases court upheld the takings of private property for transfer to other private parties to remedy blight and to avoid dangers of land oligopoly**
      d. State determinations of benefits of revelopments are entitled great deference
         i. **Takings should be upheld as long as they bear a rational relation to a conceivable purpose.**
      e. Courts shouldn't scrutinize each parcel but should

consider the whole program

f. Potential economic benefits conferred on the public are sufficient to satisfy the 5th amendments public use requirement
g. Dissent - conservatives - Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded—i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public—in the process. - the other 2 cases were a clear public harm - but there were problems w the properties being taken in those cases.
h. Thomas- thinks the test should be narrower- public use should be public use not public purpose. (strictest approach)
i. Thomas strict. Oconnor middle. Majority most lenient.
j. States responded to Kelo by adding limitations themselves
    i. Example: procedural requirements
    ii. State Constitution: Private property taken by eminent domain pursuant to a petition to initiate condemnation proceedings filed on or after January 2, 2007, may not be conveyed to a natural person or private entity except as provided by general law passed by a three-fifths vote of the membership of each house of the Legislature.
k. JUST COMPENSATION -
    i. Some state statutes in response to Kelo mandated above-fair market value compensation.

b. Regulatory Takings - THEY ARE NOT ACTUALLY TAKING IT - THEY ARE PUTTING REGULATION THAT MAKES IT FEEL LIKE THE PROPERTY IS BEING TAKEN AWAY FROM THEM.
    i. Penn Central Transportation Co. v. New York City WATCH QUIMBEE- (defendant) enacted the “Landmarks Preservation Law” to enable the city to designate certain buildings and neighborhoods as historical landmarks. Penn Central Transportation Co. (Penn Central) (plaintiff) owned Grand Central Terminal in New York City which was designated as a historical landmark under the law. they werent allowed to do extra but they were allowed to do stay the same and make money.
        1. Rule - In determining whether a state regulation constitutes a

taking under the Fifth and Fourteenth Amendments, courts should consider the **economic impact of the regulation on the owner, the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations, and the character of the government action involved in the regulation.**

   a. **Physical over restricting is usually more often a taking - motomura. People being forced to install cable- permanent physical invasion was considered to be a taking.**
   b. **Character of government action - taking is more likely if we have a physician invasion than just a public program adjusting benefits and burdens of economic life to promote the common good.**
      i. **In this case it was to preserve landmarks which was a legitimate interest.**
   c. **"Additionally, precedent decisions often do not find a taking when private property is destroyed to promote the health, safety, and general welfare of the public"**
   d. **Justice berman - not every incidental reduction in property value caused by general changes in the law need to be compensated**
      i. **Regulation constitutes a taking only when it wholly frustrates the owners reasonable investment backed expectations, or otherwise renders the property completely useless**
   e. Dissent - burden of preservation is falling on the owners. He is saying that it is taking but its fine as long as their is just compensation.

2. Is the regulation is a taking? **Not a taking** - **Hadacheck v. Sebastian, 239 U.S. 394 (1915**), upheld a law prohibiting the claimant from continuing his otherwise lawful business of operating a brickyard in a particular physical community on the ground that the legislature had reasonably concluded that the presence of the brickyard was inconsistent with neighboring uses.
3. **Not a taking Miller 1928**- If a state is forced to make a choice between saving one of two types of property, the state does not violate the Due Process Clause by deciding upon the destruction of one class of property in order to save another which, in the legislature's judgment, is more valuable to the public.
4. **Causby- A taking - holding that direct overflights above the claimant's land, that destroyed the present use of**

the land as a chicken farm, constituted a "taking,"

UNNECESSARY BELOW

ii. Pennsylvania Coal Co. v. Mahon

1. What if instead of taking ur land the law prohibits u from using it or from profiting from it?
2. **A state may pass laws in the valid exercise of its police powers that has incidental impact on property values, but when the law causes sufficient diminution in property value, the state must take the land by eminent domain and provide compensation.**
3. **Rule - While the use of property may be regulated, overregulation will be considered a taking.**

EXAM FORMAT FOR MOTO:

Part 1 - 4 short answer Qs ⅓ of grade

30 minutes each question

Word limits 1-2 page

Part 2 consists of 3 essay questions regarding 1 fact pattern - ⅔ of grade

No character limit

Take a 10 min break then go hard on this

Organize by issue

Subissue

Give majority minority dissent

You get points for writing, write things down.

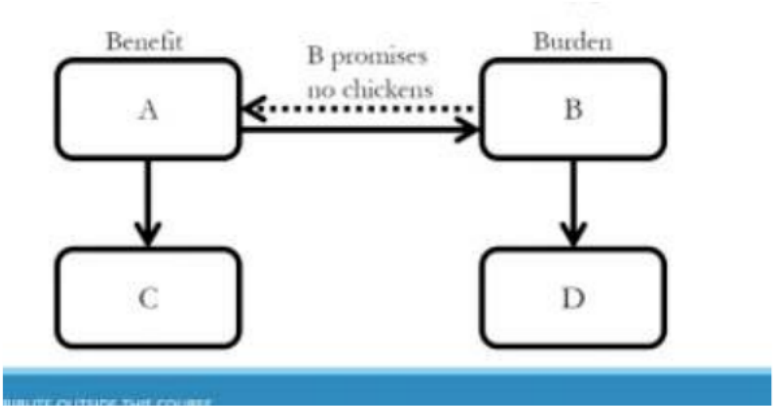
Review Session:

- Give common law rule, whoever got the deed first had title to the property - under the common law, you wouldnt even have to record at all. If u own something and hand it off to someone, you know longer have it to give to someone else.
- Every state has a statute
- Race - were looking at who records first
- Notice and race notice - were looking if the subsequent buyer was a sympathetic buyer. Should we feel bad for them? They didnt actually know and could not have know.
- BFP - notice and racenotice.
    - If C didnt pay anything for the property its as if they didnt really loes anything.
    - To determine if they were
- Moto made a good chart regarding all of this BS
- Inquiry notice - if your buying from someone that doesnt have kids and u see kids when u drive by- would a reasonable person follow up on the facts that they have and find out.
- **LEARN HOW TO READ THE STATUES FOR THIS BULLSHIT**
- Minority view
- If we have a tract index then everything is going to be listed under that address - as long as u put the number right youll find
- If u have a grantor -grantee index u have to go back.
- Does the recording system apply to everything - there are state statutes that says what needs to be recorded.
- Recording system.

HEIRS PROPERTY IN REVIEW SESSION

- Heirs property when ppl die without a will
- The propery gets passed down to all of the heirs as tenants in common and when they die it passes down to their heirs as tenants as common
- Highly fractionated ownership resulting from interstate succession
- Because
- Default co-ownership is a tenancy in common.
- Each co-owner hs the right to alienate her interest in the property
- Each coowner has the right to force a partition of a property
- **De facto preference for partition by sale**
    - **Delfino and chuck taught us that court can partition in kind and in certain circumstances we can do partition by sale**
- Technically anyone can sell their co ownership right
- U have to know the delfino statute

FINAL REVIEW SESSION (LAST DAY WITH MOTO)



Does the benefit run with the land is just saying can C enforce

Intent for it to run - can be language in the deed by saying it will run with the land or to their heirs and assignees

If u can enforce it as a covenant u can ask for both

Functional difference between the two is whether the tenant wants to leave or stay

Covenant of quiet enjoyment - both (but tenant can waive it)

Habitability - just residential (we dont let the residential tenants waive we dont want them to get too fucked)

Ms murphy means u cant post discriminatory info

If seisin was breached then we could end up with a breach of quiet enjoyment

Warranty of title and the buyer loses-seller will reimburse the attorney fees

Further assurances - isnt always included

Additional notes:

- the most important thing to know for joint tenancies is that if one party transfers their right it severes the joint tenancy
- And then under the modern rule if you convey to yourself it severed the joint tenancy but not in the “traditional view”
    - You would have to do it under a straw man.
- And then under the classic rule If I own a property I cant convey to me and u as joint tenants but under modern rule I can

Nonpossesory isnt paramount to ur possessory